

HUMAN SHIELDS IN INTERNATIONAL HUMANITARIAN LAW

By Michael N. Schmitt*

INTRODUCTION

Human shielding involves the use of persons protected by international humanitarian law, such as prisoners of war or civilians, to deter attacks on combatants and military objectives. Labelled “counter-targeting” in military parlance,¹ the tactic hardly represents a new battlefield phenomenon. Shielding occurred, for example, in both the American Civil War and the Franco-Prussian War.² The *British Manual of Military Law*, issued as the First World War commenced, noted that placing prominent civilians on trains in occupied territory to prevent attacks “cannot be considered a commendable practice”.³ During the Second World War, as pointed out in the *Commentaries* to the 1949 Geneva Conventions,

public opinion was shocked by certain instances (fortunately rare) of belligerents compelling civilians to remain in places of strategic importance (such as railway stations, viaducts, dams, power stations or factories), or to accompany military convoys, or again, to serve as a protective screen for the fighting troops. Such practices, the object of which is to divert enemy fire, have rightly been condemned as cruel and barbaric... .⁴

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¹ Counter-targeting is “preventing or degrading detection, characterization, destruction and post-strike assessment of targets, by any means”. Defense Intelligence Agency, *Saddam’s Use of Human Shields and Deceptive Sanctuaries: Special Briefing for the Pentagon Press Corps*, Feb. 26, 2003, at: <http://www.defenselink.mil/news/Feb2003/g030226-D-9085M.html>.

The accompanying text describes Iraqi use of human shields during the 1990-91 First Gulf War. Dep’t of Defense, *Briefing on Human Shields*, Feb. 26, 2003, at: <http://merln.ndu.edu/MERLIN/PFIraq/archive/dod/t02262003.pdf>.

² J.M. Spaight, *War Rights on Land* 466 (1911). Interestingly, during the Civil War, the Union Commander in Alabama ordered that secessionist preachers be placed on trains to deter attacks. W. Winthrop, 2 *Military Law and Precedents* 797 n. 61 (2nd ed., 1920).

³ British War Office, *Manual of Military Law* 306 (1914).

⁴ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV): Commentary* 208 (ICRC, J. Pictet ed., 1958).

Despite condemnation, the practice persisted throughout the Cold War, including the Korea and Vietnam conflicts.⁵

Tragically, human shielding has become endemic in contemporary conflict, taking place across the legal spectrum of conflict.⁶ In international armed conflict,⁷ for instance, Iraq used human shields in its war with Iran from 1980-1988⁸ and those with United States led-coalitions in 1990-1991 (Operation Desert Storm)⁹ and 2003 (Operation Iraqi Freedom).¹⁰ Notably,

⁵ Statement of Secretary of State D. Acheson, Sept. 6, 1950, *repr. in* M. Whiteman, 10 *Digest of International Law* 424 (1968); Dep't of Defense Statement, Dec. 26, 1966, *repr. in ibid.*, at 427.

⁶ *See, e.g.*, discussion in D.P. Schoenekase, "Targeting Decisions Regarding Human Shields", *Mil. Rev.*, Sept.-Oct. 2004, at 26, 26-27.

⁷ International armed conflicts are armed confrontations between, at least in part, States. The precise scope of such conflicts is unsettled. In 2006, the Israeli Supreme Court, sitting as the High Court of Justice, looked to the geographic aspects of conflict, defining an international armed conflict as one that "crosses the borders of the State". H.C. [High Court of Justice] 796/02, Public Committee against Torture in Israel *et al. v. Government of Israel et al.*, Judgment (Dec. 13, 2006), para. 18 (full translation in 46 *I.L.M.* 375 (2007); [hereinafter: *Targeted Killings Case*].

⁸ The Secretary-General, *Report: Mission to Inspect Civilian Areas in Iran and Iraq which May have been Subject to Military Attack*, U.N. Doc. S/15834 (June 20, 1983); Letter from Secretary-General to the President of the Islamic Republic of Iran and to the President of the Republic of Iraq, June 29, 1984, U.N. Doc. S/16663 (July 6, 1984).

⁹ The United Nations General Assembly condemned the Iraqi use of shields: G.A. Res. 46/134, U.N. Doc. A/RES/46/134 (Dec. 17, 1991). *See also*: U.N. Commission on Human Rights, Res. 1992/71, Situation of Human Rights in Iraq, U.N. Doc. E/CN.4/1992/94 (Mar. 5, 1992), sec. 2(d); Declaration Following the Extraordinary European Political Cooperation Meeting in the Situation of Foreigners in Iraq and Kuwait, Paris (Aug. 21, 1990), communicated to the United Nations in U.N. Doc. A/45/433, S/21590, Aug. 22, 1990; European Council, Statement on the Situation of Prisoners of War, Annexed to Letter dated Jan. 23, 1991, from Luxembourg to the U.N. Secretary-General, U.N. Doc. A/45/940-S/22140 (Jan. 23, 1991); European Council, Declaration on the Gulf Crisis, Brussels (Oct. 28, 1990), communicated to the United Nations in U.N. Doc. S/21719 (Sept. 6, 1990); Gulf Cooperation Council, Ministerial Council, 36th Sess., Jeddah (Sept. 5-6, 1990), Final Communiqué, communicated to United Nations in U.N. Doc. S/21719, Sept. 6, 1990, at 4; League of Arab States, Council Res. 5039 (Aug. 31, 1990), at para. 2; Nordic Foreign Ministers, Declaration on the Iraq-Kuwait Conflict, Molde (Sept. 12, 1990), communicated to the United Nations in U.N. Doc. S/21751, Sept. 13, 1990; Dep't of Defense, *Conduct of the Persian Gulf War, Final Report to Congress Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991* (Pub. L. 102-25) 607-08, 613, 619 (1992) [hereinafter: *Gulf War Report*].

The Iraqis also threatened to use journalists as human shields, although those seized were released before the conflict began. A.L. DeSaussure, "The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview", 37 *Air Force L. Rev.* 52-53 (1994).

during Desert Storm the Iraqis seized foreign citizens for use as shields (Saddam Hussein labelled them “special guests”),¹¹ whereas foreigners travelled to Iraq to shield against American and British attacks in anticipation of Iraqi Freedom.¹²

Resistance groups in occupied territories have also employed human shields, sometimes with dreadful results, as in the 2002 Israeli operations in the West Bank city of Jenin.¹³ Terrorists have likewise adopted the tactic. Hezbollah did so during Operation Change Direction, the 2006 Israeli

¹⁰ Iraqi soldiers were instructed to “use any means necessary” in resisting the U.S. Marines, including “putting women and children in the street”. Among their tactics, they regularly hid near residences in order to use the civilians therein as shields. A Human Rights Watch report catalogued numerous eyewitness accounts. For instance:

Major M. Samarov, a battalion executive officer, encountered civilian shields as his Marines entered Baghdad on Apr. 8. “There were busloads of people driven to our position on Highway 6. When [the Iraqi military advance] wouldn’t work, they threw families in the vehicles. It was a very challenging situation. We made every attempt to minimize casualties, but it was extraordinarily difficult”, he said. In al-Shatra, a Marine corporal said a caravan of three buses drove toward his unit. Fedayeen had put women and children in the first two to allow the third carrying Fedayeen to advance on the Marines safely. British troops also reported shielding from the southern part of the country. During fighting east of Basra, Colonel Gil Baldwin, commanding officer of the Queen’s Dragoon Guards, said he saw Iraqi forces “herd” women and children out of their homes and fire rocket-propelled grenades (RPGs) over their heads.

Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* 67 (2003) [hereinafter: *Off Target*].

¹¹ The U.N. Security Council condemned the action. S.C. Res. 664, U.N. Doc. S/RES/664 (Aug. 8, 1999). Seizure of foreign citizens is only permitted if “absolutely necessary” to maintain security in one’s own country or for “imperative reasons of security” in occupied territory. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, Arts. 5, 42, 78, 75 *U.N.T.S.* 287 [hereinafter: GC IV].

¹² Estimates are that from 100-250 peace activists from some 32 countries travelled to Iraq to serve as shields. S. Peterson, “‘Human Shields’ in Tug-of-War”, *Christian Science Monitor*, Mar. 17, 2003, at 1. On the legal implications of their actions under U.S. law, see G.H. Teninbaum, “American Volunteer Shields in Iraq: Free Speech or Treason?”, 28 *Suffolk Transnat’l L. Rev.* 139 (2004).

¹³ The Jenin incident occurred during Operation “Defensive Shield”, an Israel Defense Force response to repeated Palestinian terrorist attacks against Israel. In April 2002, Israeli troops entered the Jenin refugee camp from which the terrorists were operating. During the fighting, the terrorists used human shields extensively. Because of the risk to civilians, the IDF mounted ground operations, rather than aerial attacks. Approximately 55 Palestinians and 23 IDF soldiers died in the fighting at the camp (and related facilities). The Secretary-General, *Report Prepared Pursuant to General Assembly Resolution ES-10/10*, U.N. Doc. A/ES-10/186 (July 30, 2002). The Israeli Supreme Court addressed the incident in H.C. 3114/02, Barake v. Minister of Defense (Apr. 14, 2002).

incursion into Lebanon,¹⁴ and al-Qaeda has used shields, including children, to deter air strikes in Afghanistan.¹⁵ Peacekeepers have even fallen victim to the tactic, most notably in Bosnia and Herzegovina in 1995¹⁶ and Lebanon in 2006.¹⁷ Finally, the use of human shields has become commonplace in non-international armed conflicts,¹⁸ such as those in El Salvador,¹⁹ Somalia,²⁰ Liberia,²¹ Sierra Leone²² and Chechnya.²³

¹⁴ See, esp., R. Erlich, *Hezbollah's Use of Lebanese Civilians as Human Shields* (Center for Special Studies, 2006); Human Rights Watch, *Why They Died: Civilian Casualties in Lebanon During the 2006 War* 52-60 (2007) [hereinafter: *Why They Died*]. See also, regarding the 1996 Operation Grapes of Wrath, M. Riesman, "The Lessons of Qana", 22 *Yale J. Int'l L.* 381, 389 (1997).

¹⁵ R. Synovitz, "U.S. Says Al-Qaeda Used Afghan Children as Human Shields", Radio Free Europe/Radio Liberty, June 18, 2007, at: <http://www.rferl/featuresarticle/2007/06/5d7daf6d-27d0-4c44-b91c-106d8a79ebef.html>; R. Faiez, "Claim: Taliban Used Children as Human Shields", Associated Press, Sept. 20, 2007. On the use of shields by terrorists, particularly the moral dimension of the issue, see E. 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 (2002).

¹⁶ On the use of shields in the Balkan conflicts, see U.N. S.C. Res. 998, U.N. Doc. S/RES/998 (June 16, 1995); U.N. Commission on Human Rights, Res. 1995/89, U.N. Doc. E/CN.4/RES/1995/89 (Mar. 8, 1995); U.N. Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, *5th Periodic Report*, U.N. Doc. E/CN.4/1994/47 (Nov. 17, 1993), at paras. 36-37, 39, 84; Council of Europe, Parliamentary Assembly, Res. 1011, (Sept. 28, 1993); Council of Europe, Parliamentary Assembly, Report on the Situation of Refugees and Displaced Persons in the Former Yugoslavia, Doc. 6740 (Jan. 19, 1993), at 19. During Operation Allied Force, the 1999 NATO air campaign against the Federal Republic of Yugoslavia, Yugoslavian forces were alleged to have forcibly concentrated civilians in a military camp in the village of Korisa. Nearly 90 civilians were killed during attacks on the facility. *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia* (n.d.), paras. 87-89, at: <http://www.un.org/icty/pressreal/nato061300.htm>; Dep't of Defense, *Report to Congress: Kosovo/Operation Allied Force After-Action Report* 60-63 (2000); Amnesty International, "Collateral Damage" or Unlawful Killings?: *Violations of the Laws of War by NATO During Operation Allied Force* (2000).

For an academic treatment of the attack, see T. Voon, "Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict", 16 *Am. U. Int'l L. Rev.* 1083, 1110-11 (2001).

¹⁷ Human Rights Watch, *Why They Died*, *supra* note 14, at 57-60.

¹⁸ "Non-international armed conflicts are armed confrontations occurring within the territory of a single State and in which the armed forces of no other State are engaged against the central government. Internal disturbances and tensions (such as riots, isolated and sporadic acts of violence, or other acts of a similar nature) do not amount to an armed conflict". M.N. Schmitt, C.H.B. Garraway & Y. Dinstein, *The Manual on the Law of*

In great part, the dramatic asymmetry characterizing many of today's conflicts engenders human shielding.²⁴ Confronted with overwhelming technological superiority, weaker parties have embraced shielding as a "method of warfare" designed to counter attacks against which they cannot effectively defend using the weaponry and forces at their disposal.²⁵ The tactic presumes that the prospect of killing civilian shields may dissuade an attacker from striking. In a paradigmatic example, Iraq, fearing Coalition attack to enforce United Nations weapons inspection requirements, openly announced in 1997 that "volunteers" had gathered at strategic locations;²⁶ President Saddam Hussein "thanked all the sons of the great Iraqi people who headed for the people's palaces, factories and other installations to be a strong shield against the unjust aggression threatening our country".²⁷

Non-International Armed Conflict with Commentary (International Institute of Humanitarian Law, 2006), repr. in 36 *Israel Y.B. Hum. Rts.* (2006) (Special Supp.), at para. 2.3.8 [hereinafter: *NIAC Manual*]. See also commentary to the Article, *id.* While the ICRC views non-international armed conflict as restricted to civil wars, rebellions, and the like [see, e.g., *Geneva Convention Relative to the Treatment of Prisoners of War (III): Commentary* 35-36 (ICRC, J. Pictet ed., 1960); hereinafter: *GC III Commentary*], the U.S. Supreme Court recently characterized the global war on terrorism as "not international" because of the absence of a belligerent State on each side of the conflict. *Hamdan v. Rumsfeld*, 126 *S. Ct.* 2749, 2796 (2006).

