

HUMAN SHIELDS IN MODERN ARMED CONFLICTS: THE NEED FOR A PROPORTIONATE PROPORTIONALITY

Amnon Rubinstein,* Yaniv Roznai**

It would not be right ... that the Aggressor Power should gain one set of advantages by tearing up all laws, and another set by sheltering behind the innate respect for law of its opponents. Humanity, rather than legality, must be our guide.

—Winston S. Churchill

INTRODUCTION

The use of civilians as human shields during hostilities has become one of the major problems facing democracies in contemporary armed conflicts. As the modern battlefield has moved from the front, where armies clash, to populated urban environments in which civilians' involvement in hostilities has been dramatically augmented, so, too, the use of human shields has dramatically escalated. Indeed, the use of civilians as human shields during armed conflicts has become an important weapon in waging a new type of warfare that relies on the belligerent's observance of international law.

This Article asserts that, despite their growing importance, these occurrences are not given the attention they deserve from the international community. Moreover, in our view, the existing application—by some international community members—of the laws of war regarding the use of civilians as human shields in armed conflicts leads to absurd and harmful results, with major theoretical and practical implications for Western and American defense policy makers.

Part I of the Article reviews the issue of human shields in modern armed conflicts. Part II reviews the international laws of armed conflict governing the

* Law Professor, Interdisciplinary Center (IDC), Herzliya, Israel; an Israel Prize laureate.

** PhD Candidate, the London School of Economics and Political Science (LSE), UK. The authors would like to thank Liav Orgad, Tal Becker, and the participants of the Stanford Defense Policy Symposium for their invaluable comments on an earlier draft of this piece, and to Stefanie Raker and Carine Rozen for assistance with editing. The authors would also like to express their appreciation to the staff of the Stanford Law and Policy Review, especially Gabe Ledeen, Ashley Romero, Noah Smith-Drelich, and Elizabeth Balassone for their insightful editing and earnest diligence.

practice of using civilians as human shields. Part III discusses the challenges we find most disturbing in this context: the current law and its application have become incompatible with modern warfare and place civilians in further peril. Part IV outlines our proposal for a modern application and interpretation of the laws of war that might resolve the problems raised in Part III. Part V concludes with a summary.

I. HUMAN SHIELDS IN MODERN ARMED CONFLICT

A. The Exploitation of Civilians in Asymmetric Warfare

The modern battlefield has moved from the front to populated urban environments, thereby dramatically increasing civilian involvement in hostilities. The urban environment, along with the deployment of lethal modern weaponry systems, has significantly augmented civilian casualties.¹ One implication of this battlefield urbanization is the increasing use of the civilian population as human shields during armed conflicts in order to exploit the belligerent's adherence to International Humanitarian Law (IHL) norms.²

The term "human shields" describes:

"[T]he intentional use of a party to a conflict of one or more human beings, usually civilians, or captured members of the adversary's forces . . . placed between the adversary and themselves in a way meant to deter an attack against the forces using the human shields, for fear of killing or harming the unarmed shields. The shields are in effect hostages used for strategic purposes."³

1. While in WWI, civilians accounted for an estimated 15% of deaths, this number increased in WWII to 65%, and in today's conflicts to over 84%. See Douglas H. Fischer, Comment, *Human Shields, Homicides, and House Fires: How a Domestic Law Analogy Can Guide International Law Regarding Human Shields Tactics in Armed Conflict*, 57 AM. U. L. REV. 479, 484 n.30 (2007) [hereinafter Fischer, Comment] (citing EDMUND CAIRNS, A SAFER FUTURE: REDUCING THE HUMAN COST OF WAR 17 (1997)).

2. ALAN VICK, AEROSPACE OPERATIONS IN URBAN ENVIRONMENTS: EXPLORING NEW CONCEPTS 39-40 (2000); MATTHEW WAXMAN, INTERNATIONAL LAW AND THE POLITICS OF URBAN AIR OPERATIONS, at ix (2000). Dunlap calls this phenomenon "Value-Based Asymmetrical Strategy." See Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*, 8 U.S.A.F. ACAD. J. LEGAL STUD. 71, 77 (1997-1998).

3. H. VICTOR CONDÉ, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 114 (2nd ed. 2004). A non-typical tactic of using protected persons is the "early warning" procedure which concerned the Israeli Defense Forces use of civilians in the West Bank during an arrest of suspected terrorists. On the use of this tactic see Roland Otto, *Neighbors as Human Shields? The Israel Defense Forces' "Early Warning Procedure" and International Humanitarian Law*, 86 INT'L REV. RED CROSS 771 (2004). The Israeli Supreme Court prohibited the use of the procedure on the grounds that it contradicted IHL. See HCJ 3799/02 Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander [2005] (2) IsrLR 206 (Isr.) (unpublished opinion), available at <http://elyon1.court.gov.il/files-eng/02/990/037/a32/02037990.a32.pdf>; see also Gabriella Blum, *The Laws of War and the "Lesser Evil"*, 35 YALE J. INT'L L. 1, 15-19 (2010); Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292, 311-15 (2008-2009)

In modern asymmetric warfare, due to the inability of weaker forces to protect military objectives with conventional methods against superior forces, the weaker forces seek to neutralize their enemies' superiority (technological or numerical) by, inter alia, exploiting civilian populations. Why is this tactic attractive and popular? First, the attacking party—which, for accuracy's sake, we shall term throughout this Article the “impeded party”—might refrain from attacking due to moral or legal constraints regarding harm to civilians.⁴ The presence of a large number of civilians who might be harmed can make the impeded party's use of force excessive relative to its anticipated military advantage and thus disproportionate and prohibited under IHL. Second, if an attack is launched despite the presence of human shields, the attacked party—sometimes described as “the weaker party” or the “defending party” and which we shall term “the shielding party”—can weaken international and domestic support for the impeded party's war efforts by exploiting the harmed civilians for the purpose of creating negative propaganda in the media. Indeed, regardless of the legal question as to whether the impeded party violated the laws of war, the mere fact and images of civilian casualties are beneficial to the shielding party's war efforts, because in the public mindset, any harm to civilians is seen as evidence of disproportionality.⁵ Consequently, the use of civilians as shields can either deter the impeded party from targeting its enemy or, alternatively, compel it to violate *jus in bello*, the laws which govern the conduct of hostilities during an armed conflict.⁶ The human shields tactic is

[hereinafter Schmitt, *Human Shields*].

4. The literature regarding IHL, and particularly regarding human shields, uses the term “attacking” to describe the party that strikes at a military object which is shielded, and the term “defending” to describe the party that utilizes the human shields in order to protect its military object. We find this terminology somewhat misleading because it automatically leads to a value judgment regarding the parties; the “attacker” is viewed as an aggressor while the “defender” is viewed more sympathetically as the innocent side simply trying to protect its forces. Actually, the situation is often reversed: the “attacker” is the defending democracy acting in self-defense in response to a prior attack, while the “defender” is often the actual aggressor. Moreover, both parties to a conflict are consistently and alternately attacking parties. The terms “attack” and “defend” are to be understood in terms of *jus in bello* to a specific attack rather than in terms of the overall *jus ad bellum* context of waging war. See Yaël Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During an Armed Conflict*, 42 VAND. J. TRANSNAT'L L. 1, 7 (2009). Therefore, in this paper we shall use different, more neutral terms, describing the “attacking party” as the “impeded party” and the “defending party” as the “shielding party.” These terms aim to describe the circumstances more accurately.

5. See David D. Jividen, *Jus In Bello in The Twenty First Century: Reaping the Benefits and Facing the Challenges of Modern Weaponry and Military Strategy*, 7 Y.B. INT'L HUMANITARIAN L. 113, 144 (2004).

6. See Schmitt, *Human Shields*, *supra* note 3, at 297-98; see also Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, in INTERNATIONAL LAW FACING NEW CHALLENGES 11, 26-29 (W. Heintschel von Heinegg & V. Epping eds., 2007) [hereinafter Schmitt, *Asymmetrical Warfare*]; Michael Skerker, *Just War Criteria and the New Face of War: Human Shields, Manufactured Martyrs, and Little Boys with Stones*, 3 J. MIL. ETHICS 1, 27-28 (2004); WAXMAN, *supra* note 2, at 44.

therefore “a successful means to gain advantages militarily and in the court of public opinion.”⁷

B. The Use of Civilians as Human Shields in Armed Conflicts

The use of civilians as human shields is not novel.⁸ Evidence of the practice dates back to the American Civil War⁹ and the Second World War.¹⁰ The practice has also been documented in the Korean Conflict and the Vietnam War.¹¹ United Nations (U.N.) peacekeeping forces similarly faced attacks from weapon systems placed within civilian areas or hostile forces that used civilians as human shields, for example, in Beirut in the early 1980s and Somalia in the early 1990s.¹² The human shields tactic was also employed by Saddam Hussein’s Iraq in many of its conflicts.¹³ Fascinatingly, during Operation Iraqi Freedom, a large number of peace activists from around the world travelled to Iraq to serve as human shields against American and British attacks.¹⁴ The use

7. Fischer, Comment, *supra* note 1, at 514.

8. For some historical examples, see Matthew W. Ezzo & Amos N. Guiora, *A Critical Decision Point on the Battlefield: Friend, Foe or Innocent Bystander*, in SECURITY: A MULTIDISCIPLINARY NORMATIVE APPROACH 91, 101-17 (Cecilia M. Bailliet ed., 2009).

9. H. Wayne Elliott, *Hostages or Prisoners of War: War Crimes at Dinner*, 149 MIL. L. REV. 241, 246 (1995).

10. INT’L COMM. OF THE RED CROSS [hereinafter ICRC], COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 208 (1958), available at <http://www.icrc.org/ihl.nsf/COM/380-600033>; see also W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1 (1990); Schmitt, *Human Shields*, *supra* note 3, at 292-93.

11. Schmitt, *Human Shields*, *supra* note 3, at 294.

12. See James Burk, *Public Support for Peacekeeping in Lebanon and Somalia: Assessing the Casualties Hypothesis*, 114 POL. SCI. Q. 53, 63, 67-68 (1999); W. Hays Parks, *The Protection of Civilians from Air Warfare*, in ISRAEL YEARBOOK ON HUMAN RIGHTS 65, 104 (Yoram Dinstein ed., 1997-1998); James O. Tubbs, *Beyond Gunboat Diplomacy: Forceful Applications of Airpower in Peace Enforcement Operations* 35 (Sept. 1997) (unpublished Master of Airpower Art and Science thesis, Air University) (on file with School of Advanced Airpower Studies, Air University, United States Air Force), available at <http://www.au.af.mil/au/awc/awcgate/saas/tubbs.pdf>.

13. See Parks, *supra* note 122, at 98-104; Schmitt, *Human Shields*, *supra* note 3, at 294. Iraq’s use of human shields during the first Gulf War was described by the United Nations General Assembly as a “most grave and blatant violation of Iraq’s obligations under international law.” G.A. Res. 46/134, ¶ 18, U.N. Doc. A/RES/46/134 (Dec. 17, 1991); see also Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 44, 50 (2005); Michael N. Schmitt, *The Conduct of Hostilities During Operation Iraqi Freedom: An International Humanitarian Law Assessment*, in 6 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 73, 99-101 (2003). See generally DIR., CENT. INTELLIGENCE AGENCY, PUTTING NONCOMBATANTS AT RISK: SADDAM’S USE OF “HUMAN SHIELDS” (January 2003), available at https://www.cia.gov/library/reports/general-reports-1/iraq_human_shields/iraq_human_shields.pdf.

