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A Chink in the Armor: How a Uniform Approach to Proportionality Analysis Can End the Use of Human Shields

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NOTES

A Chink in the Armor: How a Uniform Approach to Proportionality Analysis Can End the Use of Human Shields

ABSTRACT

The appropriate response to human shields is a recurring issue in modern warfare. Technological asymmetry, disparate obligations, and doctrinal divergence between state and nonstate adversaries combine to make civilians account for 84 percent of combat deaths. Just as a slot machine entices a gambler though he rarely wins, the international community's inconsistent response to human shields has placed shield users on an intermittent reinforcement schedule, thereby ensuring that this tactic remains part of insurgent strategy. Long-term protection of civilians requires eliminating this tactic. Principles of behavior science indicate that an effective way to do so is to uniformly remove its desired consequence—combatants must never allow the presence of shields to impede access to the shielded military objective. This approach is supported by a broader, more forward-thinking conception of the principle of proportionality as reflected in current treaty and customary international law.

TABLE OF CONTENTS

I.	INTRODUCTION	1448
II.	THE CODIFICATION OF PROTECTION FOR CIVILIANS IN LAW	1450
A.	<i>The Lieber Code</i>	1451
B.	<i>Total War and the Geneva Conventions</i>	1453
C.	<i>The Vietnam War and the Additional Protocols to the Geneva Conventions</i>	1454
	i. Additional Protocol I on Proportionality	1456

	ii. Additional Protocol I on Human Shields....	1458
III.	THE DIVERSE DEMOGRAPHICS OF HUMAN SHIELDS	1459
	A. <i>Voluntary vs. Involuntary Shields</i>	1460
	B. <i>Systematic vs. Isolated Use of Shields</i>	1461
IV.	WHY BELLIGERENTS USE HUMAN SHIELDS	1463
	A. <i>Factor One: Technological Asymmetry</i>	1463
	i. Effects of Technological Superiority on the Advantaged Side.....	1464
	ii. Effects of Technological Inferiority on the Disadvantaged Side.....	1467
	B. <i>Factor Two: Diversity of Obligations and Restraints</i>	1468
	C. <i>Factor Three: Doctrinal Divergence</i>	1471
V.	TWO PERSPECTIVES ON HOW HUMAN SHIELDS FACTOR INTO PROPORTIONALITY ANALYSIS	1473
	A. <i>The Human Rights Model</i>	1474
	B. <i>The Humanitarian Model</i>	1475
	C. <i>The Result of Two Approaches: Gambling on Human Shields</i>	1476
VI.	HOW TO END THE USE OF HUMAN SHIELDS: A UNIFORM APPROACH.....	1478
	A. <i>The Human Rights Approach Risks Legitimizing Shield Use as a Tactic</i>	1480
	B. <i>The Humanitarian Approach Is Supported by International Law and Most Effectively Protects Civilians</i>	1481
	C. <i>The Costs of This Choice</i>	1483
	D. <i>How the Transition Can Be Made Easier</i>	1484
VII.	CONCLUSION.....	1486

I. INTRODUCTION

A recent UN report described an instance in which members of the Syrian Armed Forces (SAF) forced children to stand at the windows of a bus transporting military personnel to a raid on their village, thereby shielding SAF fighters from attack by the children's families and neighbors.¹ Syrian government forces have used close proximity to civilians as a strategy to deter enemies throughout the

1. U.N. Secretary-General, *Children and Armed Conflict: Rep. of the Secretary-General*, ¶ 7, U.N. DOC. A/66/782-S/2012/261 (Apr. 26, 2012).

conflict.² The SAF have established operational centers in hospitals and even erected gun embankments on schoolhouse roofs while students study below.³ Though clearly unlawful, such instances are not unusual. The rate of civilian casualties in conflict has steadily increased since World War I,⁴ and human shields have become an abundant and effective weapon favored in today's asymmetric conflicts.

Two perspectives prevail on how human shields should factor into the proportionality analysis that military decision makers use to balance the anticipated military advantage and collateral damage that a particular operation will yield. The first approach, heavily influenced by human rights law, subscribes to a narrow understanding of proportionality analysis in which collateral damage outweighs a potential military advantage the vast majority of the time.⁵ The second approach, rooted in humanitarian law, conceives of proportionality more broadly. In this calculation, other considerations like the sovereign right of self-defense and safety of soldiers on the ground add greater heft to the military-advantage side of the proportionality scale.⁶ Which approach is lawful or even the most humane remains unclear in the international realm. States that subscribe to the former approach are more likely to allow the presence of human shields to deter their operations, whereas states that subscribe to the latter are more likely to pursue a valuable military objective despite the presence of human shields. Even within a single country, the response to human shields may vary. It is this inconsistency that ensures this tactic remains a prevalent part of insurgent strategy.

This Note applies the rule of intermittent reinforcement, a tenet of behavior science, to the use of human shields in conflict. Just as a slot machine entices a gambler though he rarely wins, the international community's inconsistent response to human shields has placed shield users on an intermittent reinforcement schedule, thereby creating a persistent and durable behavior. In order to change this behavior, actors who face human shields must respond consistently every time. And given the options (deterrence in the presence of human shields or pursuit of the military objective 100 percent of the time), the latter is the only option that disables human-shield use as a functional behavior and effective strategy. Therefore,

2. See *id.* ¶ 119–26 (describing grave violations against children in the Syrian Arab Republic).

3. *Id.*

4. Douglas H. Fischer, Comment, *Human Shields, Homicides, and House Fires: How a Domestic Law Analogy Can Guide International Law Regarding Human Shield Tactics in Armed Conflict*, 57 AM. U. L. REV. 479, 484 & n.30 (2007).

5. See discussion *infra* Part V.A.

6. See discussion *infra* Part V.B.

this Note suggests that the international community should adopt a broad understanding of proportionality analysis that allows attacking forces to achieve their military objective despite the presence of human shields. If this approach is pursued uniformly, it will extinguish the use of shields as an effective tactic, thereby increasing compliance with international humanitarian law principles and reaffirming the overarching premise of international humanitarian law to protect the right to life.

Part I provides a brief history of the codification of civilian immunity in law. Part II describes the diverse demographics of civilians used as human shields. Part III explores the three facets of modern, asymmetric conflict that have made the use of human shields a prevalent tactic amongst insurgents and disadvantaged belligerents. Part IV describes the two perspectives that inform how human shields factor into proportionality analysis. Finally, Part V offers a uniform approach to remove human-shield use from an intermittent reinforcement schedule, thereby removing its function as an effective strategy in conflict.

II. THE CODIFICATION OF PROTECTION FOR CIVILIANS IN LAW

The earliest normative codes of conduct carved out an area of special treatment for civilians in war. Greek forces over 2,500 years ago adopted rules of engagement that specifically referred to civilian immunity.⁷ Such early restrictions on combatants were based on pragmatism rather than humanitarian concerns.⁸ They were developed to ensure that the fruits of conquest and the labor to maintain them remained after the conflict ended; land sown with salt was of little value to the victors.⁹ Yet, despite the existence of these norms, adherence to them has historically been inconsistent. In fact, military thinkers at many points in history have actively advocated targeting civilians as an effective tactic for hurting the morale of an opponent.¹⁰

7. Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 AIR FORCE L. REV. 1, 4 (2005).

8. See Michael A. Newton, *Modern Military Necessity: The Role & Relevance of Military Lawyers*, 12 ROGER WILLIAMS U. L. REV. 877, 884 (2007) (noting that detailed prescriptions of the law of armed conflict evolved in response to military pragmatism and changing technology, with no mention of humanitarian concerns).

9. See Reynolds, *supra* note 7, at 3 (explaining that the concept of restraint in warfare more likely evolved out of the necessity to spare resources and labor instead of a philosophy of compassion and progressive ideology).

10. See JEREMY M. WEINSTEIN, *INSIDE REBELLION: THE POLITICS OF INSURGENT VIOLENCE* 30 (2007). Weinstein notes Mao Tse-Tung and Che Guevara saw using violence against civilians as an important strategy. Guevara thought it should not be used indiscriminately, however. This is prohibited by Article 51(2) of the

This Part charts the creation of legal protections for civilians in combat, drawing on recent conflicts that put civilians in jeopardy and the current codification of civilian immunity in international humanitarian law.

A. *The Lieber Code*

During the nineteenth century, in response to an inconsistent history regarding the treatment of civilians in conflict, a greater concern with humanitarian issues began to shape the law of armed conflict (LOAC). Compliance with civilian immunity norms slowly increased to better protect the most vulnerable class of participants in conflict.¹¹ During the Civil War, the United States adopted the first comprehensive code of conduct for land warfare, Army General Order No. 100.¹² The General in Chief of the Union was troubled by the uncertainty that his forces and the adversary expressed with respect to the treatment of combatants and noncombatants.¹³ He asked Dr. Francis Lieber, a leading law professor, to define guerilla warfare.¹⁴ Dr. Lieber created the first detailed code of military discipline in an effort to identify the boundaries of lawful conduct in war and “strike a balance between the demands of military necessity and principles of humanity.”¹⁵ One of the Lieber Code’s most basic elements, which states that protection under the LOAC is based on status (combatant or civilian) and is lost if one acts beyond the limits

Additional Protocol (AP I), which states: “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51.2, June 8, 1977, 1125 U.N.T.S. 243 [hereinafter AP I].

11. See ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 255 (1986) (“[D]uring part of the seventeenth and into the eighteenth centuries (1648–1789), wars tended to take the shape of contests between professionals . . .”); see also JUDITH GAIL GARDAM, *NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW* 12 (1993) (describing the contribution of Jean-Jacques Rousseau’s eighteenth-century theory, which distinguished individuals from their country and framed war as a contest between states, to the development of noncombatant immunity).

12. INT’L COMM. OF THE RED CROSS, *Introduction to CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES*, at xxxi (Jean-Marie Henckaerts et. al. eds., 3d ed. 2009) [hereinafter ICRC].

13. Newton, *supra* note 8, at 881–82. The dramatic death toll and routine targeting of civilians and civilian property has led some historians to label the Civil War a “total war.” James M. McPherson, *From Limited War to Total War in America*, in *ON THE ROAD TO TOTAL WAR: THE AMERICAN CIVIL WAR AND THE GERMAN WARS OF UNIFICATION, 1861–1871*, at 296 (Stig Förster & Jörg Nagler eds., 1997). During the conflict, nearly 4 percent of the Southern population perished, including one-quarter of men eligible to serve in the Confederate military. *Id.* at 295.

14. Newton, *supra* note 8, at 882.

15. GARDAM, *supra* note 11, at 16–17.

of prescribed behavior for that status, remains a fundamental aspect of the LOAC.¹⁶

The Lieber Code proscribed targeting of civilians and civilian objects.¹⁷ It also articulated a version of the principle of proportionality, a tenet of the LOAC that has come to be integrally tied with the use of human shields, in this fashion: "The unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."¹⁸ Thus, the Lieber Code articulated the era's approach towards civilians—they were not to be targeted directly but were not immune in all circumstances.¹⁹

The Lieber Code influenced later international treaties that further codified protection for civilians.²⁰ Foreign states issued similar codes and, later, more comprehensive military manuals that emphasized the vital importance of "behavioral norms" amongst all levels of military actors.²¹ The Second Hague Peace Conference of 1907 reiterated the rule of civilian immunity and included a provision on civilian objects.²² It also included a prohibition on attacks of undefended towns and dwellings.²³ Thus, the Conference marked the beginning of a regime that distinguished "the military significance of a target from its civilian purpose"²⁴ and acknowledged the issue of dual-use facilities to support both military operations and civilian activities.²⁵

16. See Newton, *supra* note 8, at 883 (explaining that the principle that persons who do not enjoy lawful combatant status are not entitled to the benefits of legal protections derived from the laws of war endures to this day).