¹⁹ R. Block, "Shields", in *Crimes of War* 378, 380 (R. Gutman et al. eds., 2d ed., 2007).

²⁰ *Report Pursuant to Paragraph 5 of the Security Council Resolution 837 (1993) on the Investigation into the 5 June 1993 Attack on United Nations Forces in Somalia Conducted on Behalf of the UN Security Council*, U.N. Doc. S/26351 (Aug. 24, 1993), Annex, paras. 8-9.

²¹ The Secretary-General, *15th Progress Report on the UNOMIL*, U.N. Doc. S/1996/47 (Jan. 23, 1996), para. 24.

²² The Secretary-General, *1st Progress Report on the UNOMSIL*, U.N. Doc. S/1998/750 (Aug. 12, 1998), paras. 33 & 36.

²³ D.B. Hollis, "Accountability in Chechnya: Addressing Internal Matters with Legal and Political International Norms", 36 *Boston C. L. Rev.* 793 (1995).

²⁴ M.N. Schmitt, "Asymmetrical Warfare and International Humanitarian Law", in *International Law Facing New Challenges* 11 (W. Heintschel von Heinegg & V. Epping eds., 2007).

²⁵ "Methods and means of warfare" is an international humanitarian law term of art referring, in military terms, to tactics and weapons respectively.

²⁶ *Iraqis Volunteering as Human Shields*, CNN Interactive, Nov. 14, 1997, at: <http://www.cnn.com/WORLD/9711/14/iraq.al.sahhaf.presser>.

²⁷ "Saddam Thanks Human Shields, Announces Day of Victory" (Text of Report by the Iraqi News Agency), BBC News, Nov. 20, 1997, at: <http://news.bbc.co.uk/1/hi/world/monitoring/33345.stm>.

The Iraqis again used human shields in advance of the U.S. and British attack of Dec. 1998, Operation Desert Fox. Human Rights Watch, *Human Shields in Iraq Put Obligation on U.S.*, Feb. 23, 2003, at:

Operationally, deterrence can manifest itself in one of three ways (or a combination thereof). First, the attacking side may refrain from conducting an attack based on moral concerns about harming those civilians forced to act as shields. Second, the attacker may abandon a planned strike because of possible negative communicative consequences. After all, images of dead and injured civilians transmitted across a globalized media (which often pays little heed to the military rationale of an operation) can make it appear as if the attacker has mounted inhumane operations. In such an environment, even a tactical engagement causing casualties risks strategic fallout.²⁸ This consequence typically constitutes the principal objective of the party employing shields; it seeks to weaken support for the enemy's war effort on the part of the international community, other States (including coalition partners), non-governmental organizations, and individuals, while enhancing its own domestic and international backing. Third, at a certain point, the number of civilians likely to be injured or killed during an attack becomes "excessive" relative to its anticipated "military advantage", such that the international humanitarian law proportionality principle bars attack.²⁹ Such "lawfare" exploits legal norms to impede the enemy's operations (at the tactical, operational or strategic levels of warfare).³⁰ It includes not only instances in which an intended operation would be prohibited due to the presence of sufficient numbers of civilians, but also those in which the attacker's operations might be *perceived* as unlawful.³¹

<http://www.hrw.org/english/docs/2003/02/20/iraq5320.htm>.

On Operation Desert Fox, see Dep't of Defense, Operation Desert Fox, at:

http://www.defenselink.mil/specials/desert_fox/.

²⁸ See discussion of the "bullying syndrome" in M.N. Schmitt, "21st Century Conflict: Can the Law Survive?", 8 *Melbourne J. Int'l L.* 443, 468-71 (2007).

²⁹ See notes 35 and 127 and accompanying text.

³⁰ Major General C. Dunlap defines lawfare as "the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective". C.J. Dunlap, Jr., "Lawfare Today: A Perspective", *Yale J. Int'l Aff.* 146 (Winter, 2008). See also C.J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Harvard University Carr Center Working Paper, 2001).

³¹ For instance, the *Gulf War Report* noted that during Operation Desert Storm:

[t]he government of Iraq sought to convey a highly inaccurate image of indiscriminate bombing by the Coalition through a deliberate disinformation campaign. Iraq utilized and collateral damage that occurred – including damage or injury caused by Iraqi surface-to-air missiles and anti-aircraft munitions falling to earth in populated areas – in its campaign to convey the misimpression that the Coalition was targeting populated areas and civilian objects. This disinformation campaign was factually incorrect, and did not accurately reflect the high degree of care exercised by the Coalition in attack of Iraqi targets.

Gulf War Report, *supra* note 9, at 613-14.

This article explores the international humanitarian law bearing on the use of human shields.³² It begins by addressing the express prohibitions on their use, most of which are straightforward articulations of longstanding customary norms.³³ The one unsettled issue involves whether the use of

The Dep't of Defense provides the following delineation of the levels of war:

Strategic Level of War: The level of war at which a nation, often as a member of a group of nations, determines, national or multinational (alliance or coalition) security objectives and guidance, and develops and uses national resources to accomplish these objectives. Activities at this level establish national and multinational military objectives; sequence initiatives; define limits and assess risks for the use of military and other instruments of national power; develop global plans or theater war plans to achieve these objectives; and provide military forces and other capabilities in accordance with strategic plans.

Operational Level of War: The level of war at which campaigns and major operations are planned, conducted, and sustained to accomplish strategic objectives within theaters or other operational areas. Activities at this level link tactics and strategy by establishing operational objectives needed to accomplish the strategic objectives, sequencing events to achieve the operational objectives, initiating actions, and applying resources to bring about and sustain these events. These activities imply a broader dimension of time or space than do tactics; they ensure the logistic and administrative support of tactical forces, and provide the means by which tactical successes are exploited to achieve strategic objectives.

Tactical Level of War: The level of war at which battles and engagements are planned and executed to accomplish military objectives assigned to tactical units or task forces. Activities at this level focus on the ordered arrangement and maneuver of combat elements in relation to each other and to the enemy to achieve combat objectives.

Dep't of Defense Dictionary of Military and Associated Terms, Joint Publication 1-02, as amended through Oct. 17, 2007, at: www.dtic.mil/doctrine/jel/doddict/.

³² International humanitarian law is also labeled, with minor substantive distinctions, law of war, law of armed conflict, and *jus in bello*.

³³ Customary international law is "a general practice accepted as law". Statute of the International Court of Justice, 1945, Art. 38(1)(b), 59 *Stat.* 1055. According to the I.C.J.:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio iuris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.

North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), [1969] *I.C.J. Rep.* 3, 44.

See also Continental Shelf (Libyan Arab Jamahiriya/Malta), [1985] *I.C.J. Rep.* 13, 36.

For an excellent summary of the nature and sources of customary international humanitarian law, see J.-M. Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict", 87:857 *Int'l Rev. Red Cross* 175 (2005). On customary international law generally, see Y. Dinstein, "The Interplay between Customary International Law and Treaties", 322 *Recueil des Cours* 246 (2006).

voluntary human shields (those who willingly serve as shields) by a party violates the relevant proscriptions. After exploring the options in that regard, the article turns to the more complex and controversial issue of an attacker's obligations when facing human shields, a subject unaddressed in *lex scripta*. In particular, the analysis distinguishes compelled and voluntary shielding through reference to the international humanitarian law proviso that civilians who directly participate in hostilities lose their protection from attack for such time as they so participate.³⁴ The involuntary-voluntary dichotomy also affects battlefield application of both the proportionality rule (prohibiting attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"³⁵) and the legal requirement to take precautions in attack (requiring selection of tactics, weapons and targets that will minimize civilian losses³⁶). As the distinction is often unclear in practice, the article concludes with a discussion of how to resolve doubt as a matter of law.³⁷

Finally, it is helpful to understand that two foundational considerations underlie the interpretive approach adopted in this article. First, all international humanitarian law reflects a delicate balance between military necessities and humanitarian concerns. As famously noted in the 1868 St. Petersburg Declaration, the law "fix[es] the technical limits at which the necessities of war ought to yield to the requirements of hostilities".³⁸ The process of law formation thus takes cognizance of the military's need to

³⁴ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977, Art. 51(3), 1125 *U.N.T.S.* 3 [hereinafter: AP I]; *Customary International Humanitarian Law* (ICRC, J.-M. Henckaerts & L. Doswald-Beck eds., 2005), rule 6 [hereinafter: *CIHLS*].

³⁵ AP I, *supra* note 34, Arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b). *See infra* note 127 and accompanying text.

³⁶ AP I, *supra* note 34, Art. 57. *See infra* note 148 and accompanying text.

³⁷ The article does not address the issue of shielding with civilian objects. The issues regarding objects as shields differ because international humanitarian law anticipates the use of civilian objects for military purposes by defining military objectives as objects "which by their ...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". AP I, *supra* note 34, Art. 52(2); *see infra* note 126 and accompanying text. For example, a Party may use a civilian apartment building as an observation post or block a bridge with vehicles. Doing so is lawful, although the building and vehicles become military objectives which may be attacked and which factor into neither the proportionality calculation, nor precautions in attack assessments.

³⁸ St. Petersburg Declaration Renouncing the Use in Time of War of Explosive Projectiles under 400 Grammes Weight, 1868, 138 *C.T.S.* 297.

fight effectively by tempering humanitarian norms with military common sense. The fact that only States in the Westphalian constitutive system possess authority to generate international law (through treaties or by practice that matures into custom) necessitates this dynamic of accommodation. After all, States are presumptively rational actors who accept constraints on their ability to conduct military operations only with great reticence. This being so, treaties “should be construed not as theorems of Euclid, but with some imagination of the purposes which lie behind them”.³⁹

Second, interpretation of ambiguous norms has to reflect contemporary warfare. States both apply and are the subjects of international humanitarian law norms. Said norms must remain relevant to contemporary circumstances if States are to remain willing to implement them in practice. Therefore, although they emerged in the context of the military necessity-humanitarian considerations balance prevailing at the time of their creation, any subsequent uncertainty must be resolved in light of present circumstances.⁴⁰

I. THE DEFENDER’S OBLIGATIONS

The use of human shields has long violated international humanitarian law.⁴¹ This is as it should be, for the practice skews the law’s fragile military necessity-humanitarian considerations balance by leveraging its protections for military ends. In the body of contemporary humanitarian law applicable during international armed conflict, Additional Protocol I of 1977, Article 51(7), provides the broadest and most specific proscription:

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, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian

³⁹ Judge Learned Hand, albeit in the context of statutes. *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d. Cir. 1914).

⁴⁰ As noted, “[t]he securing of appropriate world public order, minimum and optimum, requires the establishment and maintenance of a prescriptive process whose outcomes – norms prescribed and potential norms rejected – are effective, rational, and inclusive”. M. S. McDougal & W. M. Reisman, “The Prescribing Function in the World Constitutive Process: How International Law is Made”, 6 *Yale J. World Order Studies* 249, 273 (1980).

⁴¹ For instance, a Commission tasked with identifying German (and other enemy) law of violations in 1919 cited the prohibition on using human shields. M.A. Marin, “The Evolution and Present Status of the Laws of War”, 92 *Receuil des Cours* 629, 678 (1957).

population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.⁴²

Article 51(7) is a corollary to Article 48, the general rule of distinction between combatants and military objectives on the one hand and civilians and civilian objects on the other,⁴³ as well as Article 51(1), which provides that “[t]he civilian population and individuals civilians shall enjoy general protection against dangers arising from military operations”.⁴⁴

Whether the use of the civilians to shield is passive, as when a party to the conflict takes advantage of their presence (they may not even realize they are being so used), or active, for example when the party directs them to a location they will shield, is irrelevant. The first sentence of Article 51(7) addresses the former situation, whereas the second covers the latter. Instead, the prescriptive key lies in the actor’s *mens rea*. Military forces often find themselves unavoidably collocated with civilians. A classic example is military retreat down a road along which civilians are fleeing. The presence of civilians in no way renders the retreat unlawful; mere collocation does not trigger the norm. However, it would be unlawful for the retreating troops purposefully to intermingle with civilians to stave off attack. The International Committee of the Red Cross’ [ICRC] commentary to the article supports this interpretation by defining the word “movements” in the first sentence of the prohibition as “cover[ing] cases where the civilian

⁴² AP I, *supra* note 34, Art. 51(7).

Following World War II, the ICRC sought to convince States to adopt a treaty designed to protect the civilian populations during bombardments. In 1954, its Board of Governors tasked the ICRC to offer a draft text at the 1957 Red Cross Conference in New Delhi. That Conference made several amendments to the resulting ICRC Draft Rules, and the product was subsequently sent out to States. Although States took no action, many of the Draft’s rules formed a basis for provisions in the 1977 Additional Protocols to the Geneva Conventions. Rule 13 provided, “Parties to the conflict are prohibited from placing or keeping members of the civilian population subject to their authority in or near military objectives, with the idea of inducing the enemy to refrain from attacking those objectives”. ICRC, 1956 Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, in *The Laws of Armed Conflict* 339 (D. Schindler & J. Toman eds., 4th rev. ed., 2004).