14. See Gabriel H. Teninbaum, Note, *American Volunteer Shields in Iraq: Free Speech or Treason?*, 28 SUFFOLK TRANSNAT’L L. REV. 139, 147-51 (2004).

of civilians as human shields has been employed worldwide in both international and non-international armed conflicts,¹⁵ including in Sierra Leone,¹⁶ during the Bosnian War,¹⁷ in Kosovo,¹⁸ in Cambodia,¹⁹ and, as reported, in the recent conflict in Libya.²⁰ In recent years, facing superior adversaries, terrorist organizations, such as Hezbollah,²¹ Taliban,²² and

15. See Robert Block, *Shields, in* CRIMES OF WAR 2.0: WHAT THE PUBLIC SHOULD KNOW (rev. expanded ed. 2007), available at www.crimesofwar.org/thebook/shields.html; Schmitt, *Human Shields*, *supra* note 3, at 296; Daniel P. Schoenekase, *Targeting Decisions Regarding Human Shields*, MIL. REV., Sept.-Oct. 2004, at 26, 27.

16. Ismene Zarifis, *Sierra Leone's Search for Justice and Accountability of Child Soldiers*, HUM. RTS. BRIEF, Spring 2002, at 18-19, available at www.wcl.american.edu/hrbrief/hrbrief093.pdf.

17. See Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶¶ 175-76, 183 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000), available at www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf; Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶¶ 709-16, 742-43 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), available at www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf; S.C. Res. 998, U.N. Doc. S/RES/998 (June 16, 1995); Mohamed S. Elewa, *Genocide at the Safe Area of Srebrenica: A Search for a New Strategy for Protecting Civilians in Contemporary Armed Conflict*, 10 MICH. ST. J. INT'L L. 429-31 (2001); Matthew Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 9 TULSA. J. COMP. & INT'L L. 1, 76 (2001-2002).

18. CARLA DEL PONTE, OFF. OF THE PROSECUTOR, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, ¶ 88 (June 13, 2000), available at http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf; HUMAN RIGHTS WATCH, UNDER ORDERS: WAR CRIMES IN KOSOVO 150-51, 439-48 (2001); Tania Voon, *Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict*, 16 AM. U. INT'L L. REV. 1083, 1110-11 (2000-2001).

19. Sydney Schanberg, *Cambodia, in* CRIMES OF WAR 2.0: WHAT THE PUBLIC SHOULD KNOW 78-83 (rev. expanded ed. 2007), available at www.crimesofwar.org/thebook/cambodia.html.

20. See, e.g., *Crisis – Libya Says Human Shields Guarding Targets*, EURONEWS (Mar. 19, 2011), available at <http://www.euronews.net/2011/03/19/libya-says-human-shields-guarding-targets/>; *NATO Changes Libya Tactics Due To Human Shields*, REUTERS (Apr. 5, 2011), available at <http://www.euronews.net/2011/03/19/libya-says-human-shields-guarding-targets/>.

21. See REUVEN ERLICH, INTELLIGENCE AND TERRORISM INFORMATION CENTER AT THE CENTER FOR SPECIAL STUDIES (C.S.S.), HEZBOLLAH'S USE OF LEBANESE CIVILIANS AS HUMAN SHIELDS: THE EXTENSIVE MILITARY INFRASTRUCTURE POSITIONED AND HIDDEN IN POPULATED AREAS (2006), available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/human_shields.pdf.

22. John F. Murphy, *Afghanistan: Hard Choice and the Future of International Law*, 85 INT'L L. STUD. SERIES U.S. NAVAL WAR C. 79, 97 (2009); Richard Norton-Taylor, *Taliban Using Human Shields, Says Afghan Army General*, THE GUARDIAN, Feb. 17, 2010, <http://www.guardian.co.uk/world/2010/feb/17/taliban-human-shields>; Schmitt, *Human Shields*, *supra* note 3, at 295-96; Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 85 INT'L L. STUD. SERIES U.S. NAVAL WAR C. 307, 322 (2009).

Hamas,²³ have also adopted the human shields tactic. The use of civilians as human shields, as a leader of Hamas had previously confirmed, is an essential tactic of Hamas in its armed confrontations with Israel.²⁴

The recent Israeli Operation Cast Lead in Gaza and the subsequent *Report of the United Nations Fact Finding Mission on the Gaza Conflict* submitted to the U.N. Human Rights Council (HRC) by the Goldstone Commission (the Goldstone Report) has exacerbated this debate. Israel claims that despite its efforts to avoid harming civilians throughout its offensive, Hamas fighters—sheltered in the midst of the civilian population and without any distinctive wear from civilians—fired mortars and launched rockets from occupied civilian buildings and civilian surroundings. Moreover, Israel alleges that Hamas took advantage of Israel's early warnings of imminent attacks on targets in order to call upon civilians to voluntarily shelter the targets as human shields in order to prevent the attacks.²⁵ Hamas's use of human shields was consistently invoked by Israel in order to explain the high rate of Palestinian civilian casualties. Hamas responded that it had no option but to fight in densely populated centers, since the Gaza Strip was sealed off by Israel.²⁶ Furthermore, Hamas accused Israeli soldiers of using Palestinian men as human shields by forcing them to carry out hazardous military tasks.²⁷

23. BEVERLY MILTON-EDWARDS & STEPHEN FARRELL, *HAMAS: THE ISLAMIC RESISTANCE MOVEMENT* 150-52 (2010); ISRAELI MINISTRY OF FOREIGN AFFAIRS, *PARTICIPATION OF CHILDREN AND TEENAGERS IN TERRORIST ACTIVITY DURING THE AL-AQSA INTIFADA* (Jan. 30, 2003), http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2003/1/Participation%20of%20Children%20and%20Teenagers%20in%20Terrori; Fischer, *supra* note 1, at 486-87; Michael Y. Kieval, Note, *Be Reasonable! Thoughts on the Effectiveness of State Criticism in Enforcing International Law*, 26 MICH. J. INT'L L. 869, 890 (2004-2005).

24. See Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT'L L. 683, 765-66 (2009).

25. See *id.* at 764-65. On Israeli allegations of Hamas's misuse of civilian areas for military operations, see ISRAELI INTELLIGENCE AND TERRORISM INFORMATION CENTER, *HAMAS AND THE TERRORIST THREAT FROM THE GAZA STRIP: THE MAIN FINDINGS OF THE GOLDSTONE REPORT VERSUS THE FACTUAL FINDINGS* 110-16 (2010), available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/g_report_e1.pdf; STATE OF ISRAEL, *THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS* 55-64 (2009), available at <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf>.

26. MILTON-EDWARDS & FARRELL, *supra* note 23, at 151.

27. HUMAN RIGHTS WATCH, *WHITE FLAG DEATHS: KILLINGS OF PALESTINIAN CIVILIANS DURING OPERATION CAST LEAD* 11 (2009), available at http://www.hrw.org/sites/default/files/reports/ioptwf0809webwcover_2.pdf. The Human Rights Watch also found no evidence of the Israeli claims that Hamas used civilians as human shields. See *id.* at 3, 47. The U.N. fact-finding mission investigated allegations of four incidents in which IDF forces coerced Palestinian civilians to participate in house searches during the military operations. The Mission found these allegations to be credible and concluded that these incidents constitute a violation of IHL. See United Nations, General Assembly, Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, ¶¶ 55,

It is clear that the use of civilians as human shields is a concrete and burning issue in contemporary armed conflicts.

II. HUMAN SHIELDS IN THE LAWS OF ARMED CONFLICT

A. General Principles of IHL

The core of IHL consists of four cardinal principles: distinction, military necessity, unnecessary suffering, and proportionality.²⁸ We shall focus our attention on distinction and proportionality.

The principle of distinction generally demands that any party to a conflict distinguish between those who are fighting and those who are not.²⁹ Solely the former can be attacked. Likewise, parties must distinguish between civilian and military objects. Solely the latter can be targeted.³⁰ Civilians enjoy a general protection³¹ and shall not be the object of attack.³² Accordingly, “[i]ndiscriminate attacks are prohibited.”³³ Violations of the principle of distinction constitute grave breaches of the Additional Protocols to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)³⁴ and are considered war crimes.³⁵

1028-1102, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) [hereinafter *Goldstone Report*]. According to Israel’s update regarding the Gaza operations investigation, the IDF Military Advocate General has referred incidents involving allegations of using civilians as human shields to criminal investigation and proceedings. STATE OF ISRAEL, GAZA OPERATION INVESTIGATIONS: AN UPDATE 35 (2010), available at <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf>. According to a second update report, two IDF soldiers were indicted for compelling a Palestinian minor to assist them in hazardous tasks. See STATE OF ISRAEL, GAZA OPERATION INVESTIGATIONS: SECOND UPDATE 3 (2010), available at <http://www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf>.

28. See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 250-85 (2010).

29. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 44, ¶ 3, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

30. See Protocol I, *supra* note 29, art. 48. Article 52, paragraph 2 of Protocol I defines military objectives as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” Protocol I, *supra* note 29, art. 52, ¶ 2.

31. Protocol I, *supra* note 29, art. 51, ¶ 1.

32. Protocol I, *supra* note 29, art. 51, ¶ 2.

33. Protocol I, *supra* note 29, art. 51, ¶ 4.

34. Protocol I, *supra* note 29, art. 85, ¶ 3.

35. See Rome Statute of the International Criminal Court, art. 8, ¶¶ (2)(b)(i)-(ii), (2)(b)-(vi), (2)(e)(i)-(ii), (2)(e)(iv), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute of the International Criminal Court] (entered into force July 1, 2002 pursuant to Rome Statute, art. 126).

The principle of distinction is essential for protecting innocent civilians and *hors de combat*, those who are unable to further participate in the fighting due to injury, and is considered customary international law governing both international and non-international armed conflicts.³⁶ It should be clear, however, that when protected objects are used for military functions by a party to an armed conflict those objects become legitimate military targets.³⁷ By the same token, those civilians taking a direct and active part in hostilities cease to enjoy their protection so long as they are engaged in military functions.³⁸

There is no absolute prohibition against civilian casualties because IHL tolerates some civilian casualties during a military action.³⁹ The desired equilibrium between considerations of humanity and military necessity is expressed by the principle of proportionality which prohibits any “attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁴⁰ Therefore, even with regard to a lawful attack on a military objective, the principle of proportionality entails a duty on the military commander to assess the attack’s collateral damage (i.e., civilian casualties or damage to civilian objects), and to consider it against the anticipated military advantage.⁴¹ If the anticipated results of the attack are excessive compared to that military advantage, then the attack would be disproportionate. It seems that “excessive” in that respect is when the collateral damage is “clearly disproportionate” to the military advantage.⁴² The principle of proportionality includes limitations on time, geographical scope, choice of targets and means of attack,⁴³ and it incorporates the idea that the only legitimate object of “war is to weaken the

36. See Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 110-11, 127 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

37. ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 620-21 (1987).

38. Protocol I, *supra* note 29, art. 51, ¶ 3; Rome Statute of the International Criminal Court, *supra* note 35, art. 8, ¶ (2)(b)(i); see YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 27-29 (1st ed. 2004).

39. Judith Gardam, *Necessity and Proportionality in Jus Ad Bellum and Jus in Bello*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 275, 283-84 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

40. Protocol I, *supra* note 29, art. 51, ¶ 5(b); see also Protocol I, *supra* note 29, art. 57, ¶¶ 2(a)(iii), (2)(b).

41. See Horst Fischer, *Principle of Proportionality*, in CRIMES OF WAR 2.0: WHAT THE PUBLIC SHOULD KNOW (rev. expanded ed. 2007), available at <http://www.crimesofwar.org/thebook/proportion-principle.html>.

42. SOLIS, *supra* note 28, at 279.

43. Christopher Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 273, 275-81 (Yoram Dinstein ed., 1989).

military forces of the enemy.”⁴⁴ A violation of the principle of proportionality constitutes a war crime.⁴⁵

B. The Prohibition on the Use of Civilians as Human Shields

The prohibition on the use of civilians as human shields is widely acknowledged under IHL⁴⁶ and carries the status of customary law.⁴⁷ Article 23 of the Geneva Convention Relative to the Treatment of Prisoners of War expressly prohibits the use of a prisoner of war in order “to render certain points or areas immune from military operations.”⁴⁸ Article 28 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War states that: “[t]he presence of a protected person may not be used to render certain points or areas immune from military operations.”⁴⁹ The clearest and most specific articulation of this prohibition on the use of human shields appears in Article 51.7 of Protocol I:

The presence or movement of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.⁵⁰

The key requirement in this prohibition is the mental element, or *mens rea*, of subjective intent to use the presence of civilians as human shields in order to protect a military objective.⁵¹

44. ICRC, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868 (Dec. 12, 1868), available at <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument>.