17. Instructions for the Government of Armies of the United States in the Field art. 22, Apr. 24, 1863, available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> ("[A]s civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms."); *cf. id.* art. 21 ("The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.").

18. *Id.* art. 22.

19. *Id.*

20. ICRC, *supra* note 12

21. Newton, *supra* note 8, at 886.

22. Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulation Concerning the Laws and Customs of War on Land art. 25, Oct. 18, 1907, 36 Stat. 2277, reprinted in LAW OF WAR DOCUMENTARY SUPPLEMENT 28 (Brian J. Bill & J. Porter Harlow eds., 2010) (amending the 1899 Convention on Land Warfare).

23. *Id.*

24. Reynolds, *supra* note 7, at 10.

25. *Id.*; see also discussion *infra* Part II.C (discussing the principle of proportionality).

B. Total War and the Geneva Conventions

The evolution of international humanitarian law (IHL) protections for civilians in conflict stalled with the doctrine of “total war” that characterized World War I.²⁶ The total war approach advocated destruction of anything that would aid or support the enemy, including civilians, industry, and infrastructure.²⁷ The proliferation of aerial warfare made it difficult to discriminate between military and civilian targets; however, distinguishing between the two was unimportant under the total war paradigm.²⁸ Rather, combatants hoped to erode popular support for the war effort and force enemy leaders to step down in the face of domestic pressure.²⁹ The combination of aerial technology and the total-war mentality made for the most brutal war the world had ever seen. Civilians fared even worse during World War II as indiscriminate tactics led to large-scale nuclear attacks by U.S. forces on the Japanese cities of Hiroshima and Nagasaki in 1945.³⁰

The four Geneva Conventions of 1949, responding to the havoc the world had wreaked on itself during the World Wars, supplemented previous treaties that codified regulations for various protected groups.³¹ The Fourth Geneva Convention (GC IV), which related to protection of civilians in wartime, was the first detailed regulation on civilians in conflict.³² It specifically addressed the issue of human shields, e.g., the intentional collocation of protected persons and a military objective with the specific intent of using the presence of protected persons to shield the objective from attack by an adversary.³³ On this topic, Article 28 of GC IV states: “The presence of a protected person may not be used to render certain points or

26. See Reynolds, *supra* note 7, at 10.

27. See JEREMY BLACK, *THE AGE OF TOTAL WAR, 1860–1945*, at 1–11 (Rowman & Littlefield reprint ed. 2010) (providing a spectrum of definitions of total war that incorporate, inter alia, the level of mobilization, creation of new technologies, intensity of the conflict, its duration, and the level of brutality shown to noncombatants).

28. *Id.*

29. *Id.*

30. See *PERSPECTIVES ON MODERN WORLD HISTORY: THE ATOMIC BOMBINGS OF HIROSHIMA AND NAGASAKI* 28–36 (Sylvia Engdahl ed., 2011) (describing the Hiroshima bombing from the perspectives of President Harry Truman and a news story).

31. *E.g.*, ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 268 (2d ed. 2010). Geneva Convention I pertained to sick and wounded combatants; II to the wounded, sick, and shipwrecked members of the armed forces at sea; III to the treatment of prisoners of war; and IV to the protection of civilians in war.

32. Reynolds, *supra* note 7, at 16.

33. ICRC, *supra* note 12, at 339–40.

areas immune from military operations.”³⁴ Today, 194 countries have ratified the Geneva Conventions.³⁵

C. The Vietnam War and the Additional Protocols to the Geneva Conventions

Later conflicts proved the protections codified in the Geneva Conventions were insufficient to effectively safeguard civilians in war. The Vietnam War marked the appearance of “concealment warfare” when the People’s Army of Vietnam incorporated the civilian population into the conflict directly.³⁶ This strategy made it difficult to distinguish between military and nonmilitary targets and increased the collateral damage inflicted by U.S. forces.³⁷ By exploiting civilian deaths, the leaders of the Democratic Republic of Vietnam, as North Vietnam was known, achieved a level of strategic success that belied their technological and military capabilities.³⁸ In response, the U.S. public and the international community rallied against U.S. operations in the region.³⁹

For its part, the United States also acted in clear violation of the Geneva Conventions in Vietnam by targeting important infrastructure to injure civilian morale.⁴⁰ American troops used Agent Orange, a toxic defoliant, to destroy almost 2 million acres of food crops and land adjacent to agricultural areas in Vietnam.⁴¹ This only furthered international outrage, fanned by the savvy political efforts of the North Vietnamese leaders.⁴² Vietnam would be the first

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

35. *Geneva Conventions of 12 August 1949*, INT’L COMMITTEE RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited Oct. 23, 2012).

36. See TAI SUNG AN, *THE VIETNAM WAR* 25 (1998).

37. Reynolds, *supra* note 7, at 19.

38. See AN, *supra* note 36, at 25.

39. See *id.* at 22 (linking the success of Vietnamese communism in part to the antiwar movement in the West generally and the United States in particular); see also MICHAEL P. SULLIVAN, *THE VIETNAM WAR: A STUDY IN THE MAKING OF AMERICAN POLICY 107–08* (1985) (stating that 66 percent of Americans polled in January 1974 believed the United States’ involvement in the Vietnam War had been a mistake).

40. See Reynolds, *supra* note 7, at 17 (describing how aerial combat operations that targeted civilian resources also purported to injure civilian morale).

41. *Id.* at 17–18.

42. For example, Henry Kissinger declared:

We fought a military war; our opponents fought a political one. We sought physical attrition; our opponents aimed for our psychological exhaustion. In this process, we lost sight of the cardinal maxims of guerilla warfare: the guerilla wins if he does not lose. The conventional army loses if it does not win.

AN, *supra* note 36, at 294–95 (quoting Henry Kissinger, *The Vietnam Negotiations*, FOREIGN AFF., Jan. 1969, at 214).

“concerted, well-organized strategy by an adversary to exploit humanitarian concerns and discredit the U.S. for collateral damage from combat operations.”⁴³ As this Note later explains in more detail, the concealment tactics of the People’s Army of Vietnam would later be adopted by insurgents in Afghanistan and Iraq.⁴⁴

The United States’ experience in Vietnam engendered heightened concern for the well-being of civilians in conflict that persists in U.S. military operations today.⁴⁵ In 1977, two additional protocols to the Geneva Convention were opened for signature: Additional Protocol I (AP I), which pertained to international armed conflict, and Additional Protocol II, which pertained to noninternational armed conflict.⁴⁶ The Additional Protocols are the latest and most detailed LOAC rules to protect civilians by codifying the principles of proportionality and distinction.⁴⁷ These principles, in turn, form the infrastructure that supports the legal discourse on human shields.

Proportionality, or the mechanism by which military decision makers assess the lawfulness of military action, was articulated differently in the Additional Protocols than its original articulation in the Lieber Code. As a general matter, proportionality operates differently in the *jus ad bellum* (regulation of the use of force) context than it does in *jus in bello* (regulation of the means and methods of warfare) context.⁴⁸ In *jus ad bellum*, proportionality limits the ability to resort to force and the degree of force that a state uses.⁴⁹ AP I codifies *jus in bello* proportionality, which involves balancing the harm an attack will cause against the military advantage the attack will achieve.⁵⁰ This cost-benefit analysis factors in the injury caused

43. Reynolds, *supra* note 7, at 18–19.

44. See AN, *supra* note 36, at 295 (noting that asymmetry of military power proved to be an inaccurate predictor of the outcome of conflicts in the post-1945 world).

45. See Reynolds, *supra* note 7, at 23 (explaining how Additional Protocols I and II of the Geneva Conventions codify the principles of distinction, proportionality, necessity, and humanity).

46. CRYER ET AL., *supra* note 31, at 268.

47. Reynolds, *supra* note 7, at 23. Note that while the United States is not a state party to AP I, the articles that pertain to proportionality are widely considered to reflect customary international law and, thus, are binding on nonsignatories. See Stephane Ojeda, *US Detention of Taliban Fighters: Some Legal Considerations*, in 85 INTERNATIONAL LAW STUDIES: THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS 357, 357–59 (Michael N. Schmitt ed., 2009) [hereinafter INTERNATIONAL LAW STUDIES: AFGHANISTAN] (describing the law applicable to U.S. military involvement in Afghanistan).

48. See Enzo Cannizzaro, *Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War*, 88 INT’L REV. RED CROSS 779, 785 (2006) (finding that “different logic” inspires the proportionality requirement in *jus in bello*).

49. Jasmine Moussa, *Can Jus ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law*, 90 INT’L REV. RED CROSS 963, 975 (2008).

50. See *id.* at 976 (linking the degree of harm to either suffering, collateral damage, or both).

to combatants as well as civilian casualties and damage to civilian property.⁵¹

Though it is not the focus of this Note, the principle of distinction is another important limit on war-making capabilities.⁵² It requires that the parties to a conflict “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.”⁵³ However, while distinction is crucial to civilian immunity generally, proportionality is more relevant to the human-shield context. When a defending party collocates civilian and military objects, thus hindering an attacking party’s ability to distinguish between the two, the attacking party must then incorporate both into a proportionality calculation. The challenges presented by the use of human shields and the principle of proportionality are discussed in more detail below.

i. Additional Protocol I on Proportionality

Despite the absence of the word *proportionality* from the text of AP I, several of its articles codify the principle and form the basis for an understanding of proportionality in modern warfare. First, Article 35, which concerns “basic rules,” states that no party in an armed conflict may use weapons or methods of warfare that cause “superfluous injury or unnecessary suffering” or “widespread, long-term and severe damage to the natural environment.”⁵⁴ Article 35 reflects a foundational premise of proportionality: there are weapons and methods of warfare so destructive that they are disproportionate to the hypothetical military advantage, regardless of context.

Article 51, which concerns the protection of the civilian population, also pertains to proportionality.⁵⁵ Section 5(b) lists “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated” among types of attacks that are indiscriminate and, therefore, prohibited.⁵⁶ Thus, in addition to basic means and methods of warfare that are always

51. *Id.*

52. See Howard M. Hensel, *The Protection of Cultural Objects During Armed Conflict*, in *THE LAW OF ARMED CONFLICT: CONSTRAINTS ON THE CONTEMPORARY USE OF MILITARY FORCE* 39, 66 (Howard M. Hensel ed., 2005) (listing the principle of distinction (“discrimination”) as one of the most significant components of contemporary humanitarian law with respect to protection of civilian property).

53. AP I, *supra* note 10, art. 48.

54. *Id.* art. 35.

55. *Id.* art. 51.5(b).

56. *Id.*

disproportionate, Article 51 adds methods of attack that, though otherwise lawful, would be more harmful than warranted by the potential military advantages in the specific context.

Article 57 helps military decision makers determine what “excessive” means within the language of Article 51. It explains combatants must use “constant care” with respect to the civilian population.⁵⁷ When planning and executing an attack, military leaders must “do everything feasible” to ensure the “objectives to be attacked are neither civilians nor civilian objects,” but rather military objectives as defined by Article 52, paragraph 2.⁵⁸ Even after military planners have verified that their target is a military objective, they must take “all feasible precautions” with respect to the choice of means and methods of attack in order to minimize harm to civilians and civilian property.⁵⁹ If, during the course of the attack, it becomes clear they have miscalculated the lawful status of the target or the level of harm to civilians so that it exceeds the balance of Article 51, the attack must be cancelled or suspended.⁶⁰ Commanders must also give advance warning to the civilian population of an impending attack “unless circumstances do not permit.”⁶¹

AP I further instructs that it is insufficient to simply avoid “excessive” loss of civilian life, injury, or damage to civilian property (in relation to the concrete and direct military objective) when there

57. *Id.* art. 57.1.

