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# The Classification of Civilians as Human Shields: a Means to Justify Violence?

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# Summary

Human shields have been increasingly documented in contemporary theatres of war. In this context, it is interesting to examine the circumstances in which the attacking party classifies the civilians they face as human shields. Therefore, this thesis focuses on the use of the classification of human shields by belligerents facing civilians during armed conflicts. The paper sets forth the argument that this legal category has been instrumentalized to justify civilian casualties, assigning the entire responsibility to the adversary. To support this claim, the research provides legal clarifications on the concept of human shields, the status of civilians used as such, and the obligations of the attacking party facing them. This involves uncovering the gaps and uncertainties in the law regarding human shields on the one hand, and the principle of proportionality on the other hand. Despite those uncertainties, this thesis maintains that human shields should be treated as civilians and that the principle of proportionality should apply normally.

The subsequent examination of two case studies, the civil war in Sri Lanka and the conflict between Israel and Palestine, evaluates the patterns of instrumentalization of the category of human shields to avoid war crime accusations. Due to the lack of legal definition, the classification of human shields is being extended to cover up to hundreds of thousands of civilians, and allows for stretching the principle of proportionality to raise the threshold of acceptable casualties. This process often involves parallel narrative building to adapt the facts to this discourse. The case studies reveal the specific role of human shielding in instrumentalizing International Humanitarian Law. However, coupled with proportionality, these legal tools question the construction and the role of International Humanitarian Law in protecting civilians during armed conflicts. The appraisal of Israel's modus operandi indeed demonstrates how the practice of instrumentalization has been systematized and shapes the course of hostilities.

# Preface

My time in Lund has been highly enriching. I had the chance to meet wonderful people among my classmates and in my *korridor*. I also truly enjoyed the Swedish academia, and am very grateful to the Faculty of Law and the Raoul Wallenberg Institute.

During these two years, I developed my interest in International Humanitarian Law. I am thrilled that I could deepen this field, not only during the courses of the master's but for my thesis paper. For all his support during this endeavor, I genuinely thank my supervisor, Alberto Rinaldi, who has been very approachable and encouraging throughout the whole process. I am also very thankful for the RWI Library, where I wrote a significant part of this research, and had amazing discussions with my classmates.

I also thank my friends and loved ones, at the faculty, in my flatshare, in the North, and outside of Sweden, who were always there for me, during and outside of work. Finally, I thank my father and sister, who are always incredibly supportive, even from afar, and call or visit whenever possible.

This topic was inspired by my work on the civil war in Sri Lanka, for the constitution of a People's Tribunal. I am delighted that I could produce this long-term research, and I hope whoever reads it enjoys it.

Coline Proy

Lund, 21 May 2023

# Table of Contents

<b>Summary .....</b>	<b>2</b>
<b>Preface .....</b>	<b>3</b>
<b>Table of Contents.....</b>	<b>4</b>
<b>List of Abbreviations .....</b>	<b>7</b>
<b>Introduction .....</b>	<b>8</b>
Background.....	8
Purpose and Research Question.....	9
State of Research .....	9
Context.....	9
Current State of Research.....	10
Contribution to Research.....	10
Method, Materials, and Scope .....	11
Method .....	11
Materials.....	11
Scope.....	11
Structure.....	12
<b>Chapter I: Current State of the Law .....</b>	<b>13</b>
1. Delimitation of the Legal Category and the Status of Human Shields.....	13
1.1. Human Shields and the Law: Prohibition and Absence of a Definition.....	13
<i>a. Prohibition as a Method of Warfare during International Armed Conflicts.....</i>	<i>13</i>
<i>b. Conduct and Intent of the Party using Shields .....</i>	<i>14</i>
<i>c. Omissions and Ambiguities of the Law .....</i>	<i>16</i>
<i>d. Other Legal Sources.....</i>	<i>19</i>
<i>e. Conclusion.....</i>	<i>21</i>
1.2. The Debated Status of Human Shields.....	22
<i>a. Nature of Human Shields .....</i>	<i>22</i>
<i>b. Function and Status of Human Shields .....</i>	<i>22</i>
<i>c. Voluntary and Proximate Shields: Forms of Shielding that Escape the Scope of the Law?.....</i>	<i>25</i>
<i>d. Human Shields: Loss of Civilian Status .....</i>	<i>27</i>
<i>e. Conclusion.....</i>	<i>31</i>
2. The obligations of combatants vis-à-vis human shields.....	32
2.1. Legal duties regarding the Protection of Civilians .....	32