45. See Rome Statute of the International Criminal Court, *supra* note 35, art. 8, ¶ (2)(b)(iv).

46. See Stéphanie Bouchié de Belle, *Les Boucliers Humains En Droit International Humanitaire: Une Analyse*, 9-28 (2007) (thesis, Université De Genève), available at http://www.prix-henry-dunant.org/sites/prixhd/doc/2008_Bouchié_de_belle.pdf.

47. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I: RULES, 71-76, 337-40 (2005); see also DINSTEIN, *supra* note 38, at 130; JUDITH GAIL GARDAM, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 153 (1993); Schmitt, *Human Shields*, *supra* note 3, at 301, 306-08.

48. Geneva Convention Relative to the Treatment of Prisoners of War, art. 23, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

49. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 28, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

50. Protocol I, *supra* note 29, art. 51, ¶ 7.

51. See Stéphanie Bouchié de Belle, *Chained to Cannons or Wearing Targets on Their T-Shirts: Human Shields in International Humanitarian Law*, 90 INT’L REV. RED CROSS 883, 889 (2008); Schmitt, *Human Shields*, *supra* note 3, at 302-03.

There is a difference between deliberately using civilians as shields and merely engaging them when in combat in urban areas. Belligerents do not always have the option of engaging in combat in unpopulated areas and fighting from a civilian area may sometimes be unavoidable. Therefore, the prohibition on using civilians as human shields is complemented by Article 58 of Protocol I, which imposes an affirmative duty on parties to take precautions against the effects of attacks by the other side.⁵² According to Article 58, parties are required “to the maximum extent feasible,” (i) to “remove the civilian population, individual civilians and civilian objects from the vicinity of military objectives;”⁵³ (ii) to “avoid locating military objectives within or near densely populated areas;”⁵⁴ and (iii) to take “other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers arising from military operations.”⁵⁵

Articles 51.7 and 58 of Protocol I complement each other with regard to the question of whether belligerents have done what is reasonable in the circumstances of combat to minimize civilian harm or whether instead they have sought to maximize it. However, they set different standards. First, the former is formulated in absolute terms, whereas the latter is formulated in relative terms. Second, while a failure to comply is sufficient to constitute a breach of the obligation to take precautions, a specific intent to shield military objects is required in order to breach the prohibition on the use of human shields. Third, unlike a violation of Article 58, a violation of the prohibition on human shielding constitutes a war crime and will lead to individual criminal responsibility.⁵⁶ Indeed, “[u]tilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations” constitutes a war crime according to Article 8.2(b)(xxiii) of the Rome Statute.⁵⁷

Consequently, civilians may never be used to shield military objectives and every feasible effort must be made to evacuate civilians from military objectives’ environs.⁵⁸ The obligation to protect civilians, one must remember, is not merely a legal obligation but also a moral one.⁵⁹ In fact, the International

52. See ICRC, *supra* note 37, at 691-92.

53. Protocol I, *supra* note 29, art. 58, ¶ (a).

54. Protocol I, *supra* note 29, art. 58, ¶ (b).

55. Protocol I, *supra* note 29, art. 58, ¶ (c).

56. Jean-François Queguiner, *Precautions Under the Law Governing the Conduct of Hostilities*, 88 INT’L REV. RED CROSS 793, 816 (2006); Schmitt, *Human Shields*, *supra* note 3, at 305.

57. Rome Statute of the International Criminal Court, *supra* note 35, art. 8.2, ¶ (b)(xxiii). This provision of the Rome Statute seems to establish that the key element is the intention to shield. See KNUT DÖRMAN, *ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 344-48 (2004).

58. See HENCKAERTS & DOSWALD-BECK, *supra* note 47, at 74 (citing Rome Statute of the International Criminal Court, *supra* note 35, art. 58).

59. Reuben E. Brigety II, *Human Rights in Armed Conflict*, in CONFLICT AND HUMAN

Committee of the Red Cross appropriately defined the use of civilians as human shields as a “cruel and barbaric act.”⁶⁰

III. WHAT IS THE CHALLENGE?

It thus seems that the use of civilians as human shields is a blatant breach of the Laws of Armed Conflict (LOAC).⁶¹ So, then, what is the challenge?

While the prohibition on using civilians as human shields is widely acknowledged under IHL, the current law and, more importantly, its application, have become incompatible with modern warfare and led to absurd results. For example, in contrast with some other crimes,⁶² the Rome Statute does not criminalize the use of human shields in non-international armed conflict,⁶³ yet there is no apparent justification for this difference.⁶⁴ Moreover, whereas violations of the principles of distinction or proportionality are considered “grave breaches,” the use of civilians as human shields is not.⁶⁵ We, however, shall focus on two main challenges that we find most troubling and which comprise two sides of the same coin.

SECURITY: A SEARCH FOR NEW APPROACHES OF PEACE-BUILDING 136, 138 (Hideaki Shinoda & Ho-Won Jeong eds., 2004), http://ir.lib.hiroshima-u.ac.jp/metadb/up/kiyofipshu_en/ipshu_en_19.pdf; see also Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?*, 16 EMORY INT'L L. REV. 445, 456 (2002) (“The prohibition on exploiting civilians . . . is not only a legal prohibition; it is first and foremost a moral prohibition.”).

60. See ICRC, *supra* note 10, at 208.

61. See DINSTEIN, *supra* note 38, at 129.

62. See, for example, Rome Statute of the International Criminal Court, *supra* note 35, art. 8.2, ¶ (c), enumerating war crimes which are also applicable in non-international armed conflicts.

63. See ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 258 (2007); Bouchié de Belle, *Chained to Cannons*, *supra* note 51, at 887; Schmitt, *Human Shields*, *supra* note 3, at 306.

64. See LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 117 (2002); GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 367 (2005). The ICTY found the use of human shields to be criminal under customary international law even in non-international armed conflicts. Prosecutor v. Blaskic, Case No. IT-95-14-T, Trial Judgment, ¶ 709 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), available at <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>. Moreover, Rule 97 of the ICRC's Customary International Humanitarian Law study contends that the norm applies in both international and non-international armed conflict. See HENCKAERTS & DOSWALD-BECK, *supra* note 47, at 74, 281-302, 337-40.

65. Protocol I, *supra* note 29, art. 85, ¶¶ 3, 3(b) (enumerating those acts deemed to be “grave breaches” of Protocol I). Thus, Rosen has proposed that the “law of war must classify the use of civilian communities to shield military installations, activities, or operations as a grave breach of the Geneva Convention.” Rosen, *supra* note 24, at 772.

A. The Shielding Party's Obligations

In recent conflicts, the strongest criticism of LOAC's violations has been directed at the impeded parties, rather than the parties who utilized civilians in order to shield themselves. As Professor Ann Bayefsky, an international human rights scholar, claimed, "the UN has never once condemned the real violation of international law by the Palestinian Authority – namely, putting civilians, deliberately and directly, in harm's way – using the civilian population as human shields."⁶⁶ French philosopher Bernard-Henri Lévy addressed this attitude in an article critical of Israel's demonization by the global media, in which he denounced the lack of indignation regarding the fact that "Gaza's children have been used as nothing more than a human shield for" Hamas.⁶⁷

Note the following examples: The Human Rights Watch report on the Lebanon-Israel conflict in the summer of 2006 deals with Israel's alleged violations of the proportionality and distinction principles, yet it turns a blind eye to the IHL obligation to remove military targets from civilian populations.⁶⁸ This was also apparent in the recent Operation Cast Lead and the Goldstone Report which followed. Throughout the conflict, the international news media focused on the devastation caused by the Israeli attacks, while barely reporting on Hamas tactics that involved the use of civilians and led to a higher number of civilian casualties. Most NGOs, in a similarly selective manner, ignored Hamas's responsibility in the conflict, while focusing on Israel's alleged IHL violations and accusing it of war crimes.⁶⁹ The HRC also took a boldly one-sided approach. It condemned, as expected, only Israel,⁷⁰ paying attention

66. ANN BAYEFSKY, THE UNITED NATIONS AGENDA AND ISRAEL, THE FOURTH ANNUAL CONFERENCE: THE BALANCE OF ISRAEL'S NATIONAL SECURITY: SETTING NATIONAL PRIORITIES 9 (Dec. 16-18, 2003) (transcript available at http://www.herzliyaconference.org/_Uploads/1171bayefskyreport.pdf).

67. Bernard-Henri Lévy, *It's Time to Stop Demonizing Israel*, HAARETZ, June 8, 2010, available at <http://www.haaretz.com/print-edition/news/it-s-time-to-stop-demonizing-israel-1.294833>.

68. See also Fischer, *supra* note 1, at 488. See generally HUMAN RIGHTS WATCH, FATAL STRIKES: ISRAEL'S INDISCRIMINATE ATTACKS IN LEBANON (2006), available at <http://www.hrw.org/reports/2006/lebanon0806>.

69. See Rosen, *supra* note 244, at 766-68.

70. It seems that the HRC had been consistently hostile toward Israel. See, e.g., Felice D. Gaer, *Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System*, 7 HUM. RTS. L. REV. 109, 135-36 (2007); Paula Gerber, *The Hitch Hiker's Guide To the New United Nations Human Rights Council*, 10 FLINDERS J.L. REFORM 241, 257-58 (2007); James H. Lebovic & Erik Voeten, *The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR*, 50 INT'L STUD. Q. 861, 865, 879-80 (2006); Patrizia Scannella & Peter Splinter, *The United Nations Human Rights Council: A Promise to be Fulfilled*, 7 HUM. RTS. L. REV. 41, 61 (2007); Yvonne Terlingen, *The Human Rights Council: A New Era in UN Human Rights Work?*, 21 ETHICS & INT'L AFF. 167, 174 (2006). But see Balakrishnan Rajagopal, *Lipstick on a Caterpillar? Assessing the New U.N. Human Rights Council Through Historical Reflection*, 13 BUFF. HUM. RTS. L. REV. 7, 13 (2007) (arguing that the HRC's findings against Israel were not a reflection of bias, but rather of the

exclusively to alleged Israeli war crimes, while utterly disregarding Hamas's use of civilians as human shields and its practice of fighting from within civilian population centers.⁷¹ Magnus Norell, a senior analyst at the Swedish Defense Research Agency denominates this approach "[m]isdirected [f]ire."⁷²

The Goldstone Report is a prime example of this principal focus on the impeded party alongside a failure to consider the shielding party's violation of IHL by using the civilian population as human shields. Although the Goldstone Report acknowledges the wrongdoing committed by the shielding party in launching attacks from civilian buildings and protected areas,⁷³ it fails to adequately discuss the shielding party's obligations under IHL.⁷⁴ While numerous reports described Hamas combatants operating from within civilian buildings and exploiting civilians while fighting, and in spite of evidence of Hamas's previously public calls to civilians to act as shields, the Goldstone Report stated that it did not encounter any evidence to substantiate these allegations and further held that without direct evidence it could not find the required criminal intent of shielding the combatants from counter-attacks by IDF forces.⁷⁵ This conclusion is highly dubious. First, as the renowned law Professor Alan Dershowitz correctly observed, with regard to allegations that Hamas used civilians as human shields, the report refuses to draw the specific required intent from the outcomes, but for some reason with respect to Israel, the Goldstone Report frequently infers intentions from the outcomes.⁷⁶ Second, as previously noted, the required intent is only necessary for the purpose of finding a violation of the prohibition on using civilians as human shields⁷⁷ but

"moral demand for the political recognition of multiple forms of human suffering, which were not being recognized elsewhere").