58. *Id.* art. 52.1. Article 52, paragraph 2 indicates:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Id. art. 52.2.

59. *Id.* art. 57.2(a)(ii).

60. *Id.* art. 57.2(b).

61. *Id.* art. 57.2(c); see also Pnina Sharvit Baruch & Noam Neuman, *Warning Civilians Prior to Attack Under International Law*, in *INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR* 359, 361–412 (Raul A. Pedrozo & Daria P. Wollschlaenger eds., 2011) (describing precautionary measures required to minimize civilian attacks). The most comprehensive warning campaign to date was undertaken by Israel during the Second Lebanon War. *Id.* at 368. The Israeli Defense Forces issued warnings to evacuate via leaflets dropped by aircraft, telephone messages, radio broadcasts, and conversations with community leaders. *Id.* at 369. Despite this comprehensive warning campaign, many citizens did not evacuate. *Id.* Many felt they had nowhere to go and did not want to lose their possessions when they fled. Others were persuaded by Hezbollah threats to kill those who heeded the Israeli warnings. Though it is beyond the scope of this Note, the debate raises the question of what an “effective” warning is: one that accurately communicates the imminent danger to civilians in an attack zone, or one that induces civilians to evacuate? See *id.* at 377–93 (discussing factors to be considered in establishing an effective warning).

are multiple courses of action available.⁶² Section 3 of Article 57 requires that: “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.”⁶³ Thus, to comply with the principle of proportionality, a military decision maker must also choose the option that causes the least harm to civilians.

Article 85(3)(b) completes the treatment of the principle of proportionality in AP I.⁶⁴ It specifies that an indiscriminate attack that affects the civilian population or property when a belligerent knows the attack will cause “excessive loss of life, injury to civilians or damage to civilian objects” is a grave breach.⁶⁵ Thus, proportionality works to limit the escalation of conflict that threatens both civilians and the basic tenets of the LOAC.

ii. Additional Protocol I on Human Shields

Article 51 of AP I contains separate provisions regarding the obligations of the shielding party and the impeded party in a situation where human shields are present.⁶⁶ Article 51(7) concerns the shielding party:

The presence or movements 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 population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.⁶⁷

Article 51(8) addresses the obligations of the impeded party when confronted with human shields and states that, “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.”⁶⁸ The dual-obligation structure is repeated in Article 57 (precautions in attack), which lists responsibilities of the

62. See AP I, *supra* note 10, art. 57.3 (stating that objectives that cause the least danger to civilians should be selected).

63. *Id.* art. 57.

64. *Id.* art. 85.3(b).

65. *Id.*

66. The titles “shielding party” and “impeded party” appear in Amnon Rubinstein & Yaniv Roznai, *Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality*, 22 STAN. L. & POL'Y REV. 93 (2011).

67. See AP I, *supra* note 10, art. 51.7.

68. *Id.* art. 51.8.

attacking party (the impeded party in a shield situation), and Article 58 (precautions against the effects of attacks), which a defending party violates when it uses civilians as human shields.⁶⁹

These protections extend to all civilians in an international armed conflict unless they take direct part in hostilities, thereby losing the protections afforded to them by their civilian status.⁷⁰ Other relevant provisions of AP I include Article 37, a proscription of perfidy, which lists among its prohibited acts “the feigning of civilian, non-combatant status,”⁷¹ and Article 50(3), which states that the presence within a civilian population of combatants or civilians taking direct part in hostilities does not rob the population of its civilian character.⁷²

III. THE DIVERSE DEMOGRAPHICS OF HUMAN SHIELDS

Human shields are not a homogeneous class of victims. As indicated by the use of the term *protected persons*, human shields are often civilians but can also be other persons *hors de combat*, such as sick or wounded combatants, or prisoners of war.⁷³ For example, Iraq used captured coalition forces to shield military sites from coalition bombs during the First Gulf War.⁷⁴ Even within the civilian category of shields, there are important distinctions that may necessitate different responses from an impeded party. First, human shields used unwillingly or unknowingly to deter an attack retain the LOAC protections afforded by their civilian status, whereas civilians who volunteer as shields may be taking “direct part in hostilities” and, therefore, lose such protections.⁷⁵ Similarly, some commentators call for differing approaches when civilians are used as shields as part of

69. *Id.* arts. 57–58.

70. *Id.* art. 51.3.

71. *Id.* art. 37(c).

72. *Id.* art. 50.3.

73. *See id.* arts. 11–12; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 19, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (“The responsible authorities shall ensure that [fixed establishments and mobile medical units] are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety.”); Geneva Convention Relative to the Treatment of Prisoners of War art. 23, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.”).

74. J. Michael Kennedy, *POWs as ‘Shields’: Iraq Sends Captured Allied Airmen to Strategic Sites: Cloud Cover Hampers Bombing*, L.A. TIMES, Jan. 21, 1991, http://articles.latimes.com/1991-01-21/news/mn-591_1_cloud-cover.

75. AP I, *supra* note 10, art. 51.3.

a long-term strategy as opposed to when an individual civilian is used as a shield in an isolated and unpremeditated incident.⁷⁶

A. Voluntary vs. Involuntary Shields

A common distinction is made between voluntary shields (those who elect to serve as shields of their own volition) and involuntary shields (those who are used as shields against their will). Many scholars and policy makers advocate leaving voluntary shields out of proportionality analysis because such civilians have lost the protection of their civilian status by taking direct part in hostilities.⁷⁷ But in many cases, “voluntary” shields are coerced and manipulated into protecting a military objective; their participation may not be “direct” enough for the civilians to lose their Article 51 protections. For example, during the First Gulf War, Saddam Hussein coerced families to take up residence in Baghdad palaces (potential coalition targets) with the promise of extra food rations.⁷⁸ Other families soon followed and many received free meals at palaces and industrial sites throughout the country, thus hindering coalition air power manned by soldiers who were unsure of how to perform the operation in such close proximity to civilians.⁷⁹

Another instance of the blurred line between voluntary and involuntary shields is the use of Somali children in combat by the militant Islamist group al-Shabaab, which has increased steadily since 2009.⁸⁰ Al-Shabaab fighters offer money, food, and mobile phones to children who participate in combat against Transitional Federal Government forces.⁸¹ Children and their families who refuse are often attacked.⁸² As a recent Human Rights Watch report on Somali child soldiers noted, “The very notion of voluntariness of any child’s decision, particularly in the context of extreme poverty, hunger, and al-Shabaab’s well-known violence against those who

76. *E.g.*, YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 130 (2004).

77. *Id.*

78. *See Putting Noncombatants at Risk: Saddam’s Use of “Human Shields,”* CENT. INTELLIGENCE AGENCY GEN. REP., 4–8 (Jan. 2003), https://www.cia.gov/library/reports/general-reports-1/iraq_human_shields/index.html [hereinafter *Saddam’s Use of “Human Shields”*] (describing the use of human shields as a tactic to forestall military attacks in Iraq).

79. *Id.*

80. *See* HUMAN RIGHTS WATCH, NO PLACE FOR CHILDREN: CHILD RECRUITMENT, FORCED MARRIAGE, AND ATTACKS ON SCHOOLS IN SOMALIA 20 (2012) (discussing the recruitment and use of child soldiers in Somalia).

81. *See id.* at 19–20, 23–26 (describing the al-Shabaab recruitment tactic of pressuring children to join by offering various incentives).

82. *See id.* at 23–26 (explaining how al-Shabaab threatens those who do not want to be recruited).

refuse, to join an armed group is questionable.”⁸³ Once on the battlefield, media outlets have documented widespread instances of indoctrination of children through the same training that al-Shabaab soldiers receive, after which the soldiers send the children to the frontlines as a distraction while combatants fire from behind.⁸⁴

The distinction between voluntary and involuntary shields is further complicated by the reality that the difference between the two is often unclear on the ground.⁸⁵ It is difficult to differentiate between voluntary shields and unknowing shields that are unaware of their proximity to a military objective.⁸⁶ During the Second Lebanon War in 2006, the Israeli Defense Forces claimed Hezbollah launched missiles from the homes of Lebanese civilians living near the Israeli border.⁸⁷ The Israeli Defense Forces asserted that prior to the conflict, Hezbollah modified several homes without the occupants’ permission.⁸⁸ Many homeowners did not know missiles had been placed in one-room additions to their houses until Hezbollah combat teams entered and attempted to launch surface-to-surface missiles towards Israeli civilian areas.⁸⁹ Israeli intelligence was aware of many house launch sites and targeted them, resulting in enemy and civilian casualties.⁹⁰

B. Systematic vs. Isolated Use of Shields

Important differences also exist between human shields used as an unpremeditated tactic and those used as part of a consistent strategy over time. Some thinkers advocate adjusting proportionality analysis when the use of human shields is “widespread or systematic”

83. *Id.* at 22–23.

84. Ambrosia Sabrina, *Somali Children as Human Shields in Combat*, INT’L BUS. TIMES, 1 (Feb. 22, 2012, 7:05 AM), <http://www.ibtimes.com/articles/302691/20120222/somali-children-human-shields-combat-abused-forced.htm>.

85. See George K. Walker, *Occupation in Iraq: A Rubik’s Cube Problem?*, in 86 INTERNATIONAL LAW STUDIES: THE WAR IN IRAQ: A LEGAL ANALYSIS, 219, 224 [hereinafter INTERNATIONAL LAW STUDIES: IRAQ] (describing the “mixed” situation in which an attack on foreign forces by a mob might include both willing and unwilling citizens of the occupied state, operatives sponsored by other states, and domestic belligerents).

86. See ICRC, *supra* note 12, at 337 (noting that for the intent requirement to be satisfied, the combatant using the shield tactic would have to purposely collocate the military objective and the unaware civilians).

87. *Deadly Hezbollah Chess Match*, WASH. TIMES (Oct. 25, 2006), <http://www.washingtontimes.com/news/2006/oct/25/20061025-092622-2090r/>.

88. *Id.*

89. *Id.*

90. HUMAN RIGHTS WATCH, FATAL STRIKES: ISRAEL’S INDISCRIMINATE ATTACKS AGAINST CIVILIANS IN LEBANON 14 (2006); *Deadly Hezbollah Chess Match*, *supra* note 87.

to allow greater weight to the military-objective side of the analysis.⁹¹ Presumably, this adjustment would allow the attacking force to react unimpeded by the presence of shields when they are routinely used but would impede the attacking force in the individual, isolated situation. Such an approach would give more leeway to military decision makers in the former instance to inflict collateral damage. Ideally, it would also mitigate the risk of unnecessary or unlawful civilian casualties through better planning and communication. There is generally more time for decision making and greater oversight from military leadership when shields are used in an organized and systematic fashion than when an individual soldier is confronted unexpectedly with a belligerent using a human shield.⁹²

However, the approach described above fails to give due importance to the reality that the single-shield situation is a pervasive problem, as measured by its increased use in counterinsurgencies and the high rate of casualties (both within the civilian population and among combats) that has resulted from it.⁹³ In order to prepare soldiers for such situations, the Rules of Engagement Vignette Handbook (the Handbook) used by U.S. troops in Afghanistan puts forth numerous examples in which soldiers may confront single individuals using human shields in an unpremeditated fashion, including:

You and your squad are clearing a building that has been reported to contain preschool-age children and their teachers as well as several enemy personnel who have been ranging your company with effective machine gun fire. As you enter a room . . . you immediately notice that behind four children and an adult woman is an enemy with an AK-47. . . . [H]e raises his rifle and is about to fire on your squad mate.⁹⁴

In this situation, the Handbook acknowledges that there is no time to use graduated force (e.g., warning, displaying weapon, etc. before resorting to deadly force).⁹⁵ It advises a soldier in this situation to shoot immediately rather than endanger the squad with hesitation.⁹⁶ If the civilians interfere, the Handbook notes the soldier has the authority to detain them.⁹⁷ Often, however, situations such as this result in the deaths of the soldiers faced with shields, the shields

91. *E.g.*, DINSTEN, *supra* note 76, at 120–21.