⁴³ “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives”. AP I, *supra* note 34, Art. 48.

⁴⁴ *Ibid.*, Art. 51(1).

population moves of its own accord”.⁴⁵ This being so, the subjective intent of the military commander directing his forces determines the lawfulness of his actions.⁴⁶

Similarly, occupying forces may lawfully evacuate the civilian population from an area “if the security of the population or imperative military reasons so demand”.⁴⁷ In order to execute the evacuation, the operation would likely involve military forces. Although the *de facto* or *de jure* consequence might be to prohibit an attack on those forces due to operation of the proportionality principle, the action would not violate Article 51(7).⁴⁸ Only if the occupation forces intentionally took advantage of the population’s evacuation to shield their own movements or to attack the enemy would a violation occur. Inclusion of specific intent as an element of the war crime of shielding codified in the International Criminal Court Statute illustrates the centrality of the actor’s state of mind.⁴⁹

Obviously, intent can prove difficult to identify in practice. For instance, it may be unclear whether a force has moved into a village to exploit the presence of civilians or simply because of the flow of battle. Yet, in some cases, intent can reliably be adduced circumstantially. In an unambiguous example, Iraqi fighters travelling down roads during Operation Iraqi Freedom regularly veered towards civilian vehicles whenever American attack helicopters appeared.⁵⁰ There is but one explanation for the phenomenon, taking advantage of civilians as shields. Uncertainty, therefore, is an issue of proof, not substance; absent intent, no violation occurs.

Finally, although not textually self-evident, the official ICRC *Commentary* to Additional Protocol I asserts that the prohibition contained

⁴⁵ *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Y. Sandoz *et al.* eds., 1987), para. 1988 [hereinafter: *AP Commentary*].

⁴⁶ The Organization for Security and Cooperation in Europe (OSCE) reported that during Operation Allied Force in 1999 “interviewees may have been used as human shields but did not recognize it from their perspective. Yugoslav authorities frequently accompanied convoys of IDPs [internally displaced persons] with military material and personnel, a practice which may have been motivated by the desire to protect such equipment during its movements”. OSCE, *Kosovo/Kosova: As Seen, As Told: An Analysis of the Human Rights Findings of the Kosovo Verification Mission: Oct. 1998 to June 1999* (1999).

⁴⁷ GC IV, *supra* note 11, Art. 49.

⁴⁸ *De jure* because of the operation of the proportionality principle.

⁴⁹ “The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations”. International Criminal Court, Elements of Crimes, Art. 8(2)(b)(xxiii), U.N. Doc. PCNICC/2000/1/Add.2 (2000). For commentary, see K. Dörmann, *Elements of War Crimes under the Statute of the International Criminal Court: Sources and Commentary* 344-45 (2002).

⁵⁰ *Off Target*, *supra* note 10, at 67.

in the second sentence “certainly also applies to transfers of prisoners of war, and civilian enemy subjects ordered by the authorities of a belligerent Power to move within its own territory”.⁵¹ While stretching Article 51(7) to cover such individuals may overreach, as a matter of *customary* international humanitarian law the assertion is sound.⁵²

Article 58 of Additional Protocol I complements the prohibition on using civilian shields by imposing an affirmative obligation on Parties to “endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives”.⁵³ The article further provides that parties must avoid “locating military objectives within or near densely populated areas”.⁵⁴ Of course, valid military or humanitarian reasons may exist for failing to move civilians away from military objectives or situating military forces near them; for instance, evacuation of the civilian population during urban combat can place it at greater risk or may be militarily imprudent. Resultantly, both requirements are conditioned by the hortatory caveat “to the maximum extent feasible”, an appreciation that “circumstances of war can change very rapidly”.⁵⁵ That the norm applies only in territory under the effective control of a force, and not where forces are in contact or merely transiting an area, further narrows its reach.⁵⁶

Despite their complementary nature, Articles 51(7) and 58 impose dissimilar standards. Contravention of the former requires a specific intent to shield. By contrast, violation of the latter merely entails unexcused (such as impossibility) non-compliance. Failure to either move civilians away from military objectives or refrain from emplacing them near civilians, when doing so is feasible in the attendant circumstances, breaches the norm.

⁵¹ *AP Commentary*, *supra* note 45, para. 1988.

⁵² *CIHLS*, *supra* 34, commentary to rule 97; *see also* text accompanying note 58, *infra*.

⁵³ AP I, *supra* note 34, Art. 58(a).

⁵⁴ *Ibid.*, Art. 58(b).

⁵⁵ *AP Commentary*, *supra* note 45, para. 2249. The term “feasible” has been the subject of some controversy. For instance, upon ratification, the United Kingdom stated that it understood the term as referring to “that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”. United Kingdom, Reservation, Jan. 28, 1998, *at*: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P>.

For the proceedings of the Diplomatic Conference on the subject, *see* VI *Off. Rec.* at 226 *ff.*, CDDH/SR.42, Annex (ad Art. 50). The official ICRC *Commentary* rejected the standard, arguing that it “seems too broad”. Instead, it urged, “interpretation will be a matter of common sense and good faith”. *AP I Commentary*, *supra* note 45, para. 2198.

⁵⁶ *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 1974-1977*, CDDH/215/Rev.1, para. 103.

Furthermore, violation of the human shielding prohibition constitutes a war crime, whereas non-compliance with Article 58's requirements is not.⁵⁷

Articles 51(7) and 58 mirror protections resident in the 1949 Geneva Conventions for various categories of individuals and objects. Article 23 of the Third Convention prohibits using prisoners of war to "render certain points or areas immune from military operations", a provision based on Article 9 of the 1929 Geneva Convention on Prisoners of War.⁵⁸ Article 28 of the Fourth Convention extends the same protection to individuals who "find themselves...in the hands of a Party to the conflict or Occupying Power of which they are not nationals".⁵⁹ Article 19 of the First Convention imposes an obligation to situate, "as far as possible," medical units and establishments "in such a manner that attacks against military objectives cannot imperil their safety".⁶⁰ Article 12(4) of Additional Protocol I transforms this implied prohibition on shielding into an unambiguous one: "Under no circumstances shall medical units be used in an attempt to shield military objectives from attack".⁶¹ The prohibition applies to both military and civilian facilities,⁶² and includes use of the wounded and sick.⁶³

No specific textual prohibition of human shielding exists in the law of non-international armed conflict.⁶⁴ However, Additional Protocol II, Article 13(1), provides that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military

⁵⁷ Statute of the International Criminal Court, 1998, Art. 8(2)(b)(xxiii), U.N. Doc. A/CONF. 183/9*, 37 *I.L.M.* 1002 (1998) [hereinafter: ICC Statute].

⁵⁸ Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, Art. 23, 75 *U.N.T.S.* 135 [hereinafter: GC III]; Geneva Convention Relative to the Treatment of Prisoners of War, 1929, Art. 9, 118 *L.N.T.S.* 343 ("No prisoner may at any time be ...employed to render by his presence certain points or areas immune from bombardment"). [hereinafter: GC 1929].

⁵⁹ GC IV, *supra* note 11, Arts. 28 and 4 respectively.

⁶⁰ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 1949, Art. 19, 75 *U.N.T.S.* 31 [hereinafter: GC I]. *See also* GC IV, *supra* note 11, Art. 18, regarding civilian hospitals.

⁶¹ AP I, *supra* note 34, Art. 12(4). Such use would also amount to misuse of the protected emblem if military equipment or troops were located within the facility. *Ibid.*, Art. 38; GC I, *supra* note 60, Art. 42; Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annexed Regulations, 1907, Art. 23(f), 205 *C.T.S.* 277; Hague Convention (II) with Respect to the Laws and Customs of War on Land, 1899, Art. 23(f), 1 *A.J.I.L.* Supp. 129 (1907).

⁶² AP I, *supra* note 34, Art. 12(2).

⁶³ *AP Commentary*, *supra* note 45, para. 540.

⁶⁴ A rule on human shields was proposed for inclusion in Additional Protocol II, but did not survive the Diplomatic Conference. *Article Adopted by Committee III, XV Official Records of the Diplomatic Conference on the Reaffirmation and Develop of International Humanitarian Law Applicable in Armed Conflict* 321 (1974-77).

operations”.⁶⁵ As the use of human shields unnecessarily places civilians at risk, the practice would violate this provision. Moreover, Article 4(2)(c) of Additional Protocol II and Common Article 3(1)(b) to the 1949 Geneva Conventions prohibit hostage taking, which is equally a violation in international armed conflict.⁶⁶ Arguably, those seized and forced to act as shields qualify as hostages.⁶⁷

While a number of key “warfighting” States, including the United States and Israel, are non-Parties to Additional Protocols I and II, the prohibition on human shielding nevertheless irrefutably constitutes customary international humanitarian law.⁶⁸ Rule 97 of the International Committee of the Red Cross’ *International Customary International Humanitarian Law* study provides, “[t]he use of human shields is prohibited”, and contends the norm applies in both international and non-international armed conflict.⁶⁹ Similarly, the San Remo *Manual on the Law of Non-International Armed*

⁶⁵ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, 1977, Art. 13(1), 1125 *U.N.T.S.* 609 [hereinafter: AP II].

⁶⁶ AP II, *supra* note 65, Art. 4(2)(c); GC I, *supra* note 60, Art. 3(1)(b); Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, 1949, Art. 3(1)(b), 75 *U.N.T.S.* 85 [hereinafter: GC II]; GC III, *supra* note 58, Art. 3(1)(b); GC IV, *supra* note 11, Art. 3(1)(b).

The act is a war crime in non-international armed conflict pursuant to the Rome Statute, ICC Statute, *supra* note 57, Art. 8(2)(c)(iv). Regarding international armed conflict, *see* GC IV, *supra* note 11, Arts. 34, 147; AP I, *supra* note 34, Art. 75(2)(c); ICC Statute, *supra* note 57, Art. 8(2)(a)(viii). The prohibition on hostage taking is customary in both international and non-international armed conflict. *CIHLS*, *supra* note 34, rule 96; *NIAC Manual*, *supra* note 18, para. 1.2.4 (non-international).

⁶⁷ The ICRC *Commentary* defines hostages as “persons who are in the power of a party to the conflict or its agent, willingly or unwillingly, and who answer with their freedom, their physical integrity or their life for the execution of orders given by those in whose hands they have fallen, or for any hostile acts committed against them”. *AP Commentary*, *supra* note 45, para. 4537. On the use of hostages, *see* H.W. Elliot, “Hostages or Prisoners of War: War Crimes at Dinner”, 149 *Mil. L. Rev.* 241 (1995).

⁶⁸ The U.S. State Department’s Deputy Legal Adviser suggested this was the U.S. position at an academic conference also attended by the Department’s Legal Adviser, A. Soafer. M.J. Matheson, “Remarks: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention”, 2 *Am. U. J. Int’l L. & Pol’y* 419, 426 (1987). The sole official pronouncement identifying those provisions of Additional Protocol I which the United States agrees are customary is Memorandum from the Service Judge Advocate Departments (International Law Divisions) to Assistant General Counsel (International), Office of the Secretary of Defense, 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (May 8, 1986) (on file with author). The letter does not cite Arts. 51(7) or 12(4) as customary.

⁶⁹ *CIHLS*, *supra* note 34, rule 97.

Conflict states “[t]he use of civilians (as well as captured enemy personnel) to shield a military objective or operation is forbidden. It is also forbidden to use them to obstruct an adversary’s operations”.⁷⁰

Military manuals, although of variable valence in ascertaining custom,⁷¹ typically include such a ban.⁷² Two of the most recently promulgated manuals are paradigmatic. The 2007 version of the US Navy/Marine Corps/Coast Guard’s *Commander’s Handbook on the Law of Naval Operations* notes, “[d]eliberate use of civilians to shield military objectives from enemy attack is prohibited”.⁷³ Its British counterpart, the *Manual of the Law of Armed Conflict*, replicates the Additional Protocol I, Article 51(7), text and extends the norm into non-international armed conflict.⁷⁴

A variety of other sources offer further support for characterization of the norm as received international humanitarian law. The Rome Statute of the International Criminal Court styles “utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations” as a war crime in international armed conflicts.⁷⁵ Inclusion in the Rome Statute represents an indication, albeit not a definitive one, of *opinio juris*.⁷⁶ So too does the widespread domestic criminalization – either legislatively or by virtue of becoming Party to the Rome Statute – of the use of human shields.⁷⁷ Shielding with protected

⁷⁰ *NIAC Manual*, *supra* note 18, para. 2.3.8.

⁷¹ See discussion in the U.S. response to the *CIHLS*. Letter to Dr. J. Kellenberger, President, ICRC, from J.B. Bellinger, III, Legal Adviser, U.S. Department of State, and William J. Haynes, General Counsel, U.S. Department of Defense (Nov. 3, 2006), *repr. in 37 Israel Y.B. Hum. Rts. Special Supp.* 271 (2007).

⁷² Manuals must be cautiously employed in identifying customary norms lest policy decisions be confused with *opinio juris*. Moreover, it is often unclear whether a manual provision reflects customary law or only a requirement of a convention to which the State is a Party. For instance, the United Kingdom is Party to Additional Protocol I, thereby begging the question of which of its Manual’s provisions reflecting that convention also represent customary law. See U.K. Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) [hereinafter: *U.K. Manual*].