71. Human Rights Council Res. S-9/1, 9th Special Sess., January 12, 2009, U.N. Doc. A/HRC/S-9/L.1 (Jan. 12, 2009), available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G09/102/82/PDF/G0910282.pdf?OpenElement>; see Rosen, *supra* note 24, at 768-69.

72. Magnus Norell, *Policy Watch #1504: Misdirected Fire: The UNHRC Report on Gaza*, WASH. INST. NEAR E. POL'Y (Apr. 6, 2009), <http://www.washingtoninstitute.org/print.php?template=C05&CID=3041>.

73. See *Goldstone Report*, *supra* note 27, ¶ 495.

74. Laurie R. Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*, 12 Y.B INT'L HUMANITARIAN L. 347, 349 (2009); INTELLIGENCE AND TERRORISM INFORMATION CENTER, *supra* note 25, at 111.

75. See *Goldstone Report*, *supra* note 27, ¶ 450; see EUROPEAN CENTER FOR LAW AND JUSTICE, LEGAL MEMORANDUM IN OPPOSITION TO ERRONEOUS ALLEGATIONS AND FLAWED LEGAL CONCLUSIONS CONTAINED IN THE UN HUMAN RIGHTS COUNCIL'S GOLDSTONE REPORT 127 (2010), available at http://www.eclj.org/pdf/ECLJ_MemoonGoldstoneReport_20100126.pdf; Abraham Bell, *A Critique of the Goldstone Report and Its Treatment of International Humanitarian Law*, 7 (San Diego Legal Studies Paper No. 10-019), available at <http://ssrn.com/abstract=1581533>.

76. See Alan Dershowitz, *The Case Against The Goldstone Report: A Study In Evidentiary Bias*, ALANDERSHOWITZ.COM, 45 (last updated Jan. 27, 2010), <http://www.alandershowitz.com/goldstone.pdf>; see also Bell, *supra* note 75, at 8-9.

77. See *Goldstone Report*, *supra* note 27, ¶ 491; see *supra* text accompanying note

not for the purpose of finding a violation of the obligation to take precautions against locating military objectives in densely populated areas. Even if we were to accept the Goldstone Report's strange inability to obtain any evidence that Hamas's fighting from within urban areas was conducted with the particular intent of shielding the rocket launchers from counter-attacks, this lack of intent is irrelevant for the purposes of Article 58 and its application.⁷⁸ Third, while Article 58 is particularly relevant to the conflict in Gaza, the Goldstone Report, despite stating that "there are indications that Palestinian armed groups launched rockets from urban areas,"⁷⁹ fails to recognize that this location of military weapons in protected, densely-populated areas is a violation of Article 58. In fact, the Report does not even mention Article 58.⁸⁰ Fourth, as Laurie Blank, the director of Emory Law's International Humanitarian Law Clinic notes, by launching rockets from within populated urban areas, it is difficult to imagine Hamas could have had any other intention than that of seeking to protect its rocket launchers from counter-attacks.⁸¹

The Goldstone Report's lack of attention to Hamas and concentrated focus on Israel is clear. As Professor Abraham Bell from the University of San Diego demonstrates, barely six percent of the portion of the Report dealing with the combat operations in Gaza concerns Hamas, and the discussion in this portion consists mainly of the Mission's rejection of Israeli claims.⁸²

The Goldstone Report thus encourages those who aim to exploit the civilian population for their own benefit and was justly criticized on this ground.⁸³ It declined to acknowledge Hamas's misconduct, giving the shielding party's obligations short shrift and granting Hamas impunity for its crimes. The Goldstone Report's standards for the obligations of shielding parties to protect their own civilians and to avoid the abuse of civilians would, if adopted, constitute a decisive failure to recognize the full extent of a shielding party's

56.

78. See Blank, *supra* note 74, at 389.

79. See *Goldstone Report*, *supra* note 27, ¶ 450.

80. See Blank, *supra* note 74, at 388.

81. See Blank, *supra* note 74, at 390.

82. See *Goldstone Report*, *supra* note 27, ¶¶ 439-96, 615; Bell, *supra* note 75, at 8-9. Bell shows that of the thirty-six incidents of Hamas's alleged misconduct investigated by the Mission, the report—while dismissing the Israeli complaints and ignoring certain media reports—refuses to embrace even one incident. In contrast with this minimal attention given to allegations about Hamas, in finding Israel guilty of four instances of alleged human shielding, the report allocated seventy-five paragraphs consisting of lengthy descriptions based solely upon the testimony of the accusers, which the report found credible.

83. See, e.g., INTELLIGENCE AND TERRORISM INFORMATION CENTER, *supra* note 255; Blank, *supra* note 74, at 351; Daniel Friedmann, Op-Ed., *Goldstone Report: The Terrorists' Magna Carta*, JERUSALEM POST, Oct. 29, 2009, available at <http://www.jpost.com/Home/Article.aspx?id=158993>; Laurie R. Blank, *Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT'L L. (forthcoming Mar. 2011), available at <http://ssrn.com/abstract=1673850>; Dershowitz, *supra* note 76, at 31-48.

obligations, especially in the thorny scenarios of contemporary conflicts, and would eventually “leave civilian populations even more vulnerable to the dangers of modern warfare.”⁸⁴

This disregard for the obligations of the shielding party—which may be the former attacker—is also evident in the relatively thin jurisprudence on the subject. Whereas the issue of fighting from within civilian population centers and utilization of human shields during armed conflict are burning issues in modern armed conflicts, the case law on human shielding is relatively sparse.⁸⁵ Neither the International Criminal Tribunal for the Former Yugoslavia (ICTY) nor the International Criminal Tribunal for Rwanda (ICTR) has rendered any decision on using human shields as a war crime. Although the ICTY has considered human shielding, it only occurred in the context of other IHL violations, such as inhumane or cruel treatment,⁸⁶ an outrage upon personal dignity,⁸⁷ or hostage-taking.⁸⁸ Similarly, there is an astounding absence of condemnations by NGOs on this all-important subject.⁸⁹ The relative lack of response—political or legal—to the use of civilians as human shields renders the prohibition merely theoretical.

B. The Impeded Party’s Obligations

The current application of the law causes more harm than good by encouraging a belligerent to use civilians as shields against military counter-attacks.⁹⁰ This tendency is aggravated by the realities of the modern urban battlefield. According to IHL, the impeded party remains bound by its obligations even if the shielding party uses civilians as human shields. Article 50.3 of Protocol I states that “[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.” Moreover, Article 51.8 of Protocol I provides that “[a]ny violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian

84. See Blank, *supra* note 74, at 383.

85. See Schmitt, *Human Shields*, *supra* note 3, at 309-11.

86. See, e.g., Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶¶ 186, 215, 716 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf; Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, ¶ 256 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf.

87. See, e.g., Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1, Trial Judgment, ¶ 229 (Int’l Crim. Trib. for the Former Yugoslavia June 25, 1999), <http://www.icty.org/x/cases/aleksovski/tjug/en/ale-tj990625e.pdf>.

88. See, e.g., *Blaskic*, Case No. IT-95-14-T ¶¶ 187, 739-41, 750.

89. Gerald M. Steinberg & Sarah Mandel, *Watching the Watchers*, 43 JUST., Fall 2006, at 24-25, available at <http://www.intjewishlawyers.org/main/files/Justice%20No.43%20Fall%202006.pdf>.

90. See Rosen, *supra* note 24, at 770.

population and civilians, including the obligation to take the precautionary measures provided for in Article 57.”⁹¹

Hence, even if a shielding party places human shields around a military objective, those shields retain their status under IHL and the impeded party must still take the usual precautions against harming civilians in an attack.⁹² The rationale for this rule is clear: the fact that a party to an armed conflict is violating the LOAC ought not to serve as an excuse for the adversary to cease taking reasonable steps to reduce civilians’ harm in the conduct of hostilities.⁹³

Nonetheless, this rule leads directly to absurd results since, under the principle of proportionality, by means of employing human shields a party can—as a matter of applied international law—render a military target thoroughly protected from an attack or counter-attack.⁹⁴ In other words, the flagrant use of civilians to shield a military objective can effectively restrain a belligerent from attacking since, although one party is violating international law, the other party remains bound by the principle of proportionality. The shielding party is virtually a “free-rider,” to use the words of Cécile Fabre, an ethics of war scholar from Oxford University, who described the impeded party’s legal restraints.⁹⁵

In addition, given the one-sided approach to this issue described above in Part III.A, if the impeded party decides to attack despite the presence of civilian human shields, the international community will scrutinize it at least as much as—and probably more than—the shielding party which, through its unlawful conduct, created the situation in the first place.⁹⁶

Some form of modification of the interpretation of IHL is critical. As Colonel W. Hays Parks (ret.) noted:

Any law of war rule that offers the potential for a military advantage for the defender over the attacker, or *vice-versa*, is a rule doomed to failure. It would

91. Protocol I, *supra* note 29, art. 51, ¶ 8.

92. See Schmitt, *Asymmetrical Warfare*, *supra* note 6, at 27.

93. It has been suggested that shifting responsibility for civilian incidental harm from a lawful attack upon a legitimate military objective entirely upon the attacker marks a departure from historic practice and customary international law, which traditionally perceived that if “civilian casualties ensue from an illegal attempts to shield combatants or a military objective, the ultimate responsibility lies with the belligerent State placing innocent civilians at risk.” DINSTEIN, *supra* note 38, at 131; see also Parks, *supra* note 10, at 162-64. The change in the law is probably a reaction against the horror of bombing civilian targets in WWII. See Matthew Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan*, 33 CAL. W. INT’L L.J. 1, 15-19, 34-39 (2002-2003).

94. See Barry A. Feinstein, *Proportionality and War Crimes in Gaza Under the Laws of Armed Conflict*, 36 RUTGERS L. REC. 224, 238, 248 (2009); Schmitt, *Human Shields*, *supra* note 3, at 326.

95. Cécile Fabre, *Using Civilians as Shields 7* (March-April 2010) (conference paper presented at Political Studies Association Conference in Edinburgh, Scotland), available at http://www.psa.ac.uk/journals/pdf/5/2010/248_526.pdf.

96. See Fischer, *supra* note 1, at 486.

not only increase the risk to the innocent civilian, but in all likelihood would jeopardize the credibility of the law of war itself.⁹⁷

The current rules governing the use of human shields and their practical application serve to benefit those parties willing to utilize civilian deaths to achieve military advantages. The modification in interpreting IHL should nevertheless preserve the concept that civilians in armed conflict—international and otherwise—merit special protection.

IV. PROPOSED SOLUTIONS

It is imperative that we find a solution that will curtail the use of this dreadful tactic and deprive human shield users of their current advantages, without generating a greater risk of harm to civilians. In our view, the best solution is two-fold; the first component relates to the defending obligations of the shielding party, and the second to the impeded party's obligations.

A. The Shielding Party's Spectrum

With regard to the shielding party's obligation, the solution is more attitudinal than structural: the shielding party's obligations must be treated more seriously. Hence, as opposed to the current atmosphere, the international community, including international organizations and the global media, must direct their monitoring, scrutiny and condemnation also toward those parties who, in order to achieve military benefits, intentionally place civilians at risk. The international community's silence or mild condemnation, in and of itself, serves to further encourage these blatantly illegal acts, in effect permitting the intentional risk of civilian lives.⁹⁸

Therefore, we endorse the assertions of Professor Kenneth Anderson and his colleagues, and of Professor Richard D. Rosen, that inquiries must not begin and end with the investigation of whether the impeded party took appropriate precautions for the protection of civilians. Rather, inquiries must also be scrupulously conducted as to whether the shielding party took appropriate safety measures to protect its civilians or, alternatively, whether it violated IHL by intentionally intermingling military objectives among civilians and relying on their presence in order to immunize its objectives from attacks.⁹⁹ In other words, the international response to civilian harm during armed conflicts must also address whether responsibility for that harm rests, at least in part, on the shielding party for using human shields. Perhaps, before a charge of

97. Parks, *supra* note 10, at 154; *see also* Rosen, *supra* note 24, at 770-71.

98. *See* Rosen, *supra* note 24, at 691-92, 770, 772.