92. Interview with Michael A. Newton, Professor of the Practice of Law, Vanderbilt University Law School, in Nashville, Tenn. (Feb. 21, 2012).

93. *Id.*

94. CENTER FOR ARMY LESSONS LEARNED, RULES OF ENGAGEMENT VIGNETTES HANDBOOK, No. 11-26, 53 (2011) [hereinafter CALL].

95. *Id.* at 54.

96. *Id.*

97. *Id.*

themselves, or both.⁹⁸ This illustrates the relevance of individual shield use in modern conflict and indicates that the collateral-damage side of the proportionality calculation should carry the same weight here as it does when human shields are used as part of a widespread and systematic strategy.

IV. WHY BELLIGERENTS USE HUMAN SHIELDS

Given the diverse types of shields used and the wide variety of contexts in which they appear, it is unsurprising that multiple factors contribute to the widespread use of this tactic in modern conflicts. This Part explores the three major factors that combine to make human shields an attractive strategy, particularly to asymmetrically disadvantaged belligerents.

Though there is a well-developed body of treaty law and customary international law created to protect civilian immunity, statistics on war casualties reveal civilians comprise a greater percentage of combat casualties than before GC IV and AP I were ratified. It is estimated that 15 percent of deaths in World War I were civilians.⁹⁹ In World War II, civilians accounted for an estimated 65 percent of deaths.¹⁰⁰ In today's conflicts, civilian casualties are estimated at more than 84 percent.¹⁰¹ This dramatic increase in rates of civilian casualties, despite the passage of the most influential treaties on the issue, can be attributed to three major factors: technological asymmetry, diversity of obligations and restraints, and doctrinal divergence between modern adversaries. When combined, these factors have two important effects on both parties in a conflict: a broadening of the scope of military objectives and a shift in the value of the variables used by both sides in proportionality analysis.

A. Factor One: Technological Asymmetry

The proliferation of military technological advancements has had consequences for both the advantaged and disadvantaged sides of a conflict. The increasing geographical scope of the battlefield that results from technological advancements makes civilians less secure due to their proximity to combat, and also gives belligerents easier

98. Yara Bayoumy, *U.S. Troops Gone, Al Qaeda Makes Iraq Peace Elusive*, REUTERS, Mar. 9, 2012, <http://www.reuters.com/article/2012/03/09/us-iraq-qaeda-idUSBRE8280OH20120309>.

99. Fischer, *supra* note 4, at 484.

100. *Id.*

101. *Id.*

access to civilians.¹⁰² Battlefields were once located far from civilian areas and delineated with clear borders; the rise of urban warfare has changed the situation.¹⁰³ It is now possible for a conflict to reach every corner of a village, city, and country, making collateral damage more likely. A highly mobile and urban-oriented battlefield also makes it easier for combatants to engage in perfidy by feigning protected status (in contravention of AP I Article 37(c)), and by using proximity to protected groups to deter attacks.¹⁰⁴ As Lieutenant Colonel Andrew P. Poppas observed of U.S. operations in Afghanistan:

[T]he almost exponential growth of the world's population and urban centers has meant that military formations have to be absolutely more discriminate in targeting enemy forces lest we lose the war in spite of winning the battle by having a population turn against us for the perception of killing innocent people indiscriminately.¹⁰⁵

i. Effects of Technological Superiority on the Advantaged Side

Technological developments have enabled effects-based operations (EBO) to replace traditional attrition warfare as the preeminent operational concept.¹⁰⁶ EBO is a targeting doctrine based on efficiency.¹⁰⁷ It seeks to achieve the desired effect of a specific engagement while minimizing time, risk, and cost.¹⁰⁸ This can increase compliance with the LOAC principles because EBO prefers the least intrusive, most effective means of achieving a goal, thereby minimizing negative effects on the civilian population.

For example, air planners charged with targeting Iraqi air-defense-sector operations centers during the First Gulf War originally determined that destruction of the centers would require a much larger number of aircraft and bombs than was available at the

102. See Rubinstein & Roznai, *supra* note 66, at 94 (explaining the exploitation of civilians in armed conflict).

103. *Id.*

104. See Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 AIR FORCE L. REV. 1, 15 (2008) (explaining the methods combatants use to deter attacks).

105. Interview with Andrew P. Poppas, Lieutenant Colonel, U.S. Army, in Nashville, Tenn. (May 24, 2011).

106. Schmitt, *supra* note 104, at 6.

107. See Allen W. Batschelet, *Effects-Based Operations for Joint Warfighters*, FIELD ARTILLERY, May–June 2003, at 7, 8, available at <http://sill-www.army.mil/firesbulletin/archives/index.html#2000> (referring to EBO as the most efficient and effective way to utilize a military force because scarce resources can be used where they are needed most).

108. Schmitt, *supra* note 104, at 29.

time.¹⁰⁹ Faced with resource constraints, the planners reoriented from a total-destruction model to focus on the specific effect desired: render the operation centers inoperative.¹¹⁰ From this perspective, the mission required dramatically less air power—destroying each of the underground centers required eight F-117s, while just one F-117 could disable each facility.¹¹¹ The planners could limit destruction in the area and, therefore, minimize injury to civilians and civilian property while still satisfying the commander's theater objectives of attacking Iraqi military command and achieving air superiority.¹¹²

However, EBO can also work against humanitarian concerns because it risks prioritizing efficiency over distinguishing between traditional military and nonmilitary objectives.¹¹³ Therefore, there is a greater risk of damage to civilians and civilian objects for the sake of efficient realization of an important goal in a particular EBO.¹¹⁴ Lieutenant General Michael Short, the North Atlantic Treaty Organization (NATO) air component commander for Operation Allied Force, articulated this reprioritization with regard to the NATO bombing of Belgrade:

I felt that on the first night, the power should have gone off, and major bridges around Belgrade should have gone into the Danube, and the water should be cut off so that the next morning the leading citizens of Belgrade would have got up and asked "Why are we doing this?" and asked Milosevic the same question . . .¹¹⁵

While the destruction of infrastructure important to civilian transportation, livelihood, and access to goods and services may have been an effective way to turn public pressure on President Slobodan Milošević, it is alarmingly reminiscent of the civilian targeting strategy advocated during some of the darkest times of LOAC compliance.¹¹⁶ This strategy clearly contravenes AP I Article 51(2),

109. Allen W. Batschelet, *Effects-Based Operations: A New Operational Model?* 9 (U.S. Army War College Strategy Research Project, 2002), available at www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA404406.

110. *Id.*

111. Batschelet, *supra* note 107, at 8.

112. *Id.*

113. For example, AP I Articles 48, 51(2), and 52(2) require military forces to distinguish between military and nonmilitary populations. AP I, *supra* note 10, arts. 48, 51.2, 52.2.

114. *Id.* art. 30.

115. Craig R. Whitney, *Crisis in the Balkans: The Commander; Air Wars Won't Stay Risk-Free, General Says*, N.Y. TIMES (June 18, 1999), <http://www.nytimes.com/1999/06/18/world/crisis-in-the-balkans-the-commander-air-wars-won-t-stay-risk-free-general-says.html> (internal quotation marks omitted).

116. See discussion *supra* Part II.A (describing the evolution of compliance with the LOAC and the Lieber Code).

which prohibits acts or threats of violence whose primary purpose is to terrorize civilians.¹¹⁷

Thus, EBO conceives of military objectives more broadly than traditional attrition warfare.¹¹⁸ Article 52(2) of AP I defines a military objective as one whose nature, location, purpose, or use makes an effective contribution to military action; *and* whose destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.¹¹⁹ But the targeting practice that has emerged focuses far more on the second part of the definition than the first. One example of this trend is U.S. forces striking electrical power grids in Baghdad during the First Gulf War.¹²⁰ As Lieutenant General Charles Horner, the commander for U.S. and allied air operations, said in an interview with the Washington Post:

You target the electrical power grids because electricity is used to support a broad range of activities, including the military. So, it's a valid target. You also want to bring the war to all Iraqis so that you can end it quickly without killing everyone. The downside is that after the war, people don't have power.¹²¹

When an advantaged party faces an opponent with very low technological abilities, the risk of the party prioritizing efficiency over the distinction between military and nonmilitary objectives rises. Because the threat of reciprocal damage is removed, the advantaged party may act with impunity, disregarding the principle of distinction between military targets and civilians and civilian property.¹²² After stating that NATO forces should have targeted various utilities and civilian infrastructure in Belgrade, General Short remarked on his surprise at the inefficacy of the Serbian anti-aircraft missile defense system.¹²³ Lack of effective weaponry on the Bosnian Serb side facilitated the NATO bombing of Belgrade.

117. AP I, *supra* note 10, art. 51.2 (“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”).

118. See Schmitt, *supra* note 104, at 30 (“EBO may . . . negatively influence IHL compliance. This is apparent in the proposal of operational concepts urging a broad interpretation of military objectives.”).

119. AP I, *supra* note 10, art. 52.2.

120. Q&A with Lt. Gen Charles Horner, WASH. POST, <http://www.washingtonpost.com/wp-srv/inatl/longterm/fogofwar/hornertext.htm> (last visited Oct. 23, 2012).

121. *Id.*

122. Schmitt, *supra* note 104, at 32.

123. Whitney, *supra* note 115, at 22.

ii. Effects of Technological Inferiority on the Disadvantaged Side

Technological asymmetry also affects the disadvantaged party in a conflict. An underdog mentality (as seen in the counterinsurgency context between allied and Iraqi forces) often leads the disadvantaged side to act outside of the rules in order to keep up with the technologically rich adversary.¹²⁴ A combatant is more likely to comply with the LOAC when he believes compliance serves his interests, whereas a combatant who sees himself as disadvantaged by the constraints of humanitarian law will likely move beyond them.¹²⁵

In the face of an attacker whose technology, wealth, and numbers cannot possibly be beaten, the norms of international humanitarian law tend to become more permeable and may be disregarded altogether.¹²⁶ Though the disadvantaged belligerent may not have ratified AP I or even be aware of it, the basic premise of striking only those people or objects that are affiliated with an opponent's military is nothing new. But when the disadvantaged party faces constant defeat at the hands of a seemingly unbeatable foe, every objective the underdog can strike is more likely to be considered a military objective.¹²⁷ This mentality likely contributes to Hamas's systematic violations of the LOAC, which have been described as a "case study par excellence" of systematic violation of international humanitarian law.¹²⁸ Throughout years of conflict with Israel's superior military power, Hamas has committed multiple violations of international law, including deliberate targeting of civilians, launching attacks from within civilian areas, and using humanitarian symbols, such as an ambulance or a UN logo, to disguise combatants.¹²⁹

The unlawful tactics employed by a disadvantaged party like Hamas can effectively level the technological playing field against a developed military power that complies with IHL to a greater degree. What good is the latest firepower if an adversary cannot use it for

124. See Schmitt, *supra* note 104, at 29–33 (stating that "disadvantaged forces facing technologically superior forces" will frequently resort to intentional violations of IHL).