⁷³ U.S. Navy/U.S. Marine Corps/U.S. Coast Guard, *The Commander’s Handbook on the Law of Naval Operations* (NWP 1-14M/MCWP 5-12.1/COMDTPUB P5600.7A) (July 2007), at para. 8.3.2 [hereinafter: *NWP 1-14M*].

⁷⁴ *U.K. Manual*, *supra* note 72, paras. 5.22 and 15.24.1.

⁷⁵ ICC Statute, *supra* note 57, Art. 8(2)(b)(xxiii).

⁷⁶ On the Statute’s delineation of war crimes, see M. Bothe, “War Crimes”, in 1 *The Rome Statute of the International Criminal Court: A Commentary* 379 (A. Cassese et al. eds., 2002). Interestingly, Canada’s war crimes statute expressly provides that the offenses listed in Art. 8(2) of the ICC Statute are war crimes in customary international law. Canada, Crimes against Humanity and War Crimes Act (2000), Sec. 4(4).

⁷⁷ As an example, Australia’s International Criminal Court (Consequential Amendments) Act (2002), Schedule 1, Sec. 268.65 provides:

persons even constitutes an offence triable before the Guantanamo Military Commissions.⁷⁸ In terms of “soft law”, the General Assembly, Security Council and other United Nations entities have adopted numerous resolutions condemning the use of human shields.⁷⁹ For instance, in December 1991, the General Assembly labelled Iraq’s resort to shielding “a most grave and blatant violation of international law”.⁸⁰ More recently, the Security Council has condemned “use by the Taliban and other extremist groups of civilians as human shields”.⁸¹

The *Customary International Humanitarian Law* study similarly asserts that the Article 58 provisions constitute a restatement of customary law applicable in international armed conflict. Rule 23 provides that “[e]ach party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas”, whereas Rule 24 requires that Parties “to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives”.⁸² As to non-international armed conflict, the study suggests the rules are “arguably” customary.⁸³ Similar obligations appear in the military manuals of many countries,

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- (1) A person (the perpetrator) commits an offence if:
- (a) the perpetrator uses the presence of one or more civilians, prisoners of war, military, medical or religious personnel or persons who are hors de combat; and
 - (b) the perpetrator intends the perpetrator’s conduct to render a military objective immune from attack or to shield, favour or impede military operations; and
 - (c) the perpetrator’s conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty:

- (a) if the conduct results in the death of any of the persons referred to in paragraph (a) – imprisonment for life; or
 - (b) otherwise—imprisonment for 17 years.
- (2) In this section: religious personnel includes non-confessional, non-combatant military personnel carrying out a similar function to religious personnel.

⁷⁸ Military Commissions Act of 2006, Pub. L. No. 109-366, 10 U.S.C. 950v(9) & (10) (Oct. 17, 2006) [hereinafter: MCA].

⁷⁹ S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991); U.N. Commission on Human Rights, Res. 1992/71, U.N. Doc. E/CN.4/RES/1992/71 (Mar. 5, 1992); C.H.R. Res. 1995/89, *supra* note 16.

⁸⁰ G.A. Res 134, U.N. Doc. A/RES/46/134 (Dec. 17, 1991).

⁸¹ S.C. Res. 1776, U.N. Doc. S/RES/1776 (Sept. 19, 2007).

⁸² *CIHLS*, *supra* note 34, rules 23 and 24.

⁸³ No analogous provision appears in Additional Protocol II, although civilians do “enjoy general protection against the dangers arising from military operations”. AP II, *supra* note 65, Art. 13(1). With regard to the obligation to safeguard cultural property during non-international armed conflict, *see* Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 1999, Art. 8, 38 *I.L.M.* 769 (1999).

including Canada, the United States and United Kingdom.⁸⁴ Moreover, in *Kupreskic*, the International Criminal Tribunal for the Former Yugoslavia held that the Article 58 requirements are “now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol”.⁸⁵

Case-law on human shielding is sparse, although that which exists categorically affirms the prohibition.⁸⁶ In 1946, a British Military Court in Germany convicted General Karl Student for mistreatment of prisoners of war by, *inter alia*, using them as a screen for advancing German paratroopers during the 1941 Battle for Crete.⁸⁷ Two years later, a US military tribunal addressed shielding in the *High Command* case.⁸⁸ During trial, the tribunal examined the war diary of General Hermann Hoth, one of the defendants. In a 1941 entry, Hoth, who commanded units against Soviet forces, wrote:

The billeting of PoW's captured in the city and some of the inhabitants of the country in the buildings used by our own troops has proven to be a useful counter measure against time bombs put there by the enemy. It has been our experience, that, as a result of this measure, the time bombs were found and rendered harmless in a very short time by the prisoners and/or inhabitants of the country.⁸⁹

⁸⁴ Canada, The Office of the Judge Advocate General, *The Law of Armed Conflict at the Operational and Tactical Level* (Publ: B-GG-005-027/AF-021) (Mar. 21, 2001), Ch. 6, para. 38 [hereinafter: *Canadian Manual*]; *NWP 1-14M*, *supra* note 73, para. 8.3.2 (as to the removal obligation); *U.K. Manual*, *supra* note 72, para. 5.36.

⁸⁵ International Criminal Tribunal for the Former Yugoslavia (ICTY), Trial Chamber, Judgment, *Kupreskic*, (IT-95-16-T) (Jan. 14, 2000), paras. 524-25.

⁸⁶ As to civil liability of a State, *see* *Hill v. Republic of Iraq*, 175 F. Supp. 2d. 36 (D.D.C 2001), confirming standing to sue Iraq under U.S. law for being held as a shield during the First Gulf War, and ordering punitive damages paid by the Republic of Iraq and Saddam Hussein.

⁸⁷ British Military Court, Luneberg, Student Case (Case No. 24), (May 6-10, 1946), 4 *L.R.T.W.C.* 118 (United Nations War Crimes Commission, His Majesty's Stationery Office, 1947). Student was not convicted of the offense, although a subsequent trial by a U.S. tribunal opined, “if proved, the mere act of forcing prisoners of war to go ahead of advancing enemy troops, thereby acting as a shield to the latter, would itself constitute another type of war crime”. U.S. Military Tribunal, Nuremberg, Trial of Wilhelm Von Leeb and Thirteen Others (Case No. 72, High Command Trial), (Dec. 30, 1947 – Oct. 28, 1948), 12 *L.R.T.W.C.* (United Nations War Crimes Commission, His Majesty's Stationery Office, 1949), at 105.

⁸⁸ *Id.*

⁸⁹ *Ibid.*, at 104.

The tribunal opined, “to use prisoners of war as a shield for the troops is contrary to international law”, although it failed to similarly characterize the use of civilians.⁹⁰

The International Criminal Tribunal for the Former Yugoslavia [ICTY] has dealt with human shielding on multiple occasions, although typically treating it as a variant of other war crimes. In *Blaskic*, the ICTY found the accused engaged in inhuman and cruel treatment by using villagers as human shields for a military headquarters.⁹¹ The inhuman treatment constituted a “grave breach” of the 1949 Geneva Conventions,⁹² whereas cruel treatment comprised a war crime in violation of Common Article 3(1)(a) of those instruments.⁹³ By contrast, in *Aleksovski* it characterized shielding as an outrage on personal dignity contrary to Common Article 3(1)(c).⁹⁴ In the ICTY’s most well-known pending case, Richard Goldstone, the former Prosecutor, alleged in his indictment of Radovan Karadzic (President of the Bosnia Serb area) and Ratko Mladic (Chief of its Armed Forces) that “Bosnian Serb military personnel physically secured or otherwise held the UN peacekeepers against their will at potential NATO air targets, including the ammunition bunkers at Jahorinski Potok, the Jahorina radar site and a nearby communications centre in order to render these locations immune from further NATO airstrikes” in 1995.⁹⁵ On these facts, Goldstone charged the two with “grave breach” of international humanitarian law by inhuman treatment and a “violation of the laws or customs of war” by cruel treatment.⁹⁶ Both indictees remain at large.

⁹⁰ Most likely because black letter law existed on point vis-à-vis use of prisoners of war. The Tribunal cited (in n. 3) GC 1929, *supra* note 58, Art. 9.

⁹¹ ICTY, Trial Chamber, Judgement, *Blaskic*, (IT-95-14-T), (Mar. 3, 2000), para. 716. The ICTY held that the status of the shield was irrelevant to whether a war crime had been committed. *Ibid.*, para. 186. Additionally, it found the acts constituted the war crime of hostage taking. *Ibid.*, para. 750. In *Kordic*, the tribunal also found the use of human shields to constitute inhuman treatment. ICTY, Trial Chamber, Judgement, *Kordic*, (IT-95-14/2), (Mar. 3, 2000).

⁹² A grave breach requires Parties to the Conventions to search for those who have committed or ordered certain serious violations of the Conventions and to either prosecute them or hand them over to another Party that will do so. GC I, *supra* note 60, Arts. 49, 50; GC II, *supra* note 66, Arts. 50, 51; GC III, *supra* note 58, Arts. 129, 130, GC IV, *supra* note 11, Arts. 146, 147.

⁹³ Common Art. 3, *supra* note 66.

⁹⁴ ICTY, Trial Chamber, Judgement, *Aleksovki*, (IT-95-14/1-T), (June 25, 1999), para. 229.

⁹⁵ ICTY, *Karadzic and Mladic*, First Initial Indictment, (IT-95-5-I), (July 1995), para. 47.

⁹⁶ *Id.*, counts 15 & 16. The Tribunal confirmed the counts contained in the indictment (as well as that of Nov. 16, 1995) in Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, (IT-95-5-R61, 95-5-18-R61), (July 11, 1996).

Discussion has thus far focused on the use of shields in defensive operations. However, they may also be employed to enhance “offensive” ones. As an example, during Operation Iraqi Freedom the Saddam Fedayeen (irregular Iraqi forces) often engaged Coalition forces from behind women and children, many of whom were forcibly seized for this purpose.⁹⁷ Such practices are unquestionably unlawful. It matters not whether the attempt to deter or block an enemy’s use of force occurs while in a defensive or offensive mode.

A normatively more unsettled situation involves the use of protected persons in other than classic shielding. One such tactic, known as “early warning,” involved Israeli use of civilians in the West Bank when arresting suspected terrorists. Early warning comprised –

an operational procedure used in actions to apprehend wanted persons. It allows soldiers to be assisted by local Palestinian residents so as to reduce the danger of injury to innocent civilians and to the wanted persons themselves (to make it possible to apprehend them without shedding blood). The use of a local resident is intended to give early warning to the occupants in the house and enable innocent persons to leave the building and for wanted persons to give themselves up before it would be necessary to use force, which is liable to endanger lives.⁹⁸

In 2005, the Israeli Supreme Court reviewed the practice in *Adalah*.⁹⁹ The petitioners, a group of human rights organizations, alleged the Israel Defence Forces [IDF] –

forced Palestinian residents to walk through and scan buildings suspected to be booby-trapped, and in which it ordered them to enter certain areas before combat forces, in order to find wanted persons there; also described are cases in which the army used residents as a ‘human shield’ which accompanied the combat forces, to serve as a shield against attack on those forces. Thus, residents were stationed on porches of houses

⁹⁷ *Off Target*, *supra* note 10, at 67-69.

⁹⁸ Military Order, Nov. 26, 2002 (B’Tselem trans.), at: www.btselem.org/english/legal_documents/advanced_warning_procedure.doc.

⁹⁹ H.C. 3799/02, *Adalah* (Legal Center for Arab Minority Rights in Israel) *et al.* v. Commander of the Central Region (Early Warning) (June 23, 2005) [hereinafter: *Early Warning Case*]. For an analysis of the early warning procedure predating issuance of the judgment, see R. Otto, “Neighbours as Human Shields? The Israel Defense Forces’ ‘Early Warning Procedure’ and International Humanitarian Law”, 86 *Int’l Rev. Red Cross* 771 (2004).

where soldiers were present, in order to prevent gunfire upon the houses”.¹⁰⁰

By the time the Court heard the case on the merits, the Israeli military had forbidden the use of “civilians as ‘live shields’ against live fire or attacks by the Palestinian side”.¹⁰¹ It also had issued an “Early Warning” operational directive that provided, in relevant part:

[s]olicitation of a local resident’s assistance is intended to allow innocent persons to leave the building and/or allow the wanted persons to turn themselves in before there is a need to use force, which is liable to endanger human life. For that purpose, one may ask a local resident to approach the house, to give notice to those in the house that the army is present and to warn them that if they do not leave the house, the army is liable to use force in order to arrest the wanted persons.¹⁰²

The order reiterated the legal prohibition on using residents as “live shields”. However, the petitioners claimed the IDF continued to use human shields.¹⁰³

The Court began by stating the obvious: “It is clear that the army is not permitted to use local residents as ‘human shields’”. As the authority it cited Article 28 of the Fourth Geneva Convention and Article 51(7) of Additional Protocol I.¹⁰⁴ On the basis of Article 23 of the 1907 Hague Regulations and Article 51 of the Fourth Geneva Convention, which prohibit coercing enemy

¹⁰⁰ *Early Warning Case*, *supra* note 99, para. 1.

¹⁰¹ *Ibid.*, para. 2.