99. *See id.*; Kenneth Anderson et al., *A Public Call for International Attention to Legal Obligations of Defending Forces as well as Attacking Forces to Protect Civilians in Armed Conflict*, CRIMESOFWAR.ORG (Mar. 19, 2003), <http://www.crimesofwar.org/special/Iraq/news-iraq3.html>.

excessive harm can be raised, the international community should pay attention to the question of the circumstances surrounding the civilian presence. Blank correctly asserted that “just as the densely-populated nature of Gaza does not relieve Israel of its obligations to distinguish between civilian and military objectives and take precautions, so it correspondingly does not relieve Palestinian armed groups of their obligations under Article 58.”¹⁰⁰

Moreover, the underlying values of IHL must be considered. As Douglas H. Fischer claimed, a shielding party’s “deliberate failure to abide by the duty to separate military targets from civilians is a greater evil than a certain amount of incidental damage from a self-defense action, because a justified self-defense measure at least has acceptable aims, whereas the use of shields does not.”¹⁰¹ The international community, in order to limit the value of human shielding to the shielding party and on the basis of policy considerations, should severely criticize the human shields tactic. Accusing only the impeded party of “excessive response” without examining the shielding party’s tactic is immoral and unwise, since it serves as an incentive to expand use of this tactic. Indeed, this behavior in the international community significantly undermines civilians’ protection during armed conflict and accordingly offends the heart of IHL. New York University School of Law Professor Samuel Estreicher was thus accurate in claiming that the shielding party’s obligation is a “neglected area of IHL.”¹⁰² He calls upon scholarship and advocacy to bring defender duties to the forefront of any discussion and investigation of armed conflicts. The necessarily joint contribution of attackers and defenders alike to civilian harm must be recognized. Any investigation of an armed conflict must focus on the duties of both parties and evaluate the feasibility of attacker compliance with some of the more open-ended obligations of IHL, such as the so-called duty of proportionality, as a function in part of the extent of defender compliance with its duties.¹⁰³ Professor Estreicher appropriately calls for linking the evaluation of the impeded party’s compliance with the duty of proportionality to the shielding party’s compliance with its obligations under IHL.¹⁰⁴

Some experts have further claimed that the party utilizing civilians as human shields should bear exclusive responsibility for consequent civilian casualties because that party is responsible for creating the danger to those civilians.¹⁰⁵ This rationale seems similar to the criminal law principle that a

100. Blank, *supra* note 74, at 389.

101. Fischer, *supra* note 1, at 518.

102. Samuel Estreicher, *Privileging Asymmetric Warfare?: Defender Duties Under International Humanitarian Law* 10 N.Y. Univ. Pub. Law & Legal Theory, Working Papers No. 193 (2010), available at http://lsr.nellco.org/nyu_plltwp/193.

103. *Id.* at 9.

104. *Id.* at 10; see also *infra* note 164.

105. See PAUL RAMSEY, *THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY* 435-36 (Rowman & Littlefield Publishers, Inc. 2002) (1968); Louis Rene Beres, *Israel, Lebanon,*

criminal who uses an innocent person as a shield while perpetrating a crime is guilty of murder if that innocent human shield is killed by anyone resisting the crime or attempting to capture the criminal.¹⁰⁶ On the other hand, it can be argued that such an analogy is not germane to the consequences of IHL abuses against civilians on the grounds that modern warfare is far more lethal, involving many more casualties than victims of ordinary crimes governed by criminal law. We do not express our opinion on this matter because we advocate a much more comprehensive solution.

We emphasize that it has to be clear that the responsibility for adherence to the obligation of civilians' safe-keeping rests upon both sides to the conflict and not only upon the impeded side, and that the deployment of civilians as human shields—whether shielding is forced upon them or is of their own volition—constitutes a grievous war crime.¹⁰⁷ Additionally, it ought to be clarified that both parties will be held accountable for criminal IHL violations arising from any use of human shields,¹⁰⁸ and also that international tribunals will adopt a strong and balanced stance against such crimes.¹⁰⁹

B. The Impeded Party's Spectrum

With regard to the impeded party's obligations, a structural change in the application of the proportionality principle is required, but not one that entails any change in the law itself. The laws of war are aimed, *inter alia*, at regulating states' right to use force so that they can defend themselves, yet historically this body of law addressed conventional threats by conventional armies.¹¹⁰ The movement of combatants from the front into the home-front, fighting from and within populated urban areas, and the growing use of civilians as human shields pose new complications. As noted above, civilians do not enjoy an absolute immunity and an attack on a legitimate military target is not by itself forbidden by the mere presence of civilians at a site, even as human shields.¹¹¹ Such an

and Hizbullah: A Jurisprudential Assessment, 14 ARIZ. J. INT'L & COMP. L. 141, 148 (1997); Feinstein, *supra* note 94, at 246; Fischer, *supra* note 1, at 497. For a different view, see George E. Bisharat et al., *Israel's Invasion of Gaza in International Law*, 38 DENV. J. INT'L L. & POL'Y 41, 103 (2009).

106. See John A. Roberts, Case Note, *Criminal Law—Homicide—Felony-Murder—Felon Is Culpable for Murder in the First Degree Under Maryland's Felony-Murder Statute When Police Officer Kills Kidnapped Hostage Used by Felon as Human Shield*—*Jackson v. State*, 9 U. BALT. L. REV. 508, 522 (1979); see also Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956).

107. GERHARD WERLE & FLORIAN JESSBERGER, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 367 (2005).

108. See Anderson et al., *supra* note 99.

109. See Rosen, *supra* note 24, at 772.

110. Yaniv Roznai, *Let the Caroline Sink! Assessing the Legality of a Possible Israeli Attack on Iranian Nuclear Facilities and Why the Traditional Self-Defense Formula Is Incompatible with the Nuclear Age*, 18 CAL. INT'L L.J. 2, 18, 31 (2010).

111. See LASSA OPPENHEIM, *INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY*

attack, however, would be prohibited if it violated the principle of proportionality.¹¹² The issue, of course, is how this principle is applied. Therefore, we propose a formula, based upon several elements, for adjusting the proportionality analysis in cases involving human shields in unconventional warfare, without digressing from the basic tenets of IHL.

1. Military Targets Protected by Human Shields: Two Categories of Shields

The first requirement is the existence of a military target protected by human shields.¹¹³ We propose dividing human shields into two categories: (i) voluntary (those who shield military targets of their own free will), and (ii) unknowing (civilians who have neither volunteered nor been coerced into serving as human shields, but are located near a legitimate military target) or involuntary (civilians or hostages who are coerced into shielding a military target).¹¹⁴ We propose differential treatment during the course of action on the battlefield, on the basis of an assessment of both the nature of the shielding (whether it is voluntary or unknowing/involuntary) and the nature of the military objective. Generally, we assert that voluntary human shields who protect offensive weapon systems that fire at the adversary are directly participating in warfare and as such should not be considered in the proportionality assessment, as opposed to involuntary or unknowing human shields who retain their civilian protection. Hence the apparent significance of this determination.¹¹⁵ In practice, however, the distinction between voluntary and unknowing/involuntary human shields may be very difficult to assess or prove.¹¹⁶ The thorny evaluation regarding the nature of the shielding should be based on reliable intelligence sources¹¹⁷ and, in cases of doubt regarding the nature of shielding, we agree with Professor Schmitt that a presumption in

525 (Hersch Lauterpacht ed., 7th ed. 1952); *see supra* text accompanying note 39.

112. *See* Schmitt, *Asymmetrical Warfare*, *supra* note 6, at 27; WAXMAN, *supra* note 2, at 8; *see supra* text accompanying note 40.

113. *See also* Horace B. Robertson Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, 8 U.S.A.F. ACAD. J. LEGAL STUD. 35 (1998); Joseph Holland, *Military Objective and Collateral Damage: Their Relationship and Dynamics*, in 2004 Y.B. INT'L HUMANITARIAN L. 35 (Timothy L.H. McCormack & Avril McDonald eds., 2007); DINSTEIN, *supra* note 38, at 82-112. *See generally supra* note 30 (defining military objectives).

114. *Compare* Schmitt, *Human Shields*, *supra* note 3, at 24 (dividing human shields into two categories: voluntary and involuntary), *with* Schoenekase, *supra* note 15, at 26 (dividing human shields into three categories: proximity human shields, involuntary human shields/hostages and voluntary human shields).

115. *See* Ezzo & Guiora, *supra* note 8, at 111; Alfred J. Sciarrino & Kenneth L. Deutsch, *Conscientious Objection to War: Heroes to Human Shields*, 18 BYU J. PUB. L. 59, 106 (2003).

116. *See* HCJ 3799/02 Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander 60(3) PD 67 [2005] (Isr.).

117. *See* Ezzo & Guiora, *supra* note 8, at 111-13.

favor of involuntary shielding should apply.¹¹⁸

2. Delivery of Adequate Warning

The second condition is delivery of an adequate warning prior to an attack. This requirement is well-established in the LOAC,¹¹⁹ and its rationale is to allow civilians to find shelter from an expected attack.¹²⁰ This obligation is exceedingly important in densely populated urban areas.¹²¹ However, it is not absolute, since circumstances or necessities of war may prevent warning or dictate a bombardment without warning.¹²²

What constitutes adequate warning? An adequate warning consists of several criteria: it must reach those who are exposed to an attack's danger, it must be clear, it must be credible, and it must be specific regarding the location to be affected.¹²³ It must allow adequate time for evacuation; however, it must not be delivered so early that civilians believe that the danger is over when the attack has yet to occur.¹²⁴ The warning party must ensure that civilians have a safe exit and somewhere to go.¹²⁵ Note that even if the warning party provides an exit route for civilians in a combat zone, some degree of responsibility surely rests upon the warned party to take care of its civilians, by creating shelters for them, for instance.

These criteria were incorrectly applied in the Goldstone Report. As stated in the report, Israel—which is accustomed to providing warnings¹²⁶—delivered 165,000 telephone calls, dropped 2,500,000 leaflets, and resorted to warnings in the form of radio broadcasts and “roof knocking.”¹²⁷ Yet according to the

118. See Schmitt, *Human Shields*, *supra* note 3, at 336-37.

119. See, e.g., Convention IV Respecting the Laws and Customs of War on Land and its Annex, art. 26, adopted Oct. 18, 1907, available at <http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument>; Protocol I, *supra* note 29, art. 57, ¶ 2(c); see Harry Post, *War Crimes in Air Warfare*, in 1 *ESSENTIAL AIR AND SPACE LAW: THE LAW OF AIR WARFARE-CONTEMPORARY ISSUES* 157, 164 (Natalino Ronzitti & Gabriella Venturini eds., 2006).

120. 1 *LASSA OPPENHEIM, INTERNATIONAL LAW: PEACE* 220 (Ronald F. Roxburgh ed., 3d ed., The Lawbook Exchange, Ltd., 2005).

121. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 37, at para. 2190.

122. *Id.* at para. 2223.

123. See *Goldstone Report*, *supra* note 27, ¶ 528.

124. See Bouchié de Belle, *supra* note 51, at 905.

125. See *Isayeva v. Russia*, Eur. Ct. H.R. at para. 189 (2005), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=57950/00&sessionid=62650825&skin=hudoc-en>.

126. See *Why They Died: Civilian Casualties in Lebanon During the 2006 War*, HUMAN RIGHTS WATCH 6-7 (Sept. 5, 2007), available at <http://www.hrw.org/sites/default/reports/lebanon0907.pdf> (During the 2006 armed conflict between Hezbollah forces and Israel in Lebanon, Israel repeatedly sent extensive warnings to the population in southern Lebanon to evacuate the area.).