125. *Id.* at 3.

126. *Id.* at 25.

127. See *id.* at 28 (indicating that a weaker party will broadly interpret "effective contribution to military action" and "definite military advantage" in identifying military objectives).

128. Haviv Rettig Gur, *Law Professor: Hamas Is a War Crimes 'Case Study,'* JERUSALEM POST, Jan. 14, 2009, at 4.

129. See *id.* (describing the six violations of international law being committed by Hamas).

fear of causing major collateral damage?¹³⁰ If the presence of civilians causes the advantaged adversary to pause even for a moment, the shielding party may gain an advantage that it would not have otherwise achieved.

Noncompliance with principles of humanitarian law may become more common the longer a conflict between a comparatively advantaged party and disadvantaged party endures. Basic principles of economics show that when something is in short supply, its value grows.¹³¹ Similarly, when victories are few and far between, a disadvantaged adversary likely values victories more highly. As a conflict becomes increasingly dire, the belligerent with fewer resources may become more willing to sacrifice disproportionate collateral damage for small military advantages.¹³² And if the disadvantaged party feels civilians are the only weapon at hand, it may use those civilians in an effort to “alter the [advantaged party’s] cost-benefit calculations enough to achieve their aims without having to defeat their enemy’s superior military.”¹³³ In this way, technological asymmetry has induced noncompliance with principles of humanitarian law by both the parties in modern warfare.

B. *Factor Two: Diversity of Obligations and Restraints*

At its foundations, IHL is premised on interactions between state actors who are motivated by fundamental reciprocity and share the same basic interests.¹³⁴ Parties limit their actions in conflict because, in doing so, they ensure the other side will also act with restraint.¹³⁵ Moreover, because most state actors share similar values and obligations, they are better informed about the others’ actions and negotiate with each other more easily.¹³⁶ But in an asymmetric situation between a state and a nonstate actor, the infrastructural incentives to follow the rules disintegrate, and IHL “begins appearing

130. See Schmitt, *supra* note 104, at 15 (explaining that under customary international law, parties are required to take “all feasible precautions” to minimize collateral damage when choosing weapons and tactics (quoting JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 7 (2005)).

131. WILLIAM J. BAUMOL & ALAN S. BLINDER, ECONOMICS: PRINCIPLES AND POLICY 68 (12th ed. 2012) (illustrating the economic law of supply and demand with the example of the Napa cabbage crop, which was wiped out in heavy rains during the fall of 2010 and promptly quadrupled in price).

132. Schmitt, *supra* note 104, at 28.

133. *Id.* at 25–26.

134. *E.g., id.* at 42.

135. *Id.*

136. See ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS 91–93 (2008) (discussing the interest that all states have in reinforcing their reputational credibility by following through on treaty commitments).

as if it operates to the benefit of one's foes."¹³⁷ When a state party confronts a nonstate actor during hostilities (as with U.S. counterinsurgency operations in Iraq and Afghanistan), the asymmetry initially created by technology widens because the adversaries face disparate obligations and restraints. As one scholar posited, the international community is "witnessing the birth of a capabilities-based IHL regime."¹³⁸

The state actor has obligations to both domestic and enemy civilians. Leaders of a democratic state must protect citizens from threats to their safety and property, represent their interests abroad, and maintain domestic social and economic health.¹³⁹ When heads of state fail to fulfill these obligations, they do so at the risk of being voted out of office.¹⁴⁰ Even in nondemocratic states, a failure to satisfy the basic needs of citizens may result in a change in power.¹⁴¹ In addition to the duties owed to their citizens, states have obligations derived from treaties and customary international law to refrain from harming enemy civilians in conflicts.¹⁴² When states fail to fulfill these obligations, they face the condemnation of fellow states and other international actors, whose criticism creates an effective system of restraint.¹⁴³

The reciprocal advantages available to states with positive, reliable reputations provide a powerful incentive to act within

137. Schmitt, *supra* note 104, at 42.

138. *Id.* at 36.

139. President Barack Obama invoked this theme in his 2008 speech accepting nomination by the Democratic National Congress when he said:

Ours is a promise that says government cannot solve all our problems, but what it should do is that which we cannot do for ourselves: protect us from harm and provide every child a decent education; keep our water clean and our toys safe; invest in new schools and new roads and science and technology. Our government should work for us, not against us. It should help us, not hurt us. It should ensure opportunity not just for those with the most money and influence, but for every American who's willing to work.

Barack Obama, Democratic Candidate for President, Acceptance Speech at the Democratic National Convention (Aug. 28, 2008), *quoted in* David Elliot Cohen & Mark Greenburg, *OBAMA: THE HISTORIC FRONT PAGES* 35 (2009).

140. See, e.g., *THE FEDERALIST NO. 71* (Alexander Hamilton) (describing a new election as the time when the public judges the conduct, confidence, and firmness of the incumbent president).

141. Margaret Scobey, Former U.S. Ambassador to Egypt, Address at the Nashville Committee on Foreign Relations Monthly Meeting (Feb. 1, 2012).

142. Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?*, 16 *EMORY INT'L L. REV.* 445, 461 (2002).

143. See GUZMAN, *supra* note 136, at 78–80 (stating that the degree of reputational damage states will suffer from failing to adhere to a commitment will depend on the reason for the violation).

international norms and laws.¹⁴⁴ Thus, a paradoxical situation is created: “The more a military is capable of conducting ‘clean’ warfare, the greater its legal obligations, and the more critical the international community will be of any instance of collateral damage and incidental injury (even when unavoidable).”¹⁴⁵

Neither obligations nor restraints operate the same way on nonstate actors.¹⁴⁶ Nonstate actors do sometimes adopt “state-like functions,” as when the Sendero Luminoso of Peru took control of coca production in the southern highlands of Peru.¹⁴⁷ Just as a state might regulate the corn market, Sendero created a public market for the taxation of coca leaves.¹⁴⁸ The infrastructure created by the rebel group protected civilians from being caught in the crossfire of Colombian drug traffickers and government soldiers.¹⁴⁹ The market also kept inflated tax rates down through competition.¹⁵⁰

But even when a nonstate actor emulates customary state pursuits, it does so by choice and not because it must answer to citizens through traditional mechanisms of accountability.¹⁵¹ Nonstate actors’ motivation in this circumstance is generally a larger political goal like amassment of power, resources, or support. The well-being of citizens is merely a fringe benefit that may not endure. Sendero, for example, created the coca infrastructure in Peru to organize and maximize civilian labor in coca fields to profit from an illicit substance rather than a desire to create a long-term system of governance or manage arable land.¹⁵²

A nonstate actor will likely choose to be constrained by state-like functions when the actor’s ultimate goal is replacing an existing government.¹⁵³ When the goal is a larger political or spiritual gain, however, a nonstate actor will not likely subject itself to state-like obligations. The FARC, for example, is not elected by the people of Colombia and its success does not depend on their support and goodwill.¹⁵⁴ Similarly, al-Qaeda insurgents are not accountable for

144. See Schmitt, *supra* note 104, at 35–36 (discussing the intense normative pressure on states with advanced militaries to minimize collateral damage when deploying military force, consistent with advances in their technology).

145. *Id.* at 36.

146. See Fischer, *supra* note 4, at 490–91 (“[S]ince insurgencies and terrorist groups, unlike states, do not have their own civilian population, they are able to risk civilian lives without facing many of the consequences that states would encounter.”).

147. WEINSTEIN, *supra* note 10, at 192.

148. *Id.* at 193.

149. *Id.*

150. *Id.*

151. See *id.* at 37–39.

152. *Id.* at 192.

153. See *id.* at 35, 37.

154. See JAMES J. BRITAIN, REVOLUTIONARY SOCIAL CHANGE IN COLOMBIA 221–25 (2010). When asked by the author why the FARC did not try to take over

the economic health of Afghanistan or for rebuilding the country when the conflict comes to an end.¹⁵⁵ The large social constructs that wield great influence over states' behavior do not have the same impact on nonstate actors.¹⁵⁶ To the extent nonstate actors are scrutinized by the international community, they have proven themselves effective at manipulating the discourse of public opinion.¹⁵⁷

C. Factor Three: Doctrinal Divergence

In place of obligations owed to citizens or maintenance of reciprocal relationships within the international community, nonstate actors are often driven by goals of greater spiritual significance.¹⁵⁸ Many such groups fight for a long-term victory that is inexorably linked with larger political conquest, survival of identity, or triumph of religious beliefs.¹⁵⁹ The motivation of a belief system that is more ardent than one's foes' can be a tremendous force multiplier, increasing the capacity of a small number of troops.¹⁶⁰ When the Chechen separatist movement adopted an Islamic discourse, beginning in 2002, it became a more effective opposition to Russian power.¹⁶¹ Though it was unclear to observers whether this change in rhetoric resulted from a search for moral support or shift in identity influenced by radical leaders, it was all the more threatening to the Russian government.¹⁶²

One such doctrinal difference exists between parties motivated primarily by traditional military concerns and opponents whose goals are politically oriented.¹⁶³ A party that strives for a victory larger than a military objective may employ strategies that move far beyond the scope of IHL. For example, if the Palestinian Liberation

government power in a coup d'état, a comandante responded, "[T]o do so would have gone against the (Marxist-Leninist) ideology of the insurgency." *Id.* at 221.

155. *Id.*

156. *Id.*

157. See discussion *infra* Part V.C.

158. See WEINSTEIN, *supra* note 10, at 34–39.

159. *Id.* at 34 (describing a psychological pathway utilized by rebel groups to recruit new members where individuals experience a discrepancy between what they think they should have and what is actually available to them).

160. Arie J. Schaap, *Cyber Warfare Operations: Development and Use Under International Law*, 64 AIR FORCE L. REV. 121, 133 (2009) (defining a force multiplier as "a military term that describes a weapon or tactic that, when added to and employed along with other combat forces, significantly increases the combat potential of that force").

161. See EMMA GILLIGAN, *TERROR IN CHECHNYA* 123–25 (2010) (discussing the increasingly Islamist discourse in Chechnya and its deliberate aggression directed toward Russia).

162. See *id.* (discussing the war crimes committed by Chechen forces).

163. WEINSTEIN, *supra* note 10, at 34–39.

Organization (PLO) understood the Israeli–Palestinian conflict as a purely territorial dispute, it could utilize the LOAC’s wide range of lawful tactics to achieve its goal. But the PLO’s “phased strategies” of the 1960s and 1970s aimed beyond mere control of the land in dispute.¹⁶⁴ Instead, the PLO desired the very annihilation of Israel.¹⁶⁵ Thus, it is not surprising the PLO has historically disregarded the LOAC;¹⁶⁶ humanitarian law does not contain the tools to achieve this larger political goal.