a.	<i>Presumption of Civilian Status</i> .....	32
b.	<i>Principle of Precautions in Attack</i> .....	34
c.	<i>Reprisals and Reciprocity</i> .....	36
d.	<i>Rome Statute</i> .....	39
e.	<i>Conclusion</i> .....	39
2.2.	On the principle of proportionality.....	41
a.	<i>Definition of the Principle</i> .....	41
b.	<i>Proportionality and Human Shields</i> .....	42
c.	<i>Proportionality: a Means to target Shields legally?</i> .....	45
d.	<i>Subjectivity of Proportionality</i> .....	48
e.	<i>Conclusion</i> .....	49
<b>Chapter II: Case Studies</b> .....		<b>51</b>
3.	The Case Study of Sri Lanka.....	51
3.1.	The Classification of the No- Fire Zones into ‘Shielding Zones’ and the conduct of the Sri Lankan Army.....	51
a.	<i>Introduction</i> .....	51
b.	<i>Restrictions on the Movements of Civilians</i> .....	52
c.	<i>Population Figures and Scale</i> .....	54
d.	<i>Allegations of Human Shielding: the Expandability of the Concept in the Field</i> .....	57
e.	<i>Narrative-Building at the Expense of the Facts</i> .....	60
f.	<i>Conclusion</i> .....	65
3.2.	The Instrumentalization of the Classification as human shields: a Shield against Responsibility.....	66
a.	<i>Nice and Nixon’s Legal Opinion</i> .....	66
b.	<i>Crane and de Silva’s Legal Opinion</i> .....	71
c.	<i>Newton’s Legal Opinion</i> .....	77
d.	<i>Conclusion</i> .....	80
4.	The Case-Study of Israel .....	82
4.1.	Voluntary Human Shields .....	82
a.	<i>Introduction</i> .....	82
b.	<i>Corrie’s Case</i> .....	83
c.	<i>Domestic Law at the Basis of the Decisions</i> .....	85
d.	<i>Application of International Humanitarian Law</i> .....	87
e.	<i>Narrative Building: Terrorism and Human Shields</i> .....	88
f.	<i>Peace Activists, Human Shields and Colonial Legacies</i> .....	90
g.	<i>Conclusion</i> .....	92
4.2.	Involuntary Human Shields.....	93
a.	<i>Human Shields: A Justification for Indiscriminate Attacks</i> .....	93

<i>b. Gaza: the Fine Line between Human Shielding and Endangerment of Civilians</i> .....	95
<i>c. Systematicity of the Human Shield Classification: Analysis of Israel's Narrative</i> .....	98
<i>d. Instrumentalization of International Humanitarian Law</i> .....	103
<i>e. Critic of the Laws of War</i> .....	106
<i>f. Conclusion</i> .....	108
<b>Conclusion</b> .....	<b>109</b>
<b>Bibliography</b> .....	<b>112</b>
Academic Articles.....	112
Books .....	113
Chapters.....	114
Legal Instruments .....	114
Cases .....	114
International Committee of the Red Cross (ICRC) Ressources.....	115
Casebook .....	115
Databases.....	116
Report.....	117
International Organizations, Institutions, and Think Tanks.....	117
Newspaper .....	118
Others.....	120
Leaked Legal Opinions .....	120
Domestic Reports and Military Manuals.....	120
Case-related.....	120
Documentary .....	121