127. “Roofknocking” is the practice of dropping lighter explosives onto rooftops as a

report, the different types of warnings issued by Israel in Gaza cannot be deemed sufficiently effective under the circumstances because some messages were general and the “roof knocking” warnings were dangerous.¹²⁸ The report establishes excessive standards for measuring the warnings’ “effectiveness” which, as the operational and international law expert Professor Michael N. Schmitt notes, “both have no basis in the law and which run counter to state practice and military common sense.”¹²⁹ First, the warning cannot be too specific, for the result would be to make the deployment of human shields easier. A slightly more general warning to civilians to avoid an area would provide an appropriate offset tactic to the use of human shields, as it would make it difficult for civilians to gather around specific targets about to be attacked.¹³⁰ Also, while the report criticized pre-recorded generic phone warnings, it neglected to explain why these warnings were ineffective.¹³¹ Second, the warnings issued by the IDF far exceeded those given in any other conflict. “Astonishingly,” Professor Schmitt notes, “the report found these measures insufficient, despite the fact that they constituted probably the most extensive, and most specific, warnings of offensive operations over such a short period in the history of warfare.”¹³² The total number of warnings involved suggests an adequate transmission.¹³³ Third, while the report examines the effectiveness of the warnings retrospectively (i.e., whether civilians in fact followed the warnings or found shelter), international law requires a prospective examination established upon the warnings’ nature and content.¹³⁴

To be sure, providing an early warning does not relieve an impeded party from its obligation to take other precautions to protect civilians from harm.¹³⁵ Notably, the impeded party is not allowed to assume that those civilians ignoring the warning or simply remaining in the area after the warning was

warning prior to an actual attack, after earlier warnings have been ignored.

128. *Goldstone Report*, *supra* note 27, ¶ 1717. On Israel’s precautions, see Sergio Catignani, *Variation on a Theme: Israel’s Operation Cast Lead and the Gaza Strip Missile Conundrum*, 154 RUSI J., 66, 71; Amos N. Guiora, *Proportionality “Re-Configured,”* 31 A.B.A. NAT’L SEC. L. REP. 9, 13 (2009).

129. Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L. 795, 829 (2010); *see also id.* at 827-29 (criticizing the Goldstone Report’s early warning requirements).

130. *See* C.B. Shotwell, *Economy and Humanity in the Use of Force: A Look at the Aerial Rules of Engagement in the 1991 Gulf War*, 4 U.S.A.F. ACAD. J. LEGAL STUD. 15, 44-45 (1993).

131. *Goldstone Report*, *supra* note 27, ¶ 529.

132. Schmitt, *supra* note 129, at 828.

133. *See* Blank, *supra* note 74, at 46-48.

134. *Id.*

135. *See* Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Addendum - Study on Targeted Killings*, ¶ 78, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> [hereinafter Special Rapporteur Report]; Bouchié de Belle, *supra* note 51, at 905.

given are military targets or voluntary human shields by that fact alone.¹³⁶ As Professor Schmitt articulated:

Those who remain may be too elderly or infirm to leave. They may be too frightened to leave—fleeing from the village may be dangerous. They may wish to remain in order to safeguard their property and possessions. Whatever the rationale for their presence, it is only when they refuse to depart because they wish to complicate the enemy's actions that they qualify as voluntary shields.¹³⁷

In our proposed formula, the warning serves additional functions related to the human shielding tactic. These functions emphasize the interrelationship between the early warning given by the impeded party, the categorization of the human shields as voluntary or involuntary/unknowing, the shielding party's reaction or non-reaction to the warning,¹³⁸ and the impact of these elements on the proportionality analysis.

3. Voluntary Human Shields

When the military objective is protected by voluntary human shields, adequate warning prior to an attack is aimed both at the shielding party using the shields,¹³⁹ providing it the opportunity to relinquish the shields, and the voluntary human shields themselves, informing them while they still have time to leave the area, that the planned attack on the military objective they are defending will be carried out despite their presence. This might convince them that their strategy to prevent the attack has failed.¹⁴⁰ If they persist in shielding the target, we believe that this contribution to the military action qualifies as direct participation in hostilities. Under these circumstances, voluntary human shields would not merit consideration in the proportionality assessment.¹⁴¹

136. See IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I* at 188 (2009); Bouchié de Belle, *supra* note 51, at 905; Federico Sperotto, *Counter-Insurgency, Human Rights, and the Law of Armed Conflict*, 17 HUM. RTS. BRIEF, 19, 21 (2009) available at <http://www.wcl.american.edu/hrbrief/17/1sperotto.pdf?rd=1>. But see Gross, *supra* note 59, at 477-78.

137. Schmitt, *Human Shields*, *supra* note 3, at 316.

138. See Estreicher, *supra* note 102, at 9 (“[The] effective warning . . . must take account of defender actions; the effectiveness of a warning is a joint product both of the message and its mode of delivery and what defenders do, including what they tell civilians, upon receipt of the warning.”).

139. The shielding party is still bound by its obligations even if the human shields were operating voluntarily. See Schmitt, *Human Shields*, *supra* note 3, at 322.

140. Bouchié de Belle, *supra* note 51, at 905.

141. Cf. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 168-69 (2d ed. 1992) (explaining that civilians should have the choice of leaving a city under a siege, but if they choose to remain and subsequently die as an accidental result of hostilities, their consent frees the attacking party of guilt for their deaths).

A counterargument is that human shields must be considered in the proportionality analysis since they are civilians.¹⁴² According to this view, the voluntary human shields' activity does not pose an immediate and direct threat to the impeded party and therefore does not amount to direct participation in hostilities.¹⁴³ Direct participation is described in the Commentary to Protocol I as "acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces."¹⁴⁴ Arguably, by merely creating moral or legal restraints upon the impeded party, the human shields seldom pose any direct and immediate physical threat.¹⁴⁵ Even if they do contribute to a party's warfare capacity by protecting military targets, the argument continues, this contribution is only indirect.¹⁴⁶ If this is the case, then any harm to the voluntary human shields during a strike on a military object should be given full consideration when evaluating proportionality.¹⁴⁷

However, in our view, the stronger argument is that by their act of shielding a military objective, voluntary human shields are conducting an effective defensive tactic. These affirmative acts are intended to thwart attacks/counter-attacks and directly contribute to military action, which amounts to direct participation.¹⁴⁸ As Dr. Richard Parrish claimed:

142. A more delicate approach takes a limited account of voluntary shields when assessing proportionality. See Rewi Lyall, *Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States*, MELBOURNE J. INT'L L. 313, 321 (2008); Schmitt, *Human Shields*, *supra* note 3, at 326; see also Queguiner, *supra* note 56, at 817 ("In applying the proportionality test, a military commander will take into account the deliberately imprudent behaviour of the voluntary human shields. As a result, these civilians will bear the risk of falling victim to a legitimate attack on the shielded object.").

143. See Josiane Haas, *Voluntary Human Shields: Status and Protection Under International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW AND THE 21ST CENTURY'S CONFLICTS: CHANGES AND CHALLENGES 191, 211 (Roberta Arnold & Pierre-Antoine Hildbrand eds., 2005); Lyall, *supra* note 142, at 321; Queguiner, *supra* note 56, at 815-17.

144. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 37, at 618.

145. See Schmitt, *Human Shields*, *supra* note 3, at 317-18.

146. See HUMAN RIGHTS WATCH, INTERNATIONAL HUMANITARIAN LAW ISSUES IN A POTENTIAL WAR IN IRAQ 3 (Feb. 20, 2003), available at http://www.google.com/url?q=http://www.hrw.org/sites/default/files/reports/Iraq%2520IHL%2520formatted.pdf&usd=2&usg=ALhdy28aw0UX2C87fKBgG_y1Ss4aaH2O-A; Bouchié de Belle, *supra* note 51, at 894-95.

147. Schmitt, *Human Shields*, *supra* note 3, at 325.

148. See Schmitt, *Human Shields*, *supra* note 3, at 318-19 ("[F]rom a practical military point of view, a civilian who takes up arms may well be less effective in deterring or defending against attack than one who shields. An attacker willing to face the risks posed by enemy defenses can always attempt to engage a defended target. On the other hand, as a matter of law, the attacker may not strike a target if the operation would likely result in injuries or deaths of civilians that are excessive relative to the attack's anticipated military advantage. . . . [U]nless voluntary shields are characterized as direct participants excluded from the proportionality equation, a sufficient number of them can absolutely immunize a target from attack.").

Although they do not carry weapons themselves, when a volunteer places him- or her-self at a target of potential military significance he or she is directly contributing to the perpetration of hostile acts by one party against another party. Voluntary human shields who seek to exploit their presumed civilian status to enhance the survivability of belligerents, their weapons systems, command and control facilities, and infrastructure that directly supports a belligerent state's war effort, have clearly become involved in combat, albeit not in any traditionally recognized way.¹⁴⁹

This stance was taken by the Israeli Supreme Court in its "targeted killings" judgment.¹⁵⁰ As direct participants in hostilities, voluntary human shields bore the battle's perilousness and compromised their immunity; hence they should not be considered in the assessment of proportionality.¹⁵¹

The ICRC offers a more flexible approach, under which the status of voluntary human shields is related to the impact of their presence. For example, when voluntary human shields pose a physical obstacle to military operations, primarily in ground operations in urban environments, they could qualify as direct participants in hostilities. However, when they lack any physical adverse effect on the attacking capability of a party to strike and destroy the military target, for example, when facing airstrikes, their presence may shift the proportionality parameters to the detriment of the impeded party. In other words, the fact that their presence poses "only" a legal obstacle to an attack points to an indirect causal relation between their conduct and the cancellation or suspension of the attack.¹⁵² In a similar vein, in his book on the

149. Richard Parrish, *The International Legal Status of Voluntary Human Shields*, Paper Presented at International Studies Association Annual Meeting 8 (Mar. 17, 2004), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/0/7/4/0/5/pages74057/p74057-1.php; see also *id.* at 10 ("[A] human shield who voluntarily attempts to protect these systems by his presence is attempting to help these systems harm the enemy. Even though the human shield is not actually armed, he has implicated himself in the war-making apparatus of a belligerent party.").

150. See HCJ 769/02 Pub. Comm. Against Torture v. Isr., Judgment, para. 36 (Dec. 13, 2006) ("Certainly, if [human shields] are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking a direct part in the hostilities. They themselves are victims of terrorism. However, if they do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in hostilities.").

151. Schmitt, *Human Shields*, *supra* note 3, at 326; Anderson et al., *supra* note 99. Professor Yoram Dinstein, for example, argued that civilians who take direct participation in hostilities become unlawful combatants after losing their civilian status. See Dinstein, *supra* note 38, at 27-33; Yoram Dinstein, *Unlawful Combatancy*, 32 ISR. Y.B. HUM. RTS. 247, 248 (2002). According to Haas, voluntary human shields do not acquire combatant status. See Haas, *supra* note 143, at 200 ("when civilians directly participate, they retain their status but lose their immunity from direct attack.") (cited in Lyall, *supra* note 142, at 319).

152. See ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 56-57 (2009), available at <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf> ("The fact that some civilians voluntarily and deliberately abuse their legal entitlement to protection against direct attack in order to shield military objectives does not . . . entail the loss of their

contemporary law of targeting, Ian Henderson, from the Royal Australian Air Force and the Asia-Pacific Centre for Military Law, claimed that one has to distinguish between human shields who truly obstruct an attack, for example, by physically blocking a route of advance, and human shields who only present moral or legal restraints upon an attacker. Only the former would not count in the proportionality assessment.¹⁵³

We do not see any basis for this distinction between ground troops and air strikes—neither from a military necessity point of view, nor from a humanitarian point of view. Such a distinction would only encourage states, when using force, to undertake ground operations rather than air bombardment.¹⁵⁴

We acknowledge that finding a definition of direct participation which concurrently protects civilians without rewarding those who use civilians as human shields is a thorny task.¹⁵⁵ However, we take the view that taking part in hostilities includes defensive acts as well as offensive ones. In combat, the two are intertwined and they both contribute toward the belligerent's overall military capacity. Human shields who voluntarily position themselves, without arms, in the presence of a military objective which is utilized to attack the adversary—weapon systems or infrastructure—with the purpose of preventing it from being attacked, are attempting to increase the survivability of this

protection and their liability to direct attack independently of the shielded objective. Nevertheless, through their voluntary presence near legitimate military objectives, voluntary human shields are particularly exposed to the dangers of military operations and, therefore, incur an increased risk of suffering incidental death or injury during attacks against those objectives.”).