¹⁰² The order provided that:

A. The civilian population has no obligation to assist the IDF in warning civilians of attack.

B. Contact, and persuasion, shall be exclusively verbal.

C. It is strictly forbidden to use force or violence toward a local resident or others, in order to secure said assistance.

D. It is strictly forbidden to threaten a resident, or other people, that physical violence, arrest, or other means will be used against them.

E. It is strictly forbidden to hold people ‘hostage’ in order to secure the assistance of a local resident.

F. If a local resident refuses – *under no circumstances is provision of assistance to be forced* [emphases in original].

Early Warning Case, *supra* note 99, para. 5.

¹⁰³ *Ibid.*, para. 12.

¹⁰⁴ *Ibid.*, para. 21.

civilians to take part in military operations, it further found the early warning procedure unlawful when the residents involved had not consented.¹⁰⁵

Reliance by the Court on Article 28 was meaningful in terms of the norm's scope. Recall that the Article prohibits the use of human shields to render "points or areas immune from military operations". Early warning, by contrast, involved protection for individual soldiers and specific operations. Additionally, the acts in question, such as booby-trapping, differ from classic "military operations".

Albeit liberal, the Court's interpretation was sound. The ICRC commentary to Article 28 specifically references the use of shields to screen troops,¹⁰⁶ thereby dispelling any possible claim of limitation to locations or military objects. It also defines "military operations" as "any acts of warfare",¹⁰⁷ a phrase that doubtlessly encompasses violent acts directed against Israeli forces. Although the article's commentary fails to define the term "immune", it would have been unsupportable for the Court to interpret it as requiring a target to be unattackable as a matter of law, for instance, through operation of the proportionality principle.¹⁰⁸ Many of the "conduct of hostilities" norms that today "immunize" a target as a matter of law were uncodified (or even accepted as customary) when the Fourth Geneva Convention came into law in 1949; thus, such an interpretation would be historically suspect. More to the point, the commentary states that the requisite intent "is to divert enemy fire", thereby suggesting a military, vice juridical, understanding of "immune".¹⁰⁹ Clearly, Article 28 encompasses any use of persons protected by the Fourth Geneva Convention as shields, regardless of whether their presence would legally immunize the intended target.

The practice of employing consenting civilians to relay early warnings proved more difficult to resolve. The Court acknowledged that the procedure might obviate the need to use force. Despite this humanitarian result, it

¹⁰⁵ *Ibid.*, para. 22. Note that doing so is a war crime by the ICC Statute. ICC Statute, *supra* note 57, Art. 8(2)(b)(xv). *See also*, ICTY, Appeals Chamber, Judgment, Blaskic, (IT-95-14A), (July 29, 2004), para. 597. The ICTY interpreted the prohibition on the use of prisoners of war and civilians in occupied areas as prohibiting compelled tasks that are "connected with war operations or have a military character or purpose". *Ibid.*, citing *GC III Commentary*, *supra* note 18, at 266-67; *GC IV Commentary*, *supra* note 4, at 294; *GC IV*, *supra* note 11, Art. 51.

¹⁰⁶ *GC IV Commentary*, *supra* note 4, at 208.

¹⁰⁷ *Ibid.*, at 209. Further, the Commentary to Art. 48 of Additional Protocol I defines the term "operations" as those "during which violence is used", a very inclusive definition. *AP Commentary*, *supra* note 45, para. 1875.

¹⁰⁸ *See* text accompanying note 127 *infra*.

¹⁰⁹ *GC IV Commentary*, *supra* note 4, at 208.

found unlawful their use as “shields” to walk through buildings suspected of being booby-trapped, enter areas in advance of soldiers, accompany Israeli forces to prevent attacks, or convey warnings to surrender.¹¹⁰

The Court pointed to Article 8 of the Fourth Geneva Convention, which bars protected persons from renouncing their protection under that convention. It also cited those articles discussed earlier which disallow an occupied population’s use for military purposes, as well as the general principle requiring separation of the civilian population from military activities. With regard to the purported consent, the Court cautioned that the occupying power’s dominant position begs the question of whether the consent in question is freely given in such circumstances. Finally, it warned that the risk to residents communicating early warnings cannot accurately be assessed in advance. This is true not only as to the physical dangers associated with a specific operation, but also as to potential retaliation for “collaborating” with the occupying forces.¹¹¹

The reliance on Article 8 in *Adalah* should not be overplayed. To begin with, the norm applies only in situations covered by the Fourth Geneva Convention, primarily occupation. More significantly, the situation envisioned by Article 8 differs from that at issue in *Adalah*.¹¹² The drafters were responding to the risk that a change in an individual’s status, rather than his conduct, might deprive him of “rights” under the Convention,¹¹³ a point apparent in the recognition by Article 8’s commentary that it “provide[s] certain categories of people with a status which does not depend on any political events which may occur”.¹¹⁴ Furthermore, the Court appeared to have neglected the fact that, in international humanitarian law, certain activities, most notably direct participation in hostilities, deprive a protected person of the law’s benefits.¹¹⁵

Ultimately, when considering *Adalah*’s applicability to the human shields issue writ large, the key lies in the Court’s focus on consent, especially the fact that an occupying force was involved. In other words, the circumstances precluded a fair assessment of whether the actions were truly volitional. Such scepticism is well-justified in many human shields situations, for, as shall be seen, a protected person’s willingness to serve as a shield can determine the action’s legal character.

¹¹⁰ *Early Warning Case*, *supra* note 99, paras. 23 and 25.

¹¹¹ *Ibid.*, para. 24.

¹¹² *GC IV Commentary*, *supra* note 4, at 73-75.

¹¹³ For example, through *debellatio* changing the legal character of territory. See Y. Dinstein, *War Aggression and Self-Defence* 48-49 (4th ed., 2005).

¹¹⁴ *GC IV Commentary*, *supra* note 4, at 74.

¹¹⁵ See text accompanying notes 119-21, *infra*.

Situations involving shields who act voluntarily at the urging of a Party to the conflict (or with its complicit acquiescence) are normatively more complex.¹¹⁶ For instance, in November 2006 Hamas radio issued an appeal for women to converge on a mosque in Beit Hanoun where Israeli security forces had trapped militants. The Palestinian women entered the mosque, clothed some of the militants in female attire, and acted as shields for them as they escaped.¹¹⁷

That “voluntary shielding” only occurs, as a matter of law, consequent to the shield’s intent to frustrate enemy operations cannot be overemphasized. Consider a military force based in a village. The mere presence of villagers does not render them voluntary shields. This is so even if they elect to remain in the village despite an opportunity to depart. Those who remain may be too elderly or infirm to leave. They may be too frightened to leave, for fleeing from the village may be dangerous. They may wish to remain 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.

As recognized by the International Committee of the Red Cross, it is “unlikely that [the shielding] norm was originally devised to cover an event where individuals acted knowingly and on their own initiative”.¹¹⁸ Yet, the mere fact that voluntary shielding was not in the contemplation of the drafters does not necessarily suffice to remove voluntary shielding from its reach. International humanitarian law is, and must remain, responsive to the evolving nature of warfare. Does the prohibition on human shielding include the voluntary shields that increasingly appear in the contemporary battlespace?

Whether it does arguably depends on characterization of the shields. By Additional Protocol I, Article 51(3), “civilians shall enjoy the protection afforded by this section [which governs attacks] unless and for such time as they take a direct part in hostilities”.¹¹⁹ The protections referred to include the prohibition on their use as human shields, as stated in Article 51(7). An analogous direct participation rule applies in non-international armed conflict, as illustrated by Additional Protocol II, Article 13(3).¹²⁰ The norm

¹¹⁶ See example at text accompanying note 12, *supra*.

¹¹⁷ BBC On-line, Gaza Women Killed in Mosque Siege, Nov. 3, 2006, at: http://news.bbc.co.uk/2/hi/middle_east/6112386.stm.

¹¹⁸ ICRC/International Institute of Humanitarian Law, 30th San Remo Round Table on Current Issues of International Humanitarian Law, *The Conduct of Hostilities, Background Document*, Aug. 2007, at 9 (on file with author).

¹¹⁹ AP I, *supra* note 34, Art. 53(1).

¹²⁰ AP II, *supra* note 65, Art. 13(3).

is customary in both categories of conflict, although significant disagreement exists over the acts that rise to the level of direct participation and the duration of the loss of protection.¹²¹ For the purposes of analysing the defender's obligations vis-à-vis human shielding, the key question is whether the volunteers are direct participants in hostilities. Two possibilities exist.

One approach insists that shielding falls short of direct participation because it fails to meet the requisite qualitative threshold.¹²² Specifically, proponents assert that shields are neither defending a military objective in the sense of posing a threat to the attacker, nor physically impeding attack, for instance by deliberately blocking passage of enemy forces across a bridge. In their view, simply causing the attacker moral pause or creating a legal barrier (through operation of the proportionality principle or precautions in attack requirements) are insufficient. In that the volunteers are not directly participating, Article 51(3) does not apply; thus, they benefit from Article 51(7)'s protections and their use as shields constitutes a violation of the norm.

Some basis exists for this interpretation. The *Commentary* to Additional Protocol I explains that direct participation "implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity occurs".¹²³ Later, it describes such participation as "acts which by their nature and purpose are intended to

¹²¹ *CIHLS*, *supra* note 34, rule 6; *NIAC Manual*, *supra* note 18, para. 1(1)(3) & 2(1)(1)(1) and accompanying commentary. The notion of direct participation also appears in Common Art. 3 to the four 1949 Geneva Conventions ("persons taking no active part in hostilities"). Although Common Art. 3 and Protocol II employ different terminology ("active" and "direct" respectively), the International Criminal Tribunal for Rwanda (ICTR) has reasonably opined that the terms are so similar they should be treated synonymously. ICTR, Judgement, Akayesu, (ICTR-96-4-T), (Sept. 2, 1998), para. 629. Under the ICC Statute, it is a war crime to "intentionally direct attacks against those civilians not taking a direct part in hostilities" in international armed conflict. ICC Statute, *supra* note 57, Art. 8(2)(b)(i). Art. 8(2)(c) replicates Common Art. 3 for the purposes of non-international armed conflict. *Id.*

¹²² J.-F. Queguiner, "Precautions Under the Law Governing the Conduct of Hostilities", 88 *Int'l Rev. Red Cross* 793, 815-17 (2006). The debate over whether voluntary shields are directly participating in hostilities has become a major point of contention in the ongoing study of direct participation sponsored by the International Committee of the Red Cross and the T.M.C. Asser Institute. See, e.g. ICRC, *Summary Report of Fourth Expert Meeting: Direct Participation of Hostilities in Armed Conflict* 46-48 (2006); ICRC, *Summary Report of Second Expert Meeting: Direct Participation of Hostilities in Armed Conflict* 6-7 (2004), at 6-7. The ICRC will release the final "Interpretive Guidance" on direct participation in 2008.

¹²³ *AP Commentary*, *supra* note 45, para. 1679.

cause actual harm to the personnel and equipment of the armed forces”.¹²⁴ Human shields rarely pose a direct physical risk to combatants, and seldom physically obstruct their operations.

Advocates of the alternative approach – that voluntary human shields qualify as direct participants – correctly respond that the aforementioned position contorts the architecture of international humanitarian law and flies in the face of military logic. An attacker may only strike military objectives, including combatants, and civilians directly participating in the hostilities.¹²⁵ Humanitarian law defines “military objectives” as “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”.¹²⁶ A voluntary shield takes affirmative steps to frustrate harm to objects (or persons) that make such a contribution. In doing so, he contributes to military action in a direct causal way; it is difficult to style his behavior as anything but direct participation.

Indeed, from 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

¹²⁴ *Ibid.*, para. 1942.

¹²⁵ AP I, *supra* note 34, Arts. 48, 51(2), 52(1); AP II, *supra* note 65, Art. 4(2)(a); *CIHLS*, *supra* note 34, rules 1, 7; *NIAC Manual*, *supra* note 18, paras. 2(1), 2(1)(1); *NWP 1-14M*, *supra* note 73, paras. 8(2), 8(3); *U.K. Manual*, *supra* note 72, paras. 5(3), 5(4); *Canadian Manual*, *supra* note 84, at 4-5; ICC Statute, *supra* note 57, Arts. 8(2)(b)(i) and (ii), 8(2)(e)(i).

¹²⁶ AP I, *supra* note 34, Art. 52(2); *CIHLS*, *supra* note 34, rule 8; *NIAC Manual*, *supra* note 18, para. 1(1)(4); *NWP 1-14M*, *supra* note 73, para. 8.2; *U.K. Manual*, *supra* note 72, para. 5(4)(1); *Canadian Manual*, *supra* note 84, at 4-1–4-2.

See also Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, 1980, 1342 *U.N.T.S.* 137; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II), as amended, 1996, Art. 2(6), 35 *I.L.M.* 1206 (1996); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 1980, Art. 1(3), 1342 *U.N.T.S.* 171. And *see* Second Protocol to the Hague Convention of 1954 for Protection of Cultural Property in the Event of Armed Conflict, 1999, Art. 1(f), 38 *I.L.M.* 769 (1999).