The greatest doctrinal imbalance exists between two parties when one side engages in a systematic devaluation of life based on disillusionment with IHL or radical religious beliefs.¹⁶⁷ When combatants perceive the civilian population is suffering, they are likely to view the humanitarian laws that are meant to protect civilians in a fundamentally different light. If IHL fails to protect the civilians around him, a disadvantaged combatant may not see the benefit of compliance with a regime that renders its own force less effective. Moreover, combatants in this situation may judge the state or military force thought to be responsible for this suffering as undeserving of IHL’s benefits.¹⁶⁸ At the most extreme end of the continuum, a combatant is more likely to put civilians in danger when he believes those who die at the hands of the enemy will be rewarded in heaven as martyrs.¹⁶⁹

164. ARYEH Y. YODFAT & YUVAL ARNON-OHANNA, PLO STRATEGY AND TACTICS 61 (1981) (citing Cairo daily publication *Al-Ahram*, Sep. 14, 1969) (“[T]he Palestinian Resistance opposition to Israel is actually opposition to the latter’s right to existence and not to the extent of this existence.”).

165. See *id.* at 49–65 (describing the ideology of the PLO and how it was applied in the formative days of the organization).

166. *Id.*

167. Marc Sageman, *A Strategy for Fighting International Islamist Terrorists*, 618 ANNALS AM. ACAD. POL. & SOC. SCI. 223, 225 (2008). Sageman describes the four prongs of radicalization that work on would-be terrorists as (1) a sense of moral outrage, (2) a specific interpretation of the world, (3) resonance with personal experiences, and (4) mobilization through networks. He notes that for radical Islamist combatants, the major source of moral outrage was “the killings of Muslims in Bosnia, Chechnya, the second Palestinian intifada, and Kashmir.” Since 2003, the war in Iraq has fueled radicalization, *id.* at 224, along with widespread poverty and a perceived war on Islam from the West, *id.* at 226.

168. See Schmitt, *supra* note 104, at 40 (“To the extent Country A believes itself to have been legally wronged by Country B, there is a natural (and historic) tendency for it to view B’s soldiers and citizens as less worthy of IHL’s benefits.”).

169. See HUMAN RIGHTS WATCH, *supra* note 80, at 30 (reporting interviews with children who were encouraged to fight to the death with assurances of martyrdom); see also Schmitt, *supra* note 104, at 24 (noting that suicide bombing is not per se unlawful). The Kamikaze pilots of World War II conducted suicide attacks against Allied Forces within the principle of distinction. But, as most often happens in modern conflicts, it is unlawful for a combatant to engage in the perfidious behavior of intentionally guising himself as a civilian to make such an attack or target civilians with a suicide attack. *Id.* at 24–25.

V. TWO PERSPECTIVES ON HOW HUMAN SHIELDS FACTOR INTO PROPORTIONALITY ANALYSIS

Two main viewpoints have emerged on how human shields should affect the behavior of troops on the ground. The first focuses on the primacy of civilians' right to life and a narrow understanding of proportionality analysis. From this perspective, collateral damage is such a critical consideration that it will almost always outweigh potential military advantages.¹⁷⁰ Conversely, the second position focuses on a state's sovereign right to self-defense and advocates balancing the obligations a military force has to maintain the safety of its own soldiers against the well-being of enemy civilians.¹⁷¹ Advocates of this position note a military force may face a situation in which it must take actions against civilians used as shields that would otherwise be unlawful.¹⁷² In this context, liability should fall on the shielding party that created the situation because it is the "greater evil."¹⁷³

Both of these positions are founded on a concern for life—the former by immediate humanitarian concerns for human-shield victims, and the latter by the safety of future potential victims. Neither side would approve of a response that increases the use of human shields on the battlefield. Unfortunately, the international community now finds itself in that very position. Rather than choosing one approach or the other, international actors straddle both.¹⁷⁴ By acting inconsistently when faced with human shields—sometimes being deterred by their presence and sometimes not—they find the problem is less tractable than previously thought.¹⁷⁵

170. See Moussa, *supra* note 49, at 988 (finding no military necessity that justifies the targeting of civilians).

171. See Gross, *supra* note 142, at 460–71 (analyzing the moral dilemma that states face when attempting to balance the duty to protect their own citizens with the duty to limit harm to enemy civilians).

172. See Fischer, *supra* note 4, at 518–19 ("Obviously, it would be best that no civilian deaths occur, but the realities of warfare make that unlikely.").

173. *Id.*

174. Even within a single country, this inconsistency can be seen clearly. Using the United States as an example, compare Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292, 322 (2009) [hereinafter Schmitt, *Human Shields*] (describing President George H.W. Bush's warning to Iraq that Iraq's use of human shields in the First Gulf War would fail to deter American attacks on legitimate military targets), with Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan* [hereinafter Schmitt, *Afghanistan*], in INTERNATIONAL LAW STUDIES: AFGHANISTAN, *supra* note 47, at 307, 322 ("[I]n Afghanistan the operational concern was the mere fact of collateral damage, not whether that damage expected to be caused was excessive relative to military advantage. Rules of engagement so embraced this casualty aversion that the legal principle of proportionality never loomed large.").

175. See Schmitt, *Human Shields*, *supra* note 174, at 294–96 (describing the continued use of human shields in the modern era in such conflicts as Iraq, Israel,

A. The Human Rights Model

The human rights model is based on the nonreciprocal nature of the civilian protections in AP I and the short-term nature of *jus in bello* proportionality analysis. This perspective emphasizes that civilians have a nonderogable right to life, and when they are harmed, there is a presumption of unlawfulness that the attacking combatant must overcome.¹⁷⁶ The prohibition against using civilians as shields is not a reciprocal rule. Therefore, failure by one side to observe this rule does not release the other side from its treaty and customary international law obligations to civilians.¹⁷⁷ Furthermore, proponents emphasize that the presence of nonprotected parties—whether they be combatants or civilians taking direct part in hostilities—within a civilian population does not rob the population of its civilian character.¹⁷⁸ This perspective does not consider the obligations a military has to the safety of its own soldiers or the larger obligations to domestic citizens.

Advocates of the human rights model do not argue that all collateral damage is per se illegal.¹⁷⁹ Collateral damage retains its place in proportionality analysis and may be incurred if civilian casualties are not “excessive in relation to the concrete and direct military advantage anticipated.”¹⁸⁰ But the military objective on the other side of the scale is limited to the immediate time frame. Greater security for civilians in the future that results from rendering shield use an ineffective tactic is too attenuated to be a valid military objective.¹⁸¹ By narrowing the proportionality analysis to the right to life of human-shield victims balanced against an immediate, isolated military objective, the human rights model anticipates the analysis will rarely allow a combatant to act against human shields in order to attain a shielded military objective.

Lebanon, Afghanistan, Bosnia and Herzegovina, El Salvador, Somalia, Liberia, Sierra Leone, and Chechnya).

176. See Schmitt, *Afghanistan*, *supra* note 174, at 325 (critiquing the Human Rights Watch approach to conflict analysis because it imposes a rebuttable presumption that instances of collateral damage indicate a failure on the part of the attacking party to take sufficient precautions).

177. AP I, *supra* note 10, arts. 51.7–8.

178. *Id.* art. 50.3.

179. Schmitt, *supra* note 103, at 18.

180. AP I, *supra* note 10, art. 51.5(b).

181. See Cannizzaro, *supra* note 48, at 787 (explaining that Israel’s long-term goal of ending Hezbollah’s aggressive tactics, including the use of human shields, was irrelevant in assessing the proportionality of Israel’s military actions).

B. *The Humanitarian Model*

The humanitarian model emphasizes that international law is premised on a strong right to self-defense, in addition to civilians' nonderogable right to life. Adherents to this position place liability for collateral damage with the shielding party rather than the impeded party. Such a view is akin to domestic criminal law, where liability for a hostage's injury normally lies with the robber who took the hostage rather than the police officer who shot the hostage.¹⁸² Similarly, customary international law traditionally places the blame for civilian casualties with the belligerent who attempts to shield a military objective and, therefore, also supports this perspective.¹⁸³

In the humanitarian model, a defending belligerent's failure to meet its obligations to protect civilians places the attacking party in a position where collateral damage (that would not otherwise have occurred) is unavoidable.¹⁸⁴ The impeded party and shielding party have different obligations to civilians under Article 51 of AP I, and the impeded party's ability to observe Article 57 depends to some degree on the shielding party's observance of Article 51(7).¹⁸⁵ Therefore, in very limited circumstances, the shielding party's actions may force the impeded party to act in ways that, when considered out of context, would be a violation of IHL but that are not unlawful when taken in response to concealment tactics.¹⁸⁶ This viewpoint encourages an adjustment of proportionality analysis.¹⁸⁷ When a belligerent shields a military object with civilians, there will be more civilian casualties than there would have been otherwise, but the damage is not necessarily excessive.¹⁸⁸

The humanitarian model also emphasizes the additional obligations owed by a military power that factor into its analysis. Military leadership has a duty to protect the lives of its soldiers.¹⁸⁹ As asked by one IHL scholar: "Is it right to demand these soldiers' deaths? To demand that they die for the benefit of the enemy citizens, because of the moral values of the democratic state, such as respect for the value of human life?"¹⁹⁰ A military power also has the

182. Fischer, *supra* note 4, at 492–95 (discussing U.S. domestic criminal law on hostage liability).

183. DINSTEIN, *supra* note 76, at 131.

184. Fischer, *supra* note 4, at 489.

185. *See id.* (discussing the relationship between Articles 51 and 57 of AP I).

186. *See* Gross, *supra* note 142, at 524 (noting that, when using a proportionality test, there are rare cases when the flaw that attaches to a violation of Article 51(8) can be "neutralized" by an opponent's misconduct).

187. DINSTEIN, *supra* note 76, at 131.

188. *Id.*

189. Gross, *supra* note 142, at 461.

190. *Id.* at 459–60.

obligation to protect its own citizens from the threat of attack, particularly by nonstate actors engaging in terrorist tactics.¹⁹¹ These groups, including Hezbollah and al-Shabaab, often gain power through systematic violations of the LOAC, including the use of human shields.¹⁹² Thus, disabling such actors will often require confronting civilians forcibly incorporated into conflict.¹⁹³ Finally, a military force has an obligation to limit the increased likelihood future enemy civilians will be used as shields.¹⁹⁴

C. The Result of Two Approaches: Gambling on Human Shields

The two conflicting models have necessarily fostered an inconsistent approach to human shields within the international community. Principles of behavior science, particularly the rule of intermittent reinforcement, indicate this variable response to the presence of shields is more detrimental to the safety of civilians than either model would be were it used consistently.¹⁹⁵ The rule of intermittent reinforcement begins with the premise that every behavior is followed by a consequence that predicts the likelihood the behavior will be repeated.¹⁹⁶ When a behavior is followed by an undesirable consequence, the behavior is less likely to occur again.¹⁹⁷ Conversely, there is a higher probability that a behavior that is met with a desirable consequence will occur again.¹⁹⁸ This basic law, called the law of effect, governs all living organisms, from bacteria to belligerents.¹⁹⁹

191. See *id.* at 461 (recognizing that a democratic state's moral obligation to vanquish its enemy may conflict with an obligation to avoid harming citizens of the enemy).

192. See, e.g., discussion *supra* Part III.A (discussing the use of human shields by Hezbollah and al-Shabaab).

193. See discussion *supra* Part III.A (discussing involuntary shields).

194. See Rubinstein & Roznai, *supra* note 66, at 121 (recognizing that adjustments must be made to a proportionality threshold if a military uses human shields as a widespread and systematic tactic).

195. See JOHN O. COOPER ET AL., APPLIED BEHAVIOR ANALYSIS 305 (2d ed. 2007) (indicating that intermittent reinforcement is an effective tool for guiding behavior toward target results).