153. HENDERSON, *supra* note 136, at 218.

154. One can perhaps assume that this might be the desired aim of those who distinguish between ground operations and aerial warfare. However, we are uncertain whether ground operations are necessarily beneficial to civilians compared to aerial warfare. On the one hand, it can be argued that “flying and bombing from a very high altitude causes the ratio of civilian casualties to increase above that of land warfare.” Yvenson St-Fleur, *Aerial Belligerency Within a Humanitarian Rhetoric: Exploring the Theorizing of the Law of War/Terrorizing of Civilians' Rights Nexus*, 8(2) CHINESE J. INT'L L. 347, 368 (2009). Moreover, this distinction might affect *jus ad bellum* considerations, since when “one side in a conflict can strike from the air with near total impunity . . . [this] makes the decision to resort to force for even limited purposes infinitely easier to take.” Michael N. Schmitt, *Effects-Based Operations and the Law of Aerial Warfare*, 5(2) WASH. U. GLOB. STUD. L. REV. 265, 281 (2006). On the other hand, the increasing precision of aerial warfare reduces the risk of collateral damage and the need for re-strikes, and enables the ending of hostilities more rapidly than do ground troops operations. See Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT'L REV. RED CROSS 445, 453 (2005). In any event, when considering a proportionate reaction against a threat upon the impeding party, the considerations must be relevant and must include all of the pros and cons regarding the proportionality of the aerial or ground use of force.

155. See Special Rapporteur Report, *supra* note 135, ¶ 60.

military objective.¹⁵⁶ Therefore, they are intentionally engaging in defensive acts by which they forfeit their IHL protection and should qualify as direct participants in hostilities.¹⁵⁷ Such an interpretation is held up by the Commentary on the Additional Protocols, by which a person can undertake hostile acts even in the absence of a weapon's use.¹⁵⁸ Human shields who voluntarily protect offensive weapon systems that fire at the adversary are certainly directly participating in warfare, and as such should be excluded when calculating the anticipated collateral damage of the attack on civilians.¹⁵⁹

4. Unknowing or Involuntary Shields

When warning is provided to unknowing or involuntary human shields, it serves different functions, but, in either case, the shields retain their civilian protection. However, the proportionality assessment must be adapted to the circumstances.

Warning serves different functions, depending on whether the human shields are used without their knowledge or against their will. When unknowing human shields protect the military objective, the early warning would make the civilians aware that they are situated near a military objective about to be targeted, and thus enable them to find shelter. When involuntary human shields protect the military objective, the early warning is intended to inform the party using the human shields that, despite their use of civilians, their objective is about to be targeted. In these two cases the shields retain their civilian protection despite the shielding party's unlawful actions.¹⁶⁰ As Dr. Michael Skerker, from the U.S Naval Academy, argued, those civilians "living

156. This should be distinct from those voluntary human shields who position themselves in the presence of a target that does not pose any risk, for example, human shields who stand on a bridge which qualifies as a legitimate military objective by its purpose or location. In such cases, the voluntary human shields should not be excluded from the proportionality assessment and similar rules which we propose with regard to involuntary human shields should apply.

157. See Bouchié de Belle, *supra* note 51, at 894; Charles J. Dunlap, *Targeting Hearts and Minds: National Will and Other Legitimate Military Objectives of Modern War*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 117, 119 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007); Parrish, *supra* note 149, at 13; Schmitt, *Asymmetrical Warfare*, *supra* note 6, at 11, 27-28; see also Michael N. Schmitt, *Humanitarian Law and the Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 541 (2005) ("[Voluntary human shields] are no different from point air defenses, which serve to protect the target rather than destroy inbound aircraft. Voluntary shielding is unquestionably direct participation.").

158. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 37, at 619.

159. As a particularly vulnerable group and due to their legal incapacity to establish the required intent to directly participate in hostilities, children might form a possible exception to this inclusion. See Schmitt, *Human Shields*, *supra* note 3, at 335-36.

160. See Schmitt, *Human Shields*, *supra* note 3, at 327; Hamilton DeSaussure, *Military Objectives, A-Z Guide*, CRIMES OF WAR PROJECT, <http://www.crimesofwar.org/thebook/military-objective.html> (last visited Dec. 4, 2010).

amidst the snipers, or chained to the factory are 'weaponized' by the enemy, turned into unconventional obstacles before the adversaries' conventional forces but they remain non-combatants. They have not chosen this path; their rights are no more expendable than if they were far from the action."¹⁶¹

a. Proportionality Under Circumstances of Widespread or Systematic Use

As aforementioned, the current rules as applied create an incentive for the use of human shields since a party can—in order to compensate for its military disadvantage, or, alternatively, to enhance its military capacity—effectively immunize a military objective from an attack by placing enough civilians at risk, thereby gaining a direct benefit from violating international law.¹⁶² We thus propose that the application of the proportionality test must be adapted to the circumstances under which involuntary or unknowing human shields are being used.¹⁶³ But why, one might wonder, should the forced or unknowing presence of civilians around a military objective lessen the value assigned to those civilians?¹⁶⁴ "To apply such reasoning," Bouchié de Belle, a diplomatic officer with the ICRC, claimed, "would be tantamount to 'punishing' the civilians acting as human shields for the violation of the law committed by the attacked party."¹⁶⁵ The answer is that this adjustment is necessary precisely to achieve greater protection for civilians. Since the current application of the proportionality requirement shifts the responsibility from the shielding party to the impeded one, it increases—and perhaps even legitimizes—the danger to civilians during hostilities, rather than reducing it.¹⁶⁶

We agree with the viewpoint that involuntary or unknowing human shields maintain their civilian immunity from a military attack. However, when assessing the proportionality calculation, generally, the requirement must be realistically applied.¹⁶⁷ We do not seek to abandon the current principle of proportionality. The proportionality standard applies and must at all times be observed. Rather, we propose the adoption of a more appropriate construction or application of the standard—one that is reasonable under the

161. Skerker, *supra* note 6, at 34.

162. *See infra* Part III.B.

163. DINSTEIN, *supra* note 38, at 131.

164. HENDERSON, *supra* note 136, at 213; Schmitt, *Human Shields*, *supra* note 3, at 332.

165. Bouchié de Belle, *supra* note 51, at 901 n.78.

166. Joshua C. Harrison, *Attracting the World's Policemen to Protocol I Additional to the 1949 Geneva Conventions*, 12 U.S.A.F. ACAD. J. LEGAL STUD. 103, 112 (2003).

167. Schmitt, *Human Shields*, *supra* note 3, at 328; Michael N. Schmitt, *The Law of Targeting*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 131, 160-61 (Elizabeth Wilmshurst & Susan Carolyn Breau eds., 2007).

circumstances.¹⁶⁸ Indeed, we need a “proportionate proportionality.” Thus we propose that when the use of involuntary or unknowing human shields is part of a widespread or systematic policy, the measure of proportionality must be adjusted.

When civilians are placed as shields for a military object, civilian casualties will be greater than they otherwise would be. Therefore, the proportionality assessment (i.e., the assessment of whether collateral damage is excessive in relation to the anticipated specific and direct military advantage) cannot be detached from the shielding party’s actions¹⁶⁹ and ought to take into account the incentive to illegally use civilians as human shields.¹⁷⁰

Moreover, when applying the law, one also has to take into consideration whether the human shields phenomenon is a sporadic act, or whether it is employed as a widespread and systematic tactic. In the latter case, under the circumstances of the modern urban battlefield, an adjustment to the proportionality threshold is mandated. As Dr. Robin Geiss, a legal advisor at the ICRC, correctly observed:

Evidently, if the use of human shields occurs only sporadically and at random in an armed conflict, humanitarian concerns are likely to outweigh the necessity to attack using disproportionate force, whereas if such tactics are systematically employed for a strategic purpose, the enemy may feel a compelling and overriding necessity to attack irrespective of the anticipated civilian casualties and damage.¹⁷¹

Otherwise, if one party continuously and persistently uses civilians as shields, the adversary would eventually and inevitably forsake its commitment to spare civilians and would attack enemy combatants and targets despite the human shields’ presence.¹⁷² Ongoing and systematic use of civilians as human shields would justify this adjusted assessment, since it would also create an incentive to lessen the use of the human shields tactic, ultimately enhancing

168. Cf. Amichai Cohen, *The Principle of Proportionality in the Context of Operation Cast Lead: Institutional Perspectives*, 35 RUTGERS L. REC. 23, 32 (2009) (“Proportionality . . . is concerned with reasonableness [T]here exists some standard of proportionality, which the reasonable commander must apply in accordance with his knowledge of the field.”).

169. See, e.g., Estreicher, *supra* note 102, at 10 (“The effectiveness of such a duty [the proportionality requirement], including the ability of military commanders to implement it in the air and on the ground, may well depend on serious consideration, elaboration and implementation of defender duties, for defenders are often in the superior position to minimize civilian exposure to the dangers of military operations.”).

170. See MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, at 295 (1982); DINSTEIN, *supra* note 388, at 131; Feinstein, *supra* note 94, at 247-48; Rosen, *supra* note 24, at 771.

171. Robin Geiss, *Asymmetric Conflict Structures*, 88 INT’L REV. RED CROSS 757, 766 (2006).

172. Fabre, *supra* note 95, at 8.

civilian protection during armed conflicts.¹⁷³ Therefore, as retired Major General A.P.V. Rogers, former Director of U.K. Army Legal Services, and a senior fellow of the Lauterpacht Centre for International Law in the University of Cambridge, proposed:

[A] tribunal considering whether a grave breach ha[s] been committed would be able to take into account when considering the rule of proportionality the extent to which the defenders had flouted their obligation to separate military objectives from civilian objects and to take precautions to protect the civilian population . . . the proportionality approach taken by tribunals should help to redress the balance which otherwise would be tilted in favor of the unscrupulous.¹⁷⁴

However, how can we be certain that this proposal would not be subject to abuse, allowing an impeded party to categorize all civilians located near a targeted military objective as human shields in order to adjust the proportionality test?¹⁷⁵ This may seem to be a legitimate objection to our proposal, but it is not entirely persuasive. First, many international law doctrines, such as self-defense,¹⁷⁶ reprisals,¹⁷⁷ immunity,¹⁷⁸ and especially the rules of customary international law,¹⁷⁹ are open to abuse, but no one can seriously claim that international law should not include such doctrines as immunities or the right to self-defense.¹⁸⁰ Indeed, as Sir Professor Christopher Greenwood CMG QC, currently a judge at the International Court of Justice, stated, "all rights are capable of being abused."¹⁸¹ Second, although an adjustment could be subject to abuse, it would be far less abusive than the current exploitation of IHL by those who systematically use civilians as protective shields and increase civilian casualties.

To recapitulate, an adjustment of the proportionality analysis is mandated when the case in question involves a widespread and systematic policy of resorting to human shields, as distinct from sporadic use. However, this adjustment does not take place in a vacuum.

173. See Fischer, *supra* note 1, at 515-16.

174. A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 79 (1996).

175. See Bouchié de Belle, *supra* note 51, at 902.

176. See TIM HILLIER, *SOURCEBOOK ON PUBLIC INTERNATIONAL LAW* 600 (1998).

177. See Shane Darcy, *What Future for the Doctrine of Belligerent Reprisals?*, 5 Y.B. INT'L HUMANITARIAN L. 107, 119 (2002).