On the topic generally, *see* Y. Dinstein, “Legitimate Military Objectives Under the Current *Jus in Bello*”, in *Legal and Ethical Lessons of NATO’s Kosovo Campaign* 139 (A.E. Wall ed., 2002); H. Robertson, “The Principle of Military Objective in the Law of Armed Conflict”, in *The Law of Military Operations* 197 (M.N. Schmitt ed., 1998).

attack's anticipated military advantage.¹²⁷ Doing so would constitute a war crime in both international and non-international armed conflict.¹²⁸ Thus, unless voluntary shields are characterized as direct participants excluded from the proportionality equation, a sufficient number of them can absolutely immunize a target from attack. Furthermore, the technology fielded by asymmetrically advantaged military forces has increasingly rendered defensive systems ineffective, while the "CNN effect" generated by images of civilian casualties has enhanced the effectiveness of shields in precluding attack, particularly given adoption of lawfare strategies by weaker parties.¹²⁹

The Israeli Supreme Court took this stance in its landmark "targeted killings" judgment, authored by President (emeritus) Barak:¹³⁰

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 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.¹³¹

While the judgment applied only to international armed conflict, the *Manual on Non-International Armed Conflict* adopts an analogous approach for internal conflicts: "Should civilians voluntarily elect to shield a military objective or obstruct military operations, they would in almost all circumstances be taking an active (direct) part in hostilities, and, for the

¹²⁷ AP I, *supra* note 34, Arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b); *CIHLS*, *supra* note 34, rule 14; *NIAC Manual*, *supra* note 18, para. 2(1)(1)(4); *NWP 1-14M*, *supra* note 73, para. 8(3)(1); *U.K. Manual*, *supra* note 72, para. 5.33; *Canadian Manual*, *supra* note 84, at 4-3. The rule of proportionality is undoubtedly an element of customary international law, a fact highlighted by R. Higgins J. in her Dissenting Opinion in the *Nuclear Weapons* case. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996, [1996] *I.C.J. Rep.* 8, 587 (dissenting on unrelated grounds). On proportionality generally, see Y. Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 119-25 (2004); M.N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict", 22 *Yale J. Int'l L.* 1, 55-60 (1997).

¹²⁸ ICC Statute, *supra* note 57, Art. 8(2)(b)(iv).

¹²⁹ See Schmitt, *supra* note 28, at 458-67.

¹³⁰ *Targeted Killings Case*, *supra* note 7.

¹³¹ *Ibid.*, para. 36, citing M.N. Schmitt, "Direct Participation in Hostilities' and 21st Century Armed Conflict", in *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* 505, 521 (H. Fischer *et al.* eds., 2004); M.N. Schmitt, "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees", 5 *Chicago J. Int'l L.* 511, 541 (2005).

purposes of this Manual, could be treated as fighters”.¹³² Characterization of voluntary human shielding as direct participation comports well with the balance between military necessity and humanitarian considerations that underpins all international humanitarian law.

Because Article 51(3) denies civilians who so participate “the protection afforded by this Section”, they are not encompassed in the prohibition on shielding. Therefore, a party to the conflict that either encourages voluntary shielding or willingly acquiesces therein contravenes neither Article 51(7) nor its customary counterpart. Moreover, since they benefit from no other protection (specifically proportionality or precautions in attack safeguards), their presence would not immunize military operations, as envisioned in the article. Lest this seem a paradoxical result, it must be recalled that no prohibition exists in international humanitarian law barring a party from using directly participating civilians.¹³³

Two variations on the approaches set forth above merit brief comment. With regard to the first, it can be argued that Article 51(7) supplies civilians with no protection beyond that already enjoyed by virtue of the principle of distinction. Instead, the article ensures that parties to the conflict derive (lawfully) no benefit from actions placing civilians at greater risk. Characterized in this fashion, it would not matter whether the shields are direct participants since Article 51(7) “protects” the side facing them, that is, the attacker. This position emphasizes the military necessity component of the military necessity-humanitarian considerations balance.¹³⁴

The title to Article 51 alone, “Protection of the Civilian Population”, augers against the interpretation. True, the notion of direct participation, also based in Article 51, can be viewed as a nod to military necessity. Yet, it more accurately amounts to a qualifying criterion for application of the article’s protections. Furthermore, the *Commentary* to Additional Protocol I states that “[t]his provision affords measures of protection to the whole of the civilian population and all civilians, thus extending to them measures

¹³² *NIAC Manual*, *supra* note 18, commentary to para. 2(3)(8).

¹³³ The issue of whether civilians violate international humanitarian law by directly participating is highly contentious. Prosecution for direct participation is authorized before the Military Commissions convened in Guantanamo, Cuba. *MCA*, *supra* note 78, Sec. 950v(13) and (15). The better position is that direct participation is not a violation, but direct participants may be prosecuted for the acts that comprise the direct participation if those acts violate international or domestic law. Dinstein, *supra* note 127, at 29-32; Schmitt, “Humanitarian Law and Direct Participation”, *supra* note 131, at 520-21.

¹³⁴ This position was taken by several international humanitarian law experts in discussions with the author.

which already exist for two categories of persons: prisoners of war and civilians protected by the Fourth Convention".¹³⁵

A variation of the second approach focuses on the word "civilian(s)" in Article 51(7). Proponents argue that civilians who directly participate in hostilities lose their civilian status and become unlawful *combatants*.¹³⁶ Advocates include such prominent scholars as Professor Yoram Dinstein¹³⁷ and certain governments, most notably the United States.¹³⁸ Since voluntary human shields directly participate in hostilities, they do not qualify as civilians and the terms of Article 51(7) do not come into play. However, the distinction between directly participating civilians and unlawful combatants bears primarily on detention matters. Both characterizations lead to exactly the same results vis-à-vis both the defender's and attacker's obligations regarding human shields.

The preceding discussion demonstrates that specific intent to use civilians or other protected persons to shield represents the norm's *sine qua non*. This begs the question of whether "the *non-reaction* of a belligerent to voluntary human shields can be assimilated to the use of the presence or movements of civilians in order to protect military objectives, or to cover, promote or hinder military operations".¹³⁹ Despite one expert commentator's suggestion that the shielding "prohibition also applies to military authorities' passive indifference towards civilians' voluntary presence or movements that would serve to shield military objectives",¹⁴⁰ the requirement of specific intent would preclude mere passivity from amounting to a violation. Of course, the Article 58 requirements to remove civilians under one's control, avoid locating military objectives near them, and take other necessary precautions to ensure their safety would still apply. Should doing so be "feasible" in the

¹³⁵ *AP Commentary*, *supra* note 45, para. 1986. The referenced protections are GC III, *supra* note 58, Art. 23, and GC IV, *supra* note 11, Art. 28.

¹³⁶ On the issue generally, see K. Watkin, "Warriors Without Rights? Combatants, Unprivileged Belligerents, And The Struggle Over Legitimacy", 2 *Occasional Paper Series* (Program on Humanitarian Policy and Conflict Research, Harvard University, Winter 2005), at: <http://www.hpcr.org/pdfs/OccasionalPaper2.pdf>.

¹³⁷ Dinstein, *supra* note 127, at 27-33; Y. Dinstein, "Unlawful Combatancy", 32 *Israel Y.B. Hum. Rts.* 247 (2002). For a contrary view, see K. Dörmann, "The Legal Status of 'Unlawful/Unprivileged Combatants'", 85 *Int'l Rev. Red Cross* 45 (Mar. 2003).

¹³⁸ For example, the Military Commissions Act defines an unlawful enemy combatant as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its cobelligerents who is not a lawful enemy combatant". MCA, *supra* note 78, Sec. 948a(1)(i). See also *Hamdi v. Rumsfeld*, 124 *S.Ct.* 2633, 2640 (2004); *Hamdan v. Rumsfeld*, *supra* note 18, at 2824; *NWP*, *supra* note 73, para. 8.2.2.

¹³⁹ San Remo Round Table, *Background Document*, *supra* note 118, at 9.

¹⁴⁰ Queguiner, *supra* note 122, at 815-16.

circumstances, the mere fact that the shields were acting voluntarily, and not at the behest of the defender, would not release that party from a duty to comply with the obligations?

Finally, what of a scenario involving civilians voluntarily shielding *contrary* to the wishes, or at least without the active acquiescence, of the party on whose behalf they act?¹⁴¹ As noted, no violation of the human shielding prohibition occurs in situations involving truly consenting shields. However, is the defender nevertheless obliged under Article 58 to prevent them from acting in this manner? The answer is unconditionally “no” because of their status as direct participants. Article 51(3)’s removal of the “protection afforded by this Section” would relieve the defender of any such obligation under Article 58.¹⁴²

II. THE ATTACKER’S OBLIGATIONS

As the United States prepared to launch military operations in early 1991, President George H.W. Bush announced that Iraq’s use of human shields to deter attacks on legitimate military targets would fail.¹⁴³ Six years later, Zairian rebels fighting to overthrow Mobutu Sese Seko complained that armed individuals regularly fired on them from within crowds of fleeing Rwanda refugees. In response, they attacked refugee camps, often slaughtering the innocent occupants.¹⁴⁴ To what extent does the prohibition of human shielding by a defender affect the attacker’s operations as a matter of law?

International humanitarian law governing attacks is highly complex.¹⁴⁵ However, certain principles, mentioned earlier, apply directly to strikes

¹⁴¹ Such situations occasionally arise. For instance, *see* the cases of civilians on bridges in Belgrade, Gordelica and Novi Sad during Operation Allied Force. BBC On-line, Serb Media: NATO Lies Over Rapes, Apr. 10, 1999, *at*: <http://news.bbc.co.uk/1/hi/world/monitoring/316147.stm>.

¹⁴² By the first approach, a duty to prevent shielding would apply. If voluntary shields retain full civilian protection because they are not directly participating, Art. 58 remains applicable. In that a Party has an obligation to move civilians at risk, analogously imposing one to prevent civilians from placing themselves at risk would seem sensible. Of course, the obligation would exist only to the extent “feasible”; no actions that would negatively affect military operations would be required.

¹⁴³ *Gulf War Report*, *supra* note 9, at 608.

¹⁴⁴ Block, *supra* note 19, at 380.

¹⁴⁵ On targeting, including issues surrounding the use of shields, *see* M. Sassoli, “Legitimate Targets of Attacks under International Humanitarian Law”, in *Harvard International Humanitarian Law Research Initiative* (2003), *at*: <http://www.ihlresearch.org/ihl/pdfs/Session1.pdf>;

involving human shields. Most importantly, the target must qualify as a military objective, a term that includes combatants and civilians directly participating in hostilities.¹⁴⁶ Even if it does, the planned attack must comport with the principle of proportionality. Lastly, an attacker complying with that principle must nevertheless also take feasible precautions in attack. These mandate selection of those methods, means, and targets that will likely yield the least incidental injury to civilians, assuming a comparable military advantage.¹⁴⁷

The sole express provision bearing on the *attacker's* obligations in shielding situations is Article 51(8) of Additional Protocol I: "Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57".¹⁴⁸ ICRC commentary to Article 12(4) adopts a parallel approach

See also M.N. Schmitt, "Targeting", in *Perspectives on the ICRC Study on Customary International Humanitarian Law* 131 (S. Breau & E. Wilmshurst eds., 2007); M.N. Schmitt, "Fault Lines in the Law of Attack", in *Testing the Boundaries of International Humanitarian Law* 277 (S. Breau & A. Jachec-Neale eds., 2006); M.N. Schmitt, "Precision Attack and International Humanitarian Law", 87 *Int'l Rev. Red Cross* 445 (2005); M.N. Schmitt, "Targeting and Humanitarian Law: Current Issues", 33 *Israel Y.B. Hum. Rts.* 59 (2003), *repr. in Issues in International Law and Military Operations* 151 (R.B. Jaques ed., 2006).

¹⁴⁶ On the inclusion of combatants, *see AP Commentary, supra* note 45, para. 2017.

¹⁴⁷ Art. 57 of AP I, *supra* note 34, provides, in relevant part -

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

....

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

See also CIHLS, supra note 34, rules 15-21; *NIAC Manual, supra* note 18, para. 2.1.2; *NWP 1-14M, supra* note 73, para. 8.3.1; *U.K. Manual, supra* note 72, para. 5.32; *Canadian Manual, supra* note 84, at 4-4. For a discussion of application of the requirements, *see* Queguiner, *supra* note 122; Dinstein, *supra* note 127, at 125-28.

¹⁴⁸ AP I, *supra* note 34, Art. 51(8).

in relation to medical establishments and units employed as shields.¹⁴⁹ However, the customary nature of the “shall not release” text remains a point of debate in contemporary international humanitarian law expert fora.¹⁵⁰

The use of human shields does not necessarily bar attack on a lawful target.¹⁵¹ As with the defender’s obligations in shielding situations, when analysing those shouldered by an attacker, it is necessary to distinguish between voluntary and involuntary shields. The interplay between voluntary human shielding and the notion of direct participation discussed earlier applies equally to an attacker’s obligations.

Recall that the first approach treats voluntary shields as civilians entitled to all international humanitarian law protections. In particular, they enjoy immunity from direct attack pursuant to Additional Protocol I, Article 51(2), a universally accepted norm of customary law which provides that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack”.¹⁵² Any anticipated harm to them during an attack on a military objective would also factor fully into the requisite proportionality analysis; there is no difference in evaluating excessiveness as between voluntary shields and incidentally present civilians. Regarding precautions in attack, harm to any human shields, including voluntary ones, would qualify as “incidental loss of civilian life” or “injury to civilians”.¹⁵³ Thus, an attacker which could feasibly minimize said harm (without forfeiting military advantage) by employing alternative means or methods of warfare, or striking a different target(s), would be obliged to do so, even in the absence of “innocent” civilians who might also be spared by the precautions.¹⁵⁴

¹⁴⁹ *AP Commentary*, *supra* note 45, paras. 539-40.