196. *Id.*

197. *Id.* at 327 (discussing the effects of punishment and how it deters people from repeating behaviors that resulted in negative consequences).

198. See PAUL CHANCE, LEARNING AND BEHAVIOR 176–78 (6th ed. 2008) (describing how consistent positive reinforcement encourages a behavior to continue in different contexts).

199. See *id.* at 188 (mentioning the law of effect and its tendency to strengthen or weaken behavior through consistent responses).

When a behavior is reinforced intermittently, it becomes especially robust.²⁰⁰ This is illustrated in the examples of the Coca-Cola machine and the slot machine. The Coke machine reinforces a thirsty customer every time. If a customer puts a dollar in and the Coke fails to appear, the customer will stop engaging in the behavior of feeding the machine money. The slot machine, conversely, reinforces customers only intermittently. A gambler may behave thousands of times and never receive the desired consequence (a win). But because there could be a win at any time and the win is highly valued, the gambler will keep behaving in the hope that next time he will hit the jackpot.²⁰¹ This is how gambling becomes a robust behavior.²⁰² It occurs frequently and continues even when there is very little reinforcement.²⁰³

In the human shield context, the shielding party—generally a nonstate, technologically disadvantaged actor—is the gambler who is reinforced intermittently for the behavior of using the presence of civilians to deter attack of a military objective. Because there is confusion over the state of the law protecting human shields and debate over how the issue should be approached,²⁰⁴ sometimes the behavior is reinforced with a jackpot—stymieing an adversary whose technological prowess greatly exceeds the gamblers' with the presence of human shields. Though this tactic does not always yield the desired result, the chance of a victory is highly valued. As explained in Part IV, in the asymmetric-conflict context, the disadvantaged party who is likely to use human shields does so in part because civilians are viewed as the only "weapon" available that rivals the military strength of the adversary. The gambler is less likely to view the IHL regime as benefitting his cause and has little incentive to comply, particularly when it renders his efforts less effective. Thus, technological asymmetry makes a shielding party more likely to place a premium on the successful deterrence of a superior military power and bet on the chance that the presence of human shields will achieve this goal.

The other two factors that contribute to the prevalence of human shields in modern conflict—diversity of obligations and restraints, and doctrinal divergence—effectively diminish the cost of a loss from

200. See W. DAVID PIERCE & CARL D. CHENEY, *BEHAVIOR ANALYSIS AND LEARNING* 107–08 (4th ed. 2008) (describing examples of intermittent reinforcement in everyday life and discussing behavioral momentum).

201. CHANCE, *supra* note 198, at 188–89 (describing the paradox of intermittent reinforcement and its tendency to strengthen behavior).

202. See *id.* (discussing the discrimination hypothesis of this paradox and how it pertains to gambling).

203. *Id.*

204. See discussion *supra* Part V.A–B (discussing two conflicting models of how human shields should affect troops).

the gambler's perspective. Because the gambler is not constrained by the reciprocal nature of international relations amongst states, the risk of a negative response from the global community matters much less. Furthermore, the immediate consequence of a "loss" to the shielding party (i.e., the adversary successfully targets the military objective despite the presence of human shields and incurs civilian casualties) is also discounted. The repercussions of civilian casualties affect the nonstate combatant far less than they would a government held to traditional mechanisms of accountability.²⁰⁵ And when the gambler views the conflict in the context of greater spiritual triumph or survival of identity, he may not see the deaths of civilians in the name of this cause to be a loss at all.²⁰⁶ Conversely, the death of human shields may allow the gambler to achieve a victory in the realm of public opinion.²⁰⁷

For these reasons, the specter of a loss in the human shield gamble pales in comparison to the chance of a win, however slim. By acting inconsistently, the military forces that face human shields have created a very robust behavior amongst shielding parties.²⁰⁸ The international community has thus chosen the response that ensures the use of shields will continue in modern conflicts; and the use of shields is likely to continue adamantly for some time, even if forces faced with shields change the consequences to the shielding party.²⁰⁹

VI. HOW TO END THE USE OF HUMAN SHIELDS: A UNIFORM APPROACH

In order to avoid making the hard choice between the two models, there have been calls to systematize the current middle-of-the-road approach. First, some argue that voluntary shields should not fit into proportionality analysis as collateral damage because they lose the protection of their civilian status when they take direct part in hostilities.²¹⁰ But this solution is unworkable on two counts. First, it fails to address the intermittent reinforcement effect that

205. See discussion *supra* Part IV.B (noting how the accountability of using human shields disproportionately affects democratic governments).

206. See discussion *supra* Part IV.C.

207. See discussion *supra* Part IV.C.

208. See COOPER ET AL., *supra* note 195, at 305 (discussing the power of intermittent reinforcement to strengthen established behaviors).

209. PIERCE & CHENEY, *supra* note 200, at 85 ("Resistance to extinction [of the reinforcement] is substantially increased when a partial or intermittent reinforcement schedule has been used to maintain behavior. . . . When people are described as having a persistent or tenacious personality, their behavior may reflect the effects of intermittent reinforcement.").

210. AP I, *supra* note 10, art. 51.3.

strengthens and maintains the use of shields in general. Second, it can be difficult in practice to distinguish between voluntary and unknowing shields.²¹¹ And as noted in the First Gulf War example, where civilians were offered food when they congregated at Baghdad palaces, “voluntary” can be a difficult line to draw.²¹² Even if the impeded party can ascertain which group a human shield falls into, it may be hard to prove so later on, causing fallout in the realm of public opinion that is already a significant problem.²¹³

Another potential solution divides shield use into sporadic acts versus a widespread and systematic tactic. Proponents of this approach argue that, when an individual uses a shield in an unpremeditated situation, proportionality analysis indicates that the military objective at stake does not generally carry as much weight as the physical safety of the civilian.²¹⁴ However, in the latter case, where civilians are routinely used as shields, the larger military objective of stopping systematic shield use as a tactic may outweigh the potential harm to the current shields.²¹⁵ This solution more accurately reflects the diverse collection of potential human shields but will ultimately be ineffective because it still fails to overcome the intermittent reinforcement dilemma.²¹⁶

Both of these proffered solutions continue down the path of intermittent reinforcement for the use of civilians as shields. Instead, the international community must develop a consistent and uniform approach—either to be impeded by the presence of human shields (the Human Rights Approach) or act despite them regardless of collateral damage (the Humanitarian Approach) every time. Any compromise between the two only furthers the gambler’s schedule, thereby increasing the use of shields. The only uncertainty that remains is which position to choose.

211. Rubinstein & Roznai, *supra* note 66, at 112.

212. See discussion *supra* Part III.A (discussing the use of human shields in the First Gulf War).

213. See discussion *supra* Part III.A (noting that coalition forces had difficulty determining if Iraqis were voluntary human shields in the First Gulf War).

214. Robin Geiß, *Asymmetric Conflict Structures*, 88 INT’L REV. RED CROSS 757, 766 (2006) (stating that if a belligerent uses human shields “only sporadically and at random in an armed conflict, humanitarian concerns are likely to outweigh the necessity to attack using disproportionate force”).

215. See Rubinstein & Roznai, *supra* note 66, at 121–22 (finding that by not protecting human shields, a military effectively dissuades an enemy to use that tactic and thus ultimately enhances civilian protection in armed conflicts).

216. *Id.* at 121.

*A. The Human Rights Approach Risks Legitimizing Shield
Use as a Tactic*

The Human Rights Approach is attractive because it is easy to reconcile with tenets of the LOAC. Logically, if IHL proscribes harming civilians, troops confronted with shields should always refrain from incurring collateral damage. It is difficult to imagine a military objective so important that harming civilians is palatable. But this approach only legitimizes the use of shields and has dangerous side effects. Most obviously, if the use of human shields is reinforced, i.e., given function, and becomes a reliably effective tactic against asymmetrically advantaged opponents, civilians will be at increased risk. Popular pressure cannot be relied upon to induce belligerents to curb this tactic because the parties who use human shields in current conflicts have been very successful at deflecting liability from themselves to their opponents.²¹⁷

Another, and perhaps even more threatening, consequence of uniformly adopting the first model is that increased use of human shields will not be limited to the classic disadvantaged nonstate actor.²¹⁸ The more common and reliable the use of human shields becomes in the repertoire of modern warfare, the more likely it is to be used by actors that have traditionally condemned the practice. It is then a short step from shield use as a tactic to shield use as a doctrine.²¹⁹

This risk was realized during the Balkans Conflict in May of 1995. Bosnian Serb forces held 370 UN Protection Force (UNPROFOR) troops hostage and tied them to bridge supports in Sarajevo to shield against potential NATO air strikes.²²⁰ This was a crucial turning point in the history of human shield use—the first time the practice was widely used by a government actor.²²¹ By June, to avoid exposing troops to the new risk of state-sponsored shield use, the United Nations withdrew all UNPROFOR forces that guarded isolated weapons-collection sites in the area—leaving weapons

217. See *id.* at 104–06 (noting the Goldstone Report mentions Hamas in only 6 percent of the report).

218. See *Israeli Troops Demoted over Gaza 'Human Shield' Boy*, BBC NEWS (Nov. 21, 2010), <http://www.bbc.co.uk/news/world-middle-east-11807152> (reporting the use of a Palestinian boy as a human shield by Israeli troops).

219. *DOD Dictionary of Military Terms*, DEF. TECHNICAL INFO. CENTER, http://www.dtic.mil/doctrine/dod_dictionary/ (last visited Oct. 23, 2012) (defining “doctrine” as when a practice rises to the level of “fundamental principles by which the military forces or elements thereof guide their actions in support of national objectives”).

220. CTR. FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN THE BALKANS 1995–1998, at 38 (1998) [hereinafter CLAMO].

221. Interview with Michael A. Newton, *supra* note 92.

exposed to belligerents, and civilians less secure.²²² It is incidents such as this, where government forces adopt shield-use tactics, that will likely increase if nonstate actors continue to use human shields with impunity, thereby normalizing the practice.

*B. The Humanitarian Approach Is Supported by International Law
and
Most Effectively Protects Civilians*

If there are negative effects associated with allowing the presence of shields to impede military forces both intermittently and consistently, the only option that remains is to uniformly refuse to allow the presence of human shields to impede an attacking party any time. The Humanitarian Approach is not the best solution because the use of civilians as shields is a “greater evil” than targeting a military objective regardless of their presence, as one scholar advocates.²²³ Nor is it the best option because the sovereign right to self-defense equals or trumps the humanitarian interests of civilians’ right to life under IHL.²²⁴ Rather, choosing this path is the *only* way to permanently stop the use of human shields, which has become one of the defining problems of modern counterinsurgencies.²²⁵ In adopting this approach, the international community commits to never being deterred from targeting a military objective that is shielded by the presence of protected persons. When the behavior of using shields is no longer given function, combatants will cease using it as a tactic. Only then can civilians in conflict live completely free from the specter of being used as a weapon.

The Humanitarian Approach is consistent with the evolution of law in this area. The articulation of proportionality in AP I, Article 51, states that an attack is indiscriminate if it “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.”²²⁶ But during ratification of AP I, many countries took a reservation with respect to Article 51 that broadened the scope of the military

222. CLAMO, *supra* note 220, at 38–39.

223. Fischer, *supra* note 4, at 518.

224. *See id.* at 483 (stating that a strong right to self-defense must be maintained notwithstanding the necessity of balancing competing humanitarian concerns).

225. *See* Rubinstein & Roznai, *supra* note 66, at 94 (noting civilian involvement in warfare has significantly increased because the modern battlefield has generally moved away from fronts to populated urban environments).