# List of Abbreviations

<b>IAC</b>	International Armed Conflict
<b>ICC</b>	International Criminal Court
<b>ICL</b>	International Criminal Law
<b>ICRC</b>	International Committee of the Red Cross
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>IDFs</b>	Israel Defense Forces
<b>IDPs</b>	Internally Displaced Persons
<b>IHL</b>	International Humanitarian Law
<b>LTTE</b>	Liberation Tigers of Tamil Eelam
<b>NFZ</b>	No-Fire Zone
<b>NIAC</b>	Non-International Armed Conflict
<b>OCHA</b>	United Nations Office for the Coordination of Humanitarian Affairs
<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights
<b>OISL</b>	OHCHR Investigation on Sri Lanka
<b>PAG</b>	Palestinian Armed Groups
<b>SLA</b>	Sri Lankan Army
<b>UN</b>	United Nations

# Introduction

## Background

The phenomenon of human shields in urban warfare situations has been increasingly documented.<sup>1</sup> By definition, human shields are civilians or other protected persons being used by belligerents to safeguard military objectives during an armed conflict. However, the contemporary evolutions of warfare have blurred the concept's limits and scope. There are also new challenges in practice: for instance, where can we draw the line between human shields and other civilians when the conduct of hostilities happens in densely-populated areas?

Besides, the narrow understanding of human shields as a method of warfare that disadvantages and destabilizes the adversary can be questioned. There are several instances in which the attacker justifies civilian casualties by the adversary's utilization of human shields, sometimes dubiously. The responsibility for these deaths is then attributed to the adversary without necessarily examining the attacker's conduct. Civilians are also presented as expendable just for being close to military objectives.

The conflict between Israel and Palestine and the Civil War in Sri Lanka are examples of this utilization of the legal category of human shields. In 2003, an American student on a university project in Gaza was crushed to death by an Israeli military bulldozer while trying to prevent the destruction of the house of a Palestinian civilian. The soldier who killed her was acquitted in the subsequent domestic trial: killing a 'voluntary' human shield was deemed legal.<sup>2</sup> More recently, Palestinian Armed Groups were accused of using the entire Gaza Strip as human shields, allegations that the ICC will investigate.<sup>3</sup> In 2008, the Army of Sri Lanka started shelling massively and indiscriminately the no-fire zones they had established for the civilians, on the pretext that members of the rebel group had infiltrated those zones, using them as 'shielding zones.' Tens of thousands of civilians were killed as a result.<sup>4</sup>

It is thus critical to examine the issue of the classification of civilians as human shields and focus on the point of view of the attacking army. Traditionally overshadowed, this

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<sup>1</sup> Romain Douillard, 'Human Shields in Contemporary Conflicts' (2021) Research Paper 112 *Institut de Recherche Stratégique de l'Ecole Militaire (IRSEM)* 1-10, p. 2

<sup>2</sup> Neve Gordon, Nicola Perugini, *Human Shields: A history of people in the line of fire* (University of California Press 2020), pp. 1-16

<sup>3</sup> Saad Hasan, 'Busting the myth of Palestinian 'human shields' in Gaza', TRT World (2021), available at <https://www.trtworld.com/magazine/busting-the-myth-of-palestinian-human-shields-in-gaza-46645>; Nida'a Yousef, 'Under Scrutiny: Allegations of Use of Human Shields by Palestinian Armed Groups and the International Criminal Court Investigation' (2021), for Law for Palestine, available at <https://law4palestine.org/under-scrutiny-allegations-of-use-of-human-shields-by-palestinian-armed-groups-and-the-international-criminal-court-investigation/>

<sup>4</sup> Gordon & Perugini, 2020, pp. 140-151



standpoint influences how legal violence against civilians is perceived and exercised in practice. This will help elucidate whether International Humanitarian Law (IHL) is used to justify this violence.

## **Purpose and Research Question**

The overarching purpose of this thesis is to clarify the legal concept of human shields, identify the obligations incumbent on a party facing shields, and analyze its use of human shields as a legal category in contemporary conflicts. The paper will set forth the argument that such a classification, coupled with the IHL principle of proportionality,<sup>5</sup> is instrumentalized to develop new forms of legal violence against civilians. The process will involve analyzing whether this violence can be deemed law-abiding, as the ones who exercise it claim. It will also identify potential loopholes in the law. Those shortcomings influence the field's conduct and can be exploited to justify violence against civilians, who should be protected under IHL.