¹⁵⁰ W.H. Parks, “Air War and the Law of War”, 32 *Air Force L. Rev.* 1, 163-68 (1990).

¹⁵¹ United States Air Force, Targeting, (Doctrine Document 2.1-9) (June 8, 2008), at 90 [hereinafter: AFDD 2.1-9].

¹⁵² AP I, *supra* note 34, Art. 51(2); AP II, *supra* note 65, Art. 4(2)(a); *CIHLS*, *supra* note 34, rule 1; *NIAC Manual*, *supra* note 18, para. 2(1)(1); *NWP I-14M*, *supra* note 73, para. 8.3; *U.K. Manual*, *supra* note 72, para. 5(3); *Canadian Manual*, *supra* note 84, at 4-5; ICC Statute, *supra* note 57, Arts. 8(2)(b)(i), 8.2(e)(i).

¹⁵³ AP I, *supra* note 34, Art. 57(2).

¹⁵⁴ For instance, if civilian shields have been placed at an electrical generating facility, a commander should consider other targets the destruction of which will cut electricity to the military objective which he wishes to neutralize. As noted, though, alternatives must be feasible, a term which includes military common sense. It would be imprudent, for example, to expend a limited inventory of precision munitions early in a conflict, especially if intense urban operations, in which they would offer greater opportunity to preserve civilians and civilian objects, are expected in the future.

The approach enjoys strong support. For instance, in light of the peace activist human shields that travelled to Iraq during late 2002 and early 2003, Human Rights Watch cautioned:

[L]ike workers in munitions factories, civilians acting as human shields, whether voluntary or not, contribute indirectly to the war capability of a state. Their actions do not pose a direct risk to opposing forces. Because they are not directly engaged in hostilities against an adversary, they retain their civilian immunity from attack. They may not be targeted, although a military objective protected by human shields remains open to attack, subject to the attacking party's obligations under IHL to weigh potential harm to civilians against the direct and concrete military advantage of any given attack, to refrain from attack if civilian harm would appear excessive.¹⁵⁵

Human Rights Watch intentionally used the word "indirectly" to preclude characterization as direct participants.

As noted in the context of the defender's obligations, this position poses a major dilemma. By the proportionality principle, a party using voluntary shields can absolutely immunize a target from attack as a matter of law. It is simply a matter of gathering enough human shields in the target area to render the resulting harm to them "excessive".

The second, and correct, approach to voluntary shields avoids this unsatisfactory result by treating them as direct participants in hostilities. The rationale for this position is set forth above.¹⁵⁶ Since direct participants are lawful military objectives, voluntary human shields obviously do not merit consideration either in the proportionality assessment or during consideration of alternative plans of attack that might minimize harm to the civilian population. Some international humanitarian law experts protest that the approach opens the possibility of directly targeting voluntary shields.¹⁵⁷ While accurate as a matter of law, doing so would serve little practical purpose. Quite aside from the negative publicity any such action would inevitably generate, attacking shields would violate the "economy of force" principle of war, which dictates that commanders should preserve assets for use against the most lucrative targets.¹⁵⁸

¹⁵⁵ Human Rights Watch, *Briefing Paper: International Humanitarian Law Issues in a Potential War in Iraq*, Feb. 20, 2003.

¹⁵⁶ See text accompanying notes 125-29, *supra*.

¹⁵⁷ Author's discussions with other humanitarian law experts at various international meetings.

¹⁵⁸ U.S. Joint Doctrine provides:

A third approach to voluntary shields “discounts” them in proportionality calculations and precautions in attack analyses. As it applies most conspicuously to treatment of involuntary shields, discussion thereof shall occur in that context.¹⁵⁹

When a party calculatedly takes advantage of international humanitarian law protections as a form of counter-targeting without the consent, or perhaps even knowledge, of the civilians in question, the act merits different treatment. As with the obligations of attackers confronting voluntary shielding, there are three possibilities.

An extreme view urges that involuntary shields should be ignored in the proportionality and precautions in attack analyses because an enemy violating the law should not be allowed to benefit from its malfeasance.¹⁶⁰ However, international humanitarian law evidences scant precedent to support the loss by a civilian of protected status due to the wrongful acts of one of the parties to the conflict. The sole possible exception with regard to individuals is the law of reprisal,¹⁶¹ which permits a party victimized by international humanitarian law violations to itself violate that law in order to force its opponent back into compliance. Even this exception is highly controversial; Additional Protocol I, in particular, dramatically curtails its use for States Party.¹⁶²

[t]he purpose of the economy of force is to allocate minimum essential combat power to secondary effects. Economy of force is the judicious employment and distribution of forces. It is the measured allocation of available combat power to such tasks as limited attacks, defense, delays, deception, or even retrograde operations to achieve mass elsewhere at the decisive point and time.

Joint Chiefs of Staff, *Joint Operations* (Joint Publication 3-0) (Feb. 13, 2008), at A-2.

¹⁵⁹ See text accompanying notes 167-73, *infra*.

¹⁶⁰ This is an approach that occasionally surfaces in discussions with international humanitarian law experts and military affairs specialists.

¹⁶¹ Instead, international humanitarian law typically only contemplates the loss of protection due to the enemy’s unlawful conduct with regard to civilian *objects*. For instance, hospitals may be attacked (subject to proportionality and precautions in attack restrictions) if they house combatants, once a warning to desist has been ignored. AP I, *supra* note 34, Art. 13(1). As an example, on Mar. 25, 2005, U.S. Marines seized the hospital in Nasiriya. They confiscated 200 weapons and captured approximately 170 Iraqi Soldiers. A. Dworkin, “Guerrilla War, ‘Deadly Deception’, and Urban Combat”, *Crimes of War Project*, Mar. 26, 2003, at:

<http://www.crimesofwar.org/print/onnews/iraq-guerrilla-print.html>

¹⁶² See AP I, *supra* note 34, Arts. 20 (wounded, sick, shipwrecked), 51(6) (civilians and civilian population), 52(1) (civilian objects), 53(c) (cultural objects and places of worship), 54(4) (objects indispensable to the survival of the civilian population), 55(2) (the natural environment), and 56(4) (dams, dykes and nuclear electrical generating stations). Additional Protocol I went far beyond prior humanitarian law in prohibiting

A polar opposite, and better approach treats involuntary shields as civilians entitled to the full benefits of their international humanitarian law protections. Its foundational premise is that the relevant provisions operate in favor of individual civilians, not the parties to the conflict. Therefore, a party may not disregard their legal protections simply because of their opponent's unlawful conduct. Additional Protocol I, Article 51(8), constitutes the linchpin of this position, for it expressly refuses to release a party facing shields from the legal obligations relevant to targeting.¹⁶³ Thus, involuntary shields factor fully into proportionality and precautions in attack assessments. In fairness, the customary international law nature of the norm is, as noted, questionable.

United States joint doctrine appears to adopt this position.¹⁶⁴ Pursuant to Joint Publication 3-60, *Joint Targeting*,

a defender may not use civilians as human shields in an attempt to protect, conceal, or render military objects immune from military operations or force them to leave their homes or shelters to disrupt the movement of an adversary. In these cases, the civilians have not lost their protected status and joint force responsibilities during such situations are driven by the principle of proportionality as mentioned above. In such cases, otherwise lawful targets shielded with protected civilians may be attacked, and the protected civilians may be considered as collateral damage, provided that the collateral damage is not excessive compared to the concrete and direct military advantage anticipated by the attack.¹⁶⁵

reprisals, a fact that led to U.S. opposition to the treaty. Parks, *supra* note 150, at 94-101.

The classic work on reprisals is F. Kalshoven, *Belligerent Reprisals* (2nd ed., 2005).

¹⁶³ See text accompanying note 148, *supra*.

¹⁶⁴ The term "joint" refers to doctrine applicable to all of the military services.

¹⁶⁵ Joint Chiefs of Staff, *Joint Targeting* (Joint Publication 3-60) (Apr. 13, 2007), at E-2 – E-3. So, too, do instructions to United States Air Force judge advocates charged with advising operational commanders on targeting law. The 2002 *Air Force Operations and the Law* text provides -

[S]tandards of conduct should apply equally to the attacker and defender. In other words, that the responsibility to minimize collateral injury to the civilian population not directly involved in the war effort remains one shared by the attacker and the defender; and that the nation that uses its civilian population to shield its own military forces violates the law of war at the peril of the civilians behind whom it hides. ... At the same time, however, targeteers and judge advocates should consider the necessity of hitting the particular target, the expected results versus expected collateral damage, and ways to minimize civilian casualties, if possible.

Dep't of the Air Force, Judge Advocate General's Department, *Air Force Operations and the Law* 293 (2002).

Although the approach seems to dominate among international humanitarian law experts,¹⁶⁶ a third also enjoys significant support. It agrees that involuntary human shields retain immunity from attack, but suggests that they should, for the lack of a better term, “be discounted” when calculating incidental injury for proportionality and precautions in attack purposes. The United Kingdom’s *Manual of the Law of Armed Conflict* adopts this position:

Even where human shields are being used, the proportionality rule must be considered. However, if the defenders put civilians or civilian objects at risk by placing military objectives in their midst or by placing civilians in or near military objectives, this is a factor to be taken into account in favour of the attackers in considering the legality of attacks on those objectives.¹⁶⁷

Elsewhere, it is even more unequivocal: “The enemy’s unlawful activity may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage expected”.¹⁶⁸ A similar approach has been endorsed in the International Committee of the Red Cross’ model manual: “The attacking commander is required to do his best to protect [civilians used to shield] but he is entitled to take the defending commander’s actions into account when considering the rule of proportionality”.¹⁶⁹

In his 1990 classic work on air warfare, W. Hays Parks commented on the relationship between the Article 51(7) prohibition on shielding and the Article 51(8) caveat that a violation of the norm does not release the other side from its own legal obligations.

Protocol I fails to state the fact that the illegal act – the violation of Article 51(7) – is the crime that places innocent civilians at risk, while attack of a lawful target is a legitimate act authorized by the law of war. While an attacker facing a target shielded from attack by civilians is not relieved from his duty to exercise reasonable precautions to minimize the loss of civilian life, neither is he obligated to assume any additional responsibility as a result of the illegal acts of the defender. Were an attacker to do so, his erroneous assumption of additional responsibility

¹⁶⁶ See Reports of the ICRC’s *Direct Participation Project*, *supra* note 122.

¹⁶⁷ *U.K. Manual*, *supra* note 72, para. 2.7.2.

¹⁶⁸ *Ibid.*, para. 5.22.1.

¹⁶⁹ ICRC, *Fight it Right: Model Manual on the Law of Armed Conflict for Armed Forces* 58 (1999).

with regard to protecting the civilians shielding a lawful target would serve as an incentive for a defender to continue to violate the law of war by exposing other civilians to similar risk.¹⁷⁰

Note that Parks does not deny that care should be taken to spare civilian shields; rather, he is concerned lest the attacker have to bear the additional responsibility of avoiding injury to them.

If the involuntary shields are civilians deserving of some protection, what obligations does the attacker continue to have regarding them? Professor Yoram Dinstein builds on Parks' work to answer the question:

[T]he principle of proportionality remains prevalent. However, even if that is the case, the actual test of excessive injury to civilians must be relaxed. That is to say, the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that – if an attempt is made to shield military objectives with civilians – civilian casualties will be higher.¹⁷¹

His rationale is defensible: “A belligerent State is not vested by LOIAC [law of international armed conflict] with the power to block an otherwise legitimate attack against combatants (or military objectives) by deliberately placing civilians in harm's way”.¹⁷²

Major General A.P.V. Rogers takes a similar approach when commenting on how a tribunal considering the practice might respond. In his opinion, it would –

be entitled to take all the circumstances into account and attach such weight as it considers proper to such matters as the defender's ... deliberate use of civilians or civilian objects as a cover for military operations...or use of hostages or involuntary 'human shields.' It is submitted that the proportionality approach by tribunals should help redress the balance [between the rights and duties of attackers and defenders] which otherwise would be tilted in favour of the unscrupulous.¹⁷³

¹⁷⁰ Parks, *supra* note 150, at 162. Certain pre-Additional Protocol I commentators are in accord. See, e.g., J.M. Spaight, *Air Power and War Rights* 163 (1st ed., 1926).

¹⁷¹ Dinstein, *supra* note 127, at 131.

¹⁷² *Id.*

¹⁷³ A.P.V. Rogers, *Law on the Battlefield* 129 (2nd ed., 2004).

Although no express precedent exists in international humanitarian law for discounting civilian value in a proportionality analysis, the literature addresses a somewhat analogous situation, workers in a munitions factory.¹⁷⁴ Virtually all commentators agree that the workers are civilians who are not directly participating in hostilities. Many nevertheless take the view that they are not entitled to the full benefits of civilian status while at work. Rogers, for example, cites “use of civilians in war support activities” as one of the factors a tribunal would consider when judging the propriety of proportionality assessments,¹⁷⁵ while Dinstein urges that industrial plant workers “enjoy no immunity while at work. If the industrial plants are important enough..., civilian casualties – even in large numbers – would usually come under the rubric of an acceptable collateral damage”.¹⁷⁶ Perhaps most persuasively, a well-known academic commentary on the Additional Protocols states “it is doubtful that incidental injury to persons serving the armed forces within a military objective will weigh as heavily in the application of the rule of proportionality as that part of the civilian population which is not so closely linked to military operations”.¹⁷⁷

Discounting the value of involuntary shields does not violate Article 51(8)’s proviso that those facing human shields remain bound by the norms safeguarding civilians. On the contrary, advocates agree that involuntary shields qualify as civilians (vice direct participants or unlawful combatants) and that the principle of proportionality applies. They merely suggest a mechanism for *implementing* the principle.