178. YITIHA SIMBEYE, *IMMUNITY AND INTERNATIONAL CRIMINAL LAW* 76 n.57 (2004).

179. WIL D. VERWEY, *RIOT CONTROL AGENTS AND HERBICIDES IN WAR: THEIR HUMANITARIAN, TOXICOLOGICAL, ECOLOGICAL, MILITARY, POLEMOLOGICAL, AND LEGAL ASPECTS* 259 (1977).

180. See Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 FIN. Y.B. INT'L L. 141, 170 (1999).

181. See Christopher Greenwood, *International Law and the NATO Intervention in Kosovo*, 49 INT'L & COMP. L. Q. 926, 931 (2000).

b. Application of the Adjustment: Strict Criteria

We propose that adjustment to the proportionality formula necessitates strict application of the other precautions regarding an attack: warning and necessity. First, the adjustment only applies after adequate warning (according to the aforementioned criteria) has been issued prior to the attack/counter-attack.¹⁸² The warning either notifies civilians that they are located near a military objective about to be targeted, thereby enabling them to find shelter, or notifies the party using the human shields that, despite their tactics, the objective is about to be targeted. Second, the attack/counter-attack itself must be justified by military necessity (i.e., the circumstances, the facts, and the degree of force used by the shielding party must demand an attack).¹⁸³ Strict adherence to these requirements of warning and necessity compensates for the adjustment—but not the abandonment—of the proportionality requirement when the enemy places civilians at risk by extensively and systematically using them as human shields.

c. Proportionality under Circumstances of Clear and Present Danger

In general, IHL currently treats all military objectives equally, dealing with them under one standard. We, however, assert that a different standard should apply in cases in which the military objective which is protected by human shields poses a clear and present danger to the adversary. These cases also merit, so we propose, an adjustment to the proportionality assessment, which would not derogate from the principles of IHL. For this adjustment to apply, it is insufficient that the target is a military object, and it is insufficient that its elimination is necessary (i.e., that its destruction would weaken the enemy's military potential).¹⁸⁴ In other words, not every case in which a military objective, such as a weaponry warehouse, is protected by involuntary human shields would enable the attacking forces to adjust the proportionality assessment. Only when the military objective poses a clear and present danger to the impeded party's forces, troops, or civilians, such as a target from which mortars or missiles are being fired, may the proportionality assessment be subject to such an adjustment.

With regard to those military objects posing a clear and present danger—such as gun emplacements, rocket launchers, and sniper hideouts—proportionality acquires a specific meaning which is conspicuously absent from the IHL literature. Such military objects, if they are actively firing at the impeded party's territory—and especially where this enemy fire is directed at civilians—are essentially distinct from the general category of military objects.

182. See *infra* Part IV.B.2.

183. On military necessity, see ROGERS, *supra* note 174, at 3-6.

184. HENDERSON, *supra* note 136, at 44.

These aggressive acts of war affect the other side's soldiers and civilians. The impeded side, often the defending democracy, will seek to protect its population by silencing the enemy positions. No one can seriously doubt that this action is compatible with principles of international law and its emphasis on self-defense: it seeks to prevent casualties—including innocent civilian casualties within the party's territory.

What does proportionality mean in this instance? We submit that under the foregoing circumstances, when enemy fire has already occurred, proportionality means that the impeded party will not exceed the amount of force required to silence the enemy fire—even when protected by human shields—in order to protect its forces and population.¹⁸⁵ Any degree of force which suffices to achieve this purpose would fall under the proportionality principle, unless it is shown that the purpose of silencing enemy fire could have been achieved by alternative means, less costly in terms of incidental harm to human shields.¹⁸⁶ Without such an understanding of the meaning of proportionality, without allowing protection of the impeded side's interests, there is a palpable danger that IHL will either be shunned or fall into disrepute.

An analogy supporting our proposal can be drawn from the international criminal law defense of self-defense. We do not refer to self-defense on the macro-state level, which is regulated by Article 51 of the U.N. Charter as part of *jus ad bellum* (the laws which govern the right to go to war and the lawfulness of the recourse to force),¹⁸⁷ but rather the micro-individual level as part of *jus in bello*.¹⁸⁸ This meaning of individual self-defense, which was accepted in the ICTY's jurisprudence as a rule of customary law,¹⁸⁹ is encapsulated in Article 31(1)(c) of the Rome Statute of the International

185. See Feinstein, *supra* note 94, at 250 (“Evaluations of proportionality . . . must take into account the security of the military commander's own forces.”); Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 93, 108 (2006) (describing how the principle of human dignity acknowledges a duty to minimize enemy civilians' harm, but there is no general requirement “to assume personal life-threatening risks” and “to risk combatants to reduce the risk to enemy civilians”).

186. See Roznai, *supra* note 110, at 27 (“The means used must be no more than necessary to attain a certain goal, but also that the goal's value must outweigh the disvalue of the means; e.g., even if in order to remove a certain threat two nuclear bombs are necessary, their use in itself may outweigh the given end.”).

187. See U.N. Charter art. 51, para. 1 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”).

188. See generally GARDAM, *supra* note 39 (discussing proportionality in *jus in bello* and *jus ad bellum*); JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 8-27 (2004) (discussing proportionality in *jus in bello* and *jus ad bellum*).

189. See *Prosecutor v. Kordic*, Case No. IT-95-14/2-T, Judgment, ¶ 256 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf; CRYER ET AL., *supra* note 63, at 337.

Criminal Court.¹⁹⁰ In essence, four requirements must be met to grant an accused the defense of self-defense under Article 31(1)(c).¹⁹¹ First, the accused must have acted “reasonably.” This is an objective test according to which the defense must be necessary and adequate to avoid the danger. Second, self-defense requires a proportionate reaction to the degree of danger faced. Third, the danger must comprise an “imminent” use of force. “Imminence” takes place when the use of force is already ongoing or is about to occur. When the danger is over, self-defense is not allowed. Fourth, the use of force on the part of the enemy must be “unlawful” in order to excuse the defender from criminal liability.¹⁹²

The elements that are most relevant to our proposal are the elements of “imminent and unlawful use of force.” These elements clearly apply to our scenario of a military object protected by human shields that poses a clear and present danger to the impeded party’s forces and population. Use of civilians as human shields is certainly unlawful according to the aforementioned LOAC, and the “clear and present danger” requirement is equivalent to an imminent use of force. Therefore, if self-defense excuses from criminal liability a defender who, in order to defend himself or another person, violates laws of war when faced with “an imminent and unlawful use of force,” then surely, and all the more so, an adjusted proportionality requirement should apply when the impeded party’s troops face an imminent threat from a military target which is unlawfully protected by human shields.

We are not calling for disregard or violation of the laws of war, but rather for their realistic application in order to eventually reduce civilian casualties. Our proposed adjusted proportionality requirement is much less far-reaching than a complete criminal excuse. Denying application of an adjusted proportionality requirement under these circumstances is tantamount to eliminating the principle of self-defense during battle—a step, which would, in effect, eviscerate the LOAC’s conceptual foundation.

Note that we do not claim that the adjustment applies to all acts which are committed during a “defensive operation.” Indeed, the last sentence of Article 31(1)(c) states clearly that the mere participation of a person in a “defensive operation” is not a ground *per se* for excluding criminal responsibility. As the

190. “[A] person shall not be criminally responsible if, at the time of that person’s conduct: . . . (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.” Rome Statute of the International Criminal Court, *supra* note 35, art. 31, ¶ 1.

191. On these elements, see E. VAN SLIEDREGT, *THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW* 260 (2003).

192. *Id.* at 260-63.

ICTY ruled, “any argument raising self-defense must be assessed on its own facts and in the specific circumstances relating to each charge.”¹⁹³ Nevertheless, it must also be remembered that just as self-defense applies in *jus in bello*, it must also apply in *jus ad bellum*.¹⁹⁴ A practice which would impair the right to individual self-defense might eventually impair the inherent rights of states to self-defense.¹⁹⁵ On this basis, we argue that, without adoption of our proposed understanding of proportionality, the inherent right of states to self-defense will be harmed.

The formula we propose for the adjusted application of proportionality under certain circumstances succeeds in recalibrating the balance between military necessity and humanitarian considerations in a reasonable manner.¹⁹⁶

V. CONCLUSION

In recent conflicts, belligerents such as the Taliban, Hamas, and Hezbollah have turned fighting from within densely populated areas and using the civilian population as human shields into a combat doctrine.¹⁹⁷ From a defensive point of view, these parties transform the densely populated areas into military formations by placing military infrastructures and weapon systems within them. From an offensive point of view, these parties fire mortars and rockets from within densely populated areas, often locating the launching squads near residences and educational institutions.¹⁹⁸

Notwithstanding the high risk posed to civilians by this combat doctrine, the current law as applied and practiced does more harm than good by encouraging a belligerent to use civilians as shields against military attacks. Not only does it increase the risks to innocent civilians, but in all probability it also jeopardizes the credibility of the laws of war.

Firstly, a change in the international community’s attitude should take place as the international community’s focus must be readjusted. It seems that nowadays the values have been reversed. The democratic states defending themselves have found themselves under relentless criticism, while there is an

193. *Kordic*, Case No. IT-95-14/2-T, Judgment, ¶ 452.

194. GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* 88 (2008).

195. For an expansion of the *jus in bello* proportionality test to include aspects of the *jus ad bellum* condition, see Eyal Benvenisti, *Rethinking the Divide Between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors*, 34 *YALE J. INT’L L.* 541, 543-48 (2009) (concluding that under contemporary conflicts’ conditions, “the insulation of *jus in bello* proportionality analysis from *ad bellum* considerations may prove at times to be more of a detriment than a contribution to the essential goals of the law.”).

196. Schmitt, *Human Shields*, *supra* note 3, at 332. *See generally* Schmitt, *supra* note 122 (discussing this equilibrium at length).

197. *See supra* notes 21-23.

198. *See INTELLIGENCE AND TERRORISM INFORMATION CTR.*, *supra* note 25, at 108-43, 195-262.

almost complete lack of attention to the parties who originally violate IHL by intentionally jeopardizing civilians in order to achieve military benefits. This attitude creates a danger for democracies and for all those who cherish human rights and democratic principles.¹⁹⁹

Secondly, IHL's rule of proportionality must be given a realistic interpretation in cases involving human shields. Facing an attack from a military target protected by human shields, but subject to IHL constraints—this dilemma demonstrates the perilous gap that exists between the actual security needs of certain states in modern conflicts and the protection standard that IHL provides. We accept the limitation that when facing war or terrorism the democratic state “must often fight with one hand tied behind its back.”²⁰⁰ However, the current rules and their current application have allowed the blatant use of human shields to successfully tie both hands of a democratic state by preventing it from defending itself. A realistic application of proportionality must be introduced.

The adjusted proportionality requirements proposed here would be more straightforward for nations to adhere to in practice and would lessen civilian casualties on both sides. If we seek to bring an end to the practice of using civilians as human shields, then we must understand the underlying reasons and motives that have allowed, or even encouraged, its proliferation: through the use of human shields, a party can currently compensate for its military disadvantage or increase its military capacity and thereby gain an advantage by violating the law. The proposed formulas realign the balance between the two conflicting principles of humanity and military necessity and make the laws of war compatible with modern warfare, both by deterring a party from systematically resorting to human shields tactics, and by applying a realistic interpretation of proportionality to cases of classic self-defense.

This Article calls for a cogent and reasonable interpretation of the laws governing the use of civilians as human shields in conflicts and demands condemnation of such practices. This is not only a legal and moral obligation, but also a strategic priority for national defense policies of democracies and for the welfare of the greater international community.

199. See Lévy, *supra* note 67.

200. See HCJ 5100/94 Pub. Comm. Against Torture in *Isr. v. Isr.*, 53(4) PD 817, 845 [1999] (Isr.).