To fulfill this purpose, this thesis will answer this research question:

*How does the classification of civilians as human shields affect the use of legal violence against them?*

## **State of Research**

### **Context**

With the rise of urban warfare and new theatres of war in which civilians and combatants are in close proximity, the concept of human shielding has become a central issue. The presence of civilians has always represented a challenge for combatants on the battlefield. It has been at the center of IHL debates, specifically on how to strike a fair balance between military necessity and the principle of humanity.<sup>6</sup>

Although human shields are back under scrutiny and accusations multiply, there is very little case law on the matter. As such, a considerable gap exists between the prosecutions and the allegations of human shielding. Moreover, there is almost no case law on the

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<sup>5</sup> The principle of proportionality establishes that once all other precautions in attack have been taken, civilian casualties should be proportional to the anticipated military advantage.

<sup>6</sup> Beth Van Schaack, 'Human Shields: Complementary Duties Under IHL' (2016) 110 *AJIL Unbound* 317–322, p. 317

conduct of attackers towards human shields.<sup>7</sup> Despite the high risk of potential impunity, it has not led to prosecutions.

## **Current State of Research**

Scholars have increasingly examined the concept of human shields in the last few years. The most exhaustive contribution is the work of Gordon and Perugini, with the publication of the only book on human shields in 2020.<sup>8</sup> Their work describes and analyzes historical and contemporary occurrences of the phenomenon. Several scholars have also addressed issues regarding the legal status of human shields, specifically voluntary and involuntary shields, and the obligations of attackers vis à vis human shields. This scholarship is however often contradictory in substance. Fewer contributors have also started examining issues related to urban warfare and the concept of ‘proximate shields.’ Finally, regarding Israel and Sri Lanka, there are several accounts of human shielding, but they are not necessarily legal or exhaustive. Overall, the scholarship on human shields appears scattered, disconnected, and sometimes contradictory.

## **Contribution to Research**

This thesis will contribute to the current debate on human shields in four ways. First, it will provide an exhaustive legal analysis of the concept of human shields from the point of view of the attacker, an aspect that has been traditionally overshadowed. Second, this thesis will offer an in-depth evaluation of two relevant case studies. This will give a comprehensive account of human shields in different conflict scenarios, and confront the law’s ambiguities with the practice. Third, through these case studies, this thesis will identify patterns of legal arguments used to justify civilian casualties. This will provide a base to determine the instrumentalizations of IHL and tackle impunity and accountability-related issues. The findings will be relevant to other conflict such as the war in Ukraine, where the human shields’ narrative has been used by Russia.<sup>9</sup> Fourth, the thesis will specifically reveal how the category of human shields and the principle of proportionality are associated in the instrumentalization of the law.

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<sup>7</sup> International Committee of the Red Cross (ICRC) Casebook – Glossary: Human Shields, available at [https://casebook.icrc.org/a\\_to\\_z/glossary/human-shields](https://casebook.icrc.org/a_to_z/glossary/human-shields)

<sup>8</sup> Gordon & Perugini, *Human Shields: A history of people in the line of fire*, University of California Press 2020

<sup>9</sup> Neve Gordon, Nicola Perugini, ‘Why we need to challenge Russia’s human shields narrative’, Al Jazeera (3 April 2022), available at: <https://www.aljazeera.com/opinions/2022/4/3/why-we-need-to-challenge-russias-human-shields-narrative>

# **Method, Materials, and Scope**

## **Method**

This thesis will attempt to answer the research question in two parts. The first chapter will offer a traditional doctrinal analysis, first of the concept of human shields and the status of human shields, second of the obligations of attackers facing them, and specifically the principle of proportionality. This part will also attempt to underline and reflect on the shortcomings of the law (*lege lata*) as regards human shields, but also proportionality. The results of the doctrinal analysis will then be embedded in the second chapter's case studies. Through an evaluative approach, this second part will confront the first chapter's findings with the conduct of the warring parties in the field and the discourses surrounding the utilization of human shields in practice, which will involve non-legal sources. This will necessarily draw from a more critical perspective of the Laws of War, which is based on the idea that IHL -and its implementation- is intertwined with the interest of the parties interacting in its frame.