By compensating for the military advantage a party using human shields gains through its violation of the law, the approach recalibrates the military necessity-humanitarian considerations balance.¹⁷⁸ Yet, it is flawed in that it makes no commensurate correction in humanitarian considerations for factors such as the increased jeopardy in which the tactic places civilians, especially vulnerable protected persons. Indeed, populations and groups at risk are the very ones likely to be compelled into shielding. The examples of women and children have been cited. Or consider conflicts fought on behalf of a particular ethnic group, such as the Kosovo Albanians during Operation

¹⁷⁴ For instance, the law of reprisal, assuming for the sake of analysis its continued vitality, allows the aggrieved party to violate the law temporarily; it does not represent a relaxation of international humanitarian law standards. *See* note 162 *supra*.

¹⁷⁵ Rogers, *supra* note 173, at 131.

¹⁷⁶ Dinstein, *supra* note 127, at 124.

¹⁷⁷ *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* 295 (M. Bothe, K.J. Partsch, & W.A. Solf eds., 1982).

¹⁷⁸ *See* text accompanying note 38, *supra*.

Allied Force. It would be illogical to discount their proportionality calculation valuation simply because the group's persecutors have forced them to act as human shields. On the contrary, international humanitarian law expressly enhances protection of vulnerable groups, such as detainees, women, children and persons in occupied territory.¹⁷⁹

The standard also poses practical difficulties. By eluding ready quantification, the art of determining proportionality already amounts to one of the most complex and difficult decisions warfighters make. For instance, what does the term "excessive" means in practice? How should one compare two disparate values – "incidental loss of civilian life, injury to civilians, damage to civilian objects" and "concrete and direct military advantage"? Proportionality assessments depend as much on instinct as calculation. Suggesting that certain civilians should count less than others would only render a sibylline determination more so.

Perhaps an accommodation between the two camps – full treatment and discounted value – is possible. A modified tack would count involuntary shields fully as civilians in the proportionality analysis. However, in the face of uncertain proportionality, an attacker would be entitled to launch the strike. Such an approach preserves the rule of proportionality in its entirety, while rebalancing the disequilibrium in the military necessity-humanitarian considerations dichotomy. It constitutes a methodology for resolving uncertainty, not a devaluation of civilians, or the protections to which they are entitled.

III. RESOLVING DOUBT

Incontrovertibly, civilians enjoy the protection of international humanitarian law even when comingled with combatants, a point emphasized by Article 50(3) of Additional Protocol I: "The 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".¹⁸⁰ In certain circumstances, however, shielding affects that protection. The practical challenge lies in applying the relevant norms when doubt exists as to whether shielding is taking place, and, if so, whether it is non-consensual. Such factual inquiries are particularly complicated given the intent requirement appertaining to the party allegedly employing shields and, in cases of voluntary shielding, to the shields themselves.

¹⁷⁹ See, e.g., AP I, *supra* note 34, Arts. 75-78; GC IV, *supra* note 11, generally.

¹⁸⁰ AP I, *supra* note 34, Art. 50(3).

Factual disagreement is common. No better example exists than the trading of allegations during Operation Change Direction. An Israeli Ministry of Foreign Affairs report on the conflict stated –

[i]n the course of the conflict that it had initiated, Hezbollah's operations entailed fundamental violations of international humanitarian law. Most specifically, it wilfully violated the principle of distinction, which obliges parties to a conflict to direct their attacks only against military objectives and prohibits the use of civilians as "human shields" in the arena of combat. Throughout the conflict, Hezbollah demonstrated cynical disregard for the lives of civilians, both on the Israeli side, where it targeted them, and on the Lebanese side, where it used them as "cover".¹⁸¹

The Ministry posted videos and photos of Hezbollah shielding on its public website,¹⁸² and the Israeli government cooperated in a non-governmental organization's comprehensive study into the incidents.¹⁸³

By contrast, Human Rights Watch noted:

Israeli officials have made the serious allegation that Hezbollah routinely used "human shields" to immunize its forces from attack and thus bears responsibility for the high civilian toll in Lebanon. Apart from its position near UN personnel, Human Rights Watch found only a handful of instances of possible shielding behind civilians, but nothing to suggest there was widespread commission of this humanitarian law violation or any Hezbollah policy encouraging such practices. These relatively few cases do not begin to account for the Lebanese civilians who died under Israeli attacks.¹⁸⁴

¹⁸¹ Israel Ministry of Foreign Affairs, "Israel's War with Hezbollah: Preserving Humanitarian Principles While Combating Terrorism" (Diplomatic Note No. 1, 2007), at 2.

¹⁸² Israel Ministry of Foreign Affairs, "Hizbullah's Exploitation of Lebanese Population Centers and Civilians: Photographic Evidence", July 12, 2006, at: http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2006/Operation%20Change%20of%20Direction%20Video%20Clips.

¹⁸³ Erlich, *supra* note 14.

¹⁸⁴ Human Rights Watch, *Why They Died*, *supra* note 14, at 40. The Human Rights accounts of the conflict proved controversial. In particular, the organization issued a major 49-page assessment condemning Israeli action (without addressing unlawful activity by Hezbollah) a mere three weeks into the conflict and as it was underway. Nevertheless, at this early point, the organization asserted that -

In the fog of battle, perceptions vary widely.

As to defender's obligations, the question of whether civilians in the target area are being utilized as shields (and, if so, voluntarily) is essentially an evidential matter bearing on a possible breach of international humanitarian law. The answer is of *de minimus* concern to those engaged in ongoing military operations.

But for attackers, the issues loom large on the battlefield. As a matter of law, they must consider the presence of shields (and their nature) when implementing proportionality and precautions in attack requirements. Of course, if all shields deserve full civilian treatment, as the first approach suggest, the issue is irrelevant; everyone counts and counts equally. However, the distinction is critical for those who (correctly) adopt the position that voluntary shields are direct participants. Additional Protocol I, Article 50(1), imposes a presumption in favor of civilian, and against combatant, status.¹⁸⁵ Should doubt arise as to whether shielding is taking place, the norm would mandate a presumption in favor of non-shielding.¹⁸⁶ Since neither combatants nor civilians who directly participate in hostilities enjoy immunity from attack, it is also reasonable to analogously impose a presumption in case of doubt against characterizing a civilian as a directly participating voluntary shield. In all cases of doubt, the appropriate international humanitarian law standard on the battlefield is whether a

The Israeli government claims that it targets only Hezbollah, and that fighters from the group are using civilians as human shields, thereby placing them at risk. Human Rights Watch found no cases in which Hezbollah deliberately used civilians as shields to protect them from retaliatory IDF attack. Hezbollah occasionally did store weapons in or near civilian homes and fighters placed rocket launchers within populated areas or near U.N. observers, which are serious violations of the laws of war because they violate the duty to take all feasible precautions to avoid civilian casualties.

Human Rights Watch, *Fatal Strikes: Israel's Indiscriminate Attacks against Civilians in Lebanon* 3 (Aug. 2006).

¹⁸⁵ AP I, *supra* note 34, Art. 50(1). See also *CIHLS*, *supra* note 34, commentary to rule 6. Additional Protocol I similarly imposes a presumption that objects "normally dedicated to civilian purposes" are civilian whenever doubt exists. AP I, *supra* note 34, Art. 52(3).

¹⁸⁶ Discerning readers might protest that the modified discounted value approach runs counter to the presumption of civilian status in that it devalues civilians. Technically, it does not. A presumption of civilian status in cases of doubt as to whether an individual is a civilian or combatant still attaches. The issue is how to resolve doubt as to the proportionality of a strike, not the status of those forced to shield. In fairness, there is a diminishment in *de facto protection* for civilians. But what must be remembered is that international humanitarian law offers no mechanism for resolving murky proportionality calculations. In the absence of an express presumption, applicative interpretation must factor in the military necessity-humanitarian considerations dynamic. The modified approach does precisely that.

reasonable warfighter in same or similar circumstances would hesitate to act based on the degree of doubt he harbored.

Beyond the operation of presumptions, Article 57(2)(a)(1) of Additional Protocol I requires an attacker to do “everything feasible” to verify that a target qualifies as a military objective.¹⁸⁷ Since this norm seeks, in part, to assure civilians the full legal protection to which they are entitled, attackers derivatively shoulder a duty to discern whether the individuals involved are shielding and, if so, whether they are acting voluntarily. The obligation to verify voluntariness is critical because, as the Israeli Supreme Court grasped in *Adalah*, appearances can be deceiving. Willingness to shield may be patently obvious, as when civilians simply answer a public call. However, when a party to the conflict exercises particular control over the civilians in question, as during occupation or in repressive States, apparent consent merits close examination.

The one exception to the voluntariness assessment requirement involves children, an especially vulnerable group. For instance, Palestinian militants often employ child shields because they have learned the Israel Defense Force has ordered its soldiers not to use live ammunition against children.¹⁸⁸ Children are legally incapable of forming the intent necessary to “directly participate” in hostilities, particularly given humanitarian law’s increasing recognition of their unique predicament during armed conflicts.¹⁸⁹ Even if that were not so, as a practical matter it would typically be problematic to determine if a child present at a prospective target is there volitionally.

IV. CONCLUDING THOUGHTS

Human shielding turns the St. Petersburg Declaration’s military necessity-humanitarian considerations balance on its head through use of the latter to achieve the former. In light of the discordance characterizing the normative regime governing the practice, this article has proposed an approach that resolves the most contentious issues by distinguishing between voluntary and involuntary shields. With regard to the defender’s obligations, the use of involuntary shields incontrovertibly violates conventional and customary international law. However, since voluntary shields, as direct participants in

¹⁸⁷ See also *CIHLS*, *supra* note 34, rule 16.

¹⁸⁸ J.R. Weiner, “Co-existence Without Conflict: The Implementation of Legal Structures for Israeli-Palestinian Cooperation Pursuant to the Interim Peace Agreements”, 26 *Brooklyn J. Int’l L.* 591, at n. 407 (2000).

¹⁸⁹ For instance with the entry into force on Feb. 12, 2002 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263, Annex I, U.N. Doc. A/54/49 (2000).

hostilities, lose the protections provided by international humanitarian law during an attack, their presence can no longer potentially “immunize” a target, and the norm becomes inoperative.

The involuntary-voluntary distinction also drives the attacker’s obligations in shielding situations. Voluntary shields qualify as direct participants in hostilities and thus do not factor into proportionality and precautions in attack calculations. Involuntary shields, by contrast, are civilians who enjoy immunity from attack. Any harm likely to be caused them during an attack against a military objective (including combatants or civilians directly participating in the hostilities) must be evaluated to ensure it is not excessive in light of the military advantage the attacker anticipates achieving. Moreover, the fact that the shields may be harmed requires the attacker to explore weapons, tactics, and targets options that might result in less harm while yielding a similar military advantage. A presumption in favor of involuntariness operates to any resolve doubt surrounding the nature of shielding.

Operationalizing the shielding rules on the battlefield is at least as complex as deconstructing their normative content. Although a defender’s use of voluntary shields may not technically contravene the human shields prohibition, experiences since at least the First Gulf War have aptly demonstrated that such practices are condemnable and that perpetrators should expect to be ostracized internationally for engaging in them. Consequently, the practical mid-and long-term costs of resorting to the tactic will typically outweigh any possible short-term benefits.

The attacker faces a similar quandary. Although striking a voluntarily shielded target may be lawful, conducting attacks that harm human shields will more often than not prove counter-productive. A prudent attacker will always consider, for instance, the risk of domestic and international blowback resulting from the scenes of dead and injured civilians certain to appear around the world in near real-time. Prudence also dictates consideration of the impact such incidents are likely to have on the morale of the enemy’s population and armed forces. This is especially so given the difficulty of communicating the anticipated military advantage that legally justified the action to a predominately non-military lay audience. In other words, the risks of falling victim to lawfare can loom as large as legal or military factors. Rules of engagement and other operational directives should reflect this reality. Accordingly, United States Air Force doctrine cautions, “[a]s directed or time permitting, targets surrounded by human shields will

probably need to be reviewed by higher authority for policy and legal considerations based on the specific facts".¹⁹⁰

Such legal, policy and operational quandaries have now descended from the ivory tower. Today, shielding is a central issue in two major international projects bringing together experts and practitioners to explore the norms governing 21st century warfare.¹⁹¹ Yet, until consensus can be achieved on interpretations of shielding norms, civilians will remain at risk and military forces will engage in combat without the definitive guidance they deserve.

¹⁹⁰ AFDD 2.1, *supra* note 151, at 90. The doctrine points to civilians and the sick and wounded, and offers the specific examples of surface-to-air missile sites intentionally placed next to a hospital or the ruins of an ancient temple. The latter example derives from the placement of aircraft next to the ancient Temple of Ur during the Gulf War of 1991. *See Gulf War Report*, *supra* note 9, at 615.

¹⁹¹ Harvard Program on Conflict Prevention, IHL in Air and Missile Warfare Project, at: <http://www.hpcr.org/projects/amw.php>; ICRC, *Direct Participation Project*, *supra* note 122.