226. AP I, *supra* note 10, art. 51.5(b).

advantage to take into account the whole context of the attack rather than an isolated part.²²⁷

This shift in *opinio juris* was incorporated into the text of the Rome Statute that created the International Criminal Court.²²⁸ Article 8 describes proportionality in a manner consistent with the reservations taken on AP I as:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be *clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated²²⁹

This wording widens the scope of the military advantage that can be considered in proportionality analysis and narrows what level of collateral damage is considered excessive.

The adoption of broad proportionality language into the Rome Statute indicates a clear development within the principle of proportionality to incorporate military objectives that cover a longer time frame than the “more immediate aims of each single military action” advocated by proponents of the Human Rights Approach.²³⁰ Thus, the law supports ending the use of human shields altogether as a valid military advantage. An individual military objective that is shielded by civilians may not constitute a large enough advantage to

227. *First Protocol of 1949 Geneva Conventions (Total Contracting Parties: 172)*, WORLD INTELL. PROP. ORG., http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=281&group_id=22 (last visited Oct. 23, 2012) (listing AP I signatories and their reservations). The Netherlands reservation stated:

With regard to Article 51, paragraph 5 and Article 57, paragraphs 2 and 3 of Protocol I: It is the understanding of the Government of the Kingdom of the Netherlands that military advantage refers to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack

Id. This language was echoed by Australia, Belgium, Canada, Germany, Italy, New Zealand, and Spain. *Id.* The United Kingdom reservation stated it regards itself as

entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government.

Id.

228. See CRYER ET AL., *supra* note 31, at 147–49 (describing the deliberations of the 1998 Rome Conference).

229. Rome Statute of the International Criminal Court, U.N. DOC. A/CONF.183/9, art. 8.2(b)(iv) (Jul. 17, 1998) [hereinafter Rome Statute] (emphasis added), reprinted in LAW OF WAR DOCUMENTARY SUPPLEMENT 474 (Brian J. Bill & J. Porter Harlow eds., 2010).

230. Cannizzaro, *supra* note 48, at 786.

overcome the “clearly excessive” collateral damage measure.²³¹ But the objective of promoting the safety of all civilians everywhere, so they never again risk being used as shields, is a sufficiently weighty advantage to always be greater than the collateral damage an attacking party incurs in a shield situation. Now it is time for state practice to catch up to the law.

C. *The Costs of This Choice*

Though the Humanitarian Approach is the only way to stop combatants from using human shields in conflicts, it comes with serious costs. First, there likely will be an “extinction burst” following the absence of reinforcement of a behavior that was previously reinforced.²³² If, for example, a person presses the button in the elevator to get to the correct floor every day, and then suddenly the button does not make the elevator move, the person will push it again, harder and more frequently, until it becomes clear that the behavior of button pushing no longer delivers the desired consequence of moving to the correct floor.²³³

In the human-shield context, the behavior of using shields has been intermittently reinforced with the consequence of successfully deterring attack.²³⁴ If that consequence no longer follows the shield behavior, then the shielding party will increase its behavior until it is clear that using shields no longer garners the desired consequence. If the international community can outlast the extinction burst, civilians will no longer be used as shields—just as the person pushing an unresponsive elevator button eventually stops rather than continues pushing the button all day long. But living through this extinction burst with the suggested uniform strategy intact will be difficult. During the extinction burst, actors who use shields may use more of them, use them more frequently, or use protected parties that are particularly effective at deterring attacks, such as children.

The effects of an extinction burst are even more difficult in the counterinsurgency context because they will be accompanied by a propaganda effort that may be both highly effective and difficult to anticipate. Belligerents who use human shields have thus far skillfully reoriented the court of public opinion from their Article 51(7) violation to the potential 51(8) violation of the attacking

231. Rome Statute, *supra* note 229, art. 8.2(b)(iv).

232. See PIERCE & CHENEY, *supra* note 200, at 83 (noting the effects on behavior when reinforcement is withdrawn).

233. *Id.* at 84.

234. See discussion *supra* Part IV.A–B (addressing the incentives for belligerents to use human shields).

party.²³⁵ The international community, facilitated by media coverage focused on civilian deaths at the hands of attacking parties rather than the defending parties who first put civilians in harm's way, has come to understand the prohibitions of Article 51 as applying solely to the attacking party.²³⁶ Public discourse indicates that observers of current events see only a subservient or even nonexistent obligation on the part of the defending party not to use civilians to their tactical advantage.²³⁷ This global condemnation, both from states and the media, has skewed the discourse in an inaccurate and unproductive manner.²³⁸ An extinction burst of shield-use behavior could aggravate this problem. But there are many ways to make the extinction burst less harmful to civilians and less damaging to the public opinion of parties faced with human shields.

D. *How the Transition Can Be Made Easier*

If, even one time, an attacking party allows itself to be impeded by the presence of human shields, the robust shield-using behavior is strengthened. Were the international community to decisively and uniformly adopt the Humanitarian Approach, only consistency would move the process as quickly as possible to a future in which civilians are no longer used as shields. There are a number of ways this movement can be facilitated to make the extinction burst more survivable.

First, it is important to reframe the action plan associated with the Humanitarian Approach from "shoot the shield every time" to "get the military objective being shielded every time." In many cases,

235. See Rubinstein & Roznai, *supra* note 66, at 104 (discussing how Hamas has effectively shifted the court of public opinion against Israel despite Hamas's use of human shields); see also Saddam's Use of "Human Shields," *supra* note 78, at 8 (discussing how Saddam Hussein had previously attempted to use human shields as a means to "play up" divisions among coalition partners).

236. See Schmitt, *Afghanistan*, *supra* note 174, at 323 (warning of the distortion of public opinion that can occur when global media and nongovernmental organizations, armed with hi-tech communications technology, focus attention on easily understood civilian casualties and disregard the less accessible complexities of a modern attack); see also Charles J. Dunlap, Jr., *Come the Revolution: A Legal Perspective on Air Operations in Iraq Since 2003*, in INTERNATIONAL LAW STUDIES: IRAQ, *supra* note 85, at 139, 145 (Michael N. Schmitt ed., 2010) ("We live in an age where adversaries increasingly seek to employ the fact or perception of illegalities, to especially include allegations of excessive civilian casualties, as a means of offsetting not just US airpower, but America's overall military prowess.").

237. See Schmitt, *Afghanistan*, *supra* note 174, at 323 (recognizing the ability that the media has to focus international attention on civilian casualties); see also Dunlap, *supra* note 236, at 145 (addressing attempts by enemies of the United States to make the U.S. military plans appear illegal and immoral in the media).

238. Schmitt, *Afghanistan*, *supra* note 174, at 323-24; see also Dunlap, *supra* note 235, at 145 (noting the development of "lawfare" as a means for defenders to exploit the effects of collateral damage in the media).

moving beyond human shields to reach the targeted objective does not require incurring heavy collateral damage. Technological advances in information gathering and tactical tools allow advanced militaries to target their operations with greater precision and discretion than ever before.²³⁹ This trend will only continue. Therefore, attaining the shielded objective does not always, or even frequently, require incurring civilian casualties or damage to civilian objects.

Second, the impeded party that faces shields must continue to adhere to all preexisting precautionary measures in attack.²⁴⁰ This includes taking feasible precautions such that the method of attack minimizes collateral damage,²⁴¹ and effective advanced warning of attack is delivered when circumstances permit.²⁴² This goal is certainly achievable, as compliance with the duty to warn has greatly increased since World War II.²⁴³ Combatants should also carefully comply with graduated-force requirements when possible, using deadly force only after working up the hierarchy of verbal warning, displaying a weapon, and so on.²⁴⁴

Third, it is time to reorient ill-informed blanket condemnation of the attacking party in a shield situation to a discourse on the precise question of law. Article 51 outlines obligations for both the attacker and defender.²⁴⁵ These obligations are simultaneously shared and independent, and are founded on what should be a joint obligation to preserve and protect human life.²⁴⁶ To the extent the defending party does not share that commonality of purpose, it must be exposed and held accountable.²⁴⁷

To this end, military forces that confront human shields must act with greater transparency and carefully document the situations they

239. See Batschelet, *supra* note 107, at 8 (referring to EBO as the most efficient and effective way to utilize a military force because scarce resources can be used where they are needed most).

240. See, e.g., AP I, *supra* note 10, art. 57 (discussing the precautionary measures that an attacking party must take to avoid civilian casualties).

241. *Id.* art. 57.2(a)(ii). However, the method of attack must still be an effective way to reach the shielded military objective in order to avoid the intermittent reinforcement problem.

242. *Id.* art. 57.2(c).

243. Baruch & Neuman, *supra* note 61, at 359; see also *supra* note 60 (discussing the warning campaign undertaken by the Israeli Defense Forces during the Second Lebanon War).

244. CALL, *supra* note 94, at 48. It is important to consider that graduated force requirements, while an important limiting technique on potential collateral damage, come with the increased risk to soldiers who must assess the likelihood of attack from an adversary under the pressure of combat. In a close-quarter firefight, common in an urban environment, graduated force is less feasible. See *id.* at 54 (commenting on how in close quarters, soldiers typically do not have the “luxury of using graduated force”).

245. AP I, *supra* note 10, art. 51.

246. See DINSTEN, *supra* note 76, at 129 (discussing the obligations of both sides to protect civilians and civilian objects).

247. Interview with Michael A. Newton, *supra* note 92.

face. As suggested in the Rules of Engagement Handbook used by U.S. military personnel in Afghanistan, enemy LOAC violations should be reported at the earliest opportunity.²⁴⁸ Military response teams organized to gather and report information from the field can then secure the site of the violation and gather data to supplement a later formal investigation.²⁴⁹ This information should be disseminated through embedded media representatives in the combat force.²⁵⁰

Facilitation of a more accurate discourse also requires the international community look beyond the actions of belligerents to their intentions, when ascertainable. To the extent a belligerent who uses human shields prioritizes a political gain over the IHL bedrock principle of protecting civilians, that belligerent should be held accountable.

VII. CONCLUSION

After experiencing a steady escalation of the use of civilians as human shields in recent decades, it is time for the international community to deviate from the course most harmful to future civilians and adopt a policy of achieving military objectives unimpeded by the presence of human shields. Though it will be a difficult transition, it is the only path to a safer future for all civilians in conflicts. This approach must be accompanied by a shift in discourse that focuses not only on the obligations of the attacker under AP I, but also the duty of the defender not to place its civilians in danger. Though it seems paradoxical, the only way to save civilians from being used as shields is to look to the long-term military advantage of discontinuing their use in the future. This reaffirms the overarching goal of IHL and is consistent with domestic criminal law, customary international law, and the developments within proportionality, as seen in Article 8(2)(b)(iv) of the Rome Statute. It is time for state practice to catch up.

Drawing from behavior science once more, there remains a larger question for the international community to tackle once the use of human shields is no longer functional: what is the alternative behavior that should be reinforced? Because organisms are made to behave rather than be static, the most effective behavior-change programs fill the vacuum created by removing the undesired behavior

248. CALL, *supra* note 94, at 54.

249. *Id.*; see also Dunlap, *supra* note 236, at 147 (describing Israel's efforts to refute expected LOAC violations during Gaza operations in 2008–2009 by pairing combat units with “operational verification teams” who filmed and documented operations as they were conducted).

250. CALL, *supra* note 94, at 54.

with a more desirable one. In the conflict context, the international community must consider how best to change shielding parties' calculus to reinforce compliance with IHL and rechannel their efforts to the negotiating table.

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