## **Materials**

The research materials will differ between the sections. The first part will primarily be based on Treaty Law, Customary Law, and doctrinal scholarship that will complete the gaps in the law. This will also involve ICRC resources and military manuals. More seldomly, there will be references International Criminal Law (ICL). The second part will be based on reports, independent investigations, and domestic case law relevant to Sri Lanka, and Israel and Palestine. This will also involve broader sources as the analyzed discourses stem from commissioned experts' opinions, governmental reports, communication operations, etc. Finally, the end of the second chapter will include contributions from critical legal scholarship.

It should be noted that for this research, the terms 'International Humanitarian Law' (IHL), 'the Laws of War', and 'the Law of Armed Conflicts' will be used interchangeably.

## **Scope**

This research will focus on human shields in contemporary conflicts and will not include a historical account. Furthermore, it will be limited to the point of view of the attacker facing human shields. However, the paper will still include an analysis of what constitutes the scope of human shields as it is necessary to understand the use of the classification of human shields. Legal and clarifications will apply solely to Sri Lanka and Palestine scenarios. The limitations imposed by the research framework make it impossible to focus on other existing scenarios. Furthermore, these cases are very relevant to the legal issues at stake and there are sufficient exploitable materials on the situation in Sri Lanka and Gaza,

in contrast with other conflicts. The scale of civilians affected and the relevance of these case studies to current events also motivated this choice (ongoing impunity in Sri Lanka and accusations of human shields during the Gaza wars under investigation).

## **Structure**

The first chapter on the current state of the law will provide legal clarifications on the concept of human shields and the obligations of warring parties *vis-à-vis* human shields. It will first delimitate the concept of human shields by looking at their prohibition in the law and assessing the legal status of individuals used as shields. From this point, the paper will assert the rules for the protection of civilians that apply before launching attacks on shielded objects, before focusing specifically on the principle of proportionality.

The second chapter will provide a conduct and discourse analysis of armies that have been confronted with alleged human shields. This part will use the findings of the first chapter and apply them to two case studies: the Civil War in Sri Lanka and the conflict between Israel and Palestine. For the first case study, the paper will look at the classification of the no-fire zones as ‘shielding zones,’ and then analyze the legal opinions of experts commissioned by the Government of Sri Lanka to justify the army’s conduct. The second case study will involve an examination Israel’s conduct and discourse regarding voluntary human shields on the one hand, and involuntary human shields on the other hand. The last section will also include a short reflection on the construction of the Laws of Wars in relation to human shields and the principle of proportionality.

# Chapter I: Current State of the Law

## 1. Delimitation of the Legal Category and the Status of Human Shields

In this first part, this thesis will attempt to delimit the legal concept of human shield and assess the status of protected persons used as shields.

### 1.1. Human Shields and the Law: Prohibition and Absence of a Definition

This section will analyze the legal bases and identify the components defining a human shield. This process will show us the limitations of the law in grasping this concept: human shields are prohibited but not defined.

#### a. Prohibition as a Method of Warfare during International Armed Conflicts

The Law of Armed Conflict has considered human shields exclusively from the angle of prohibition as a method of warfare. With regard to International Armed Conflicts (IACs), the concept of human shielding is found in three treaties.

- In the **Geneva Convention III** with respect to Prisoners of War:

Article 23 on the Security of Prisoners, §1 — *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.*

- In the **Geneva Convention VI** with respect to the protection of Civilian Persons in Times of War:

Article 28 on Danger Zones — *The presence of a protected person may not be used to render certain points or areas immune from military operations.*

- In **Additional Protocol I** with respect to the Protection of Victims of International Armed Conflicts

Article 51(7) on the Protection of the Civilian Population — *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.*

These dispositions will serve as a basis to attempt to define the limits of the legal concept.

## **b. Conduct and Intent of the Party using Shields**

### On the Conduct

- *How is the conduct of the party using human shields characterized?*

The above articles are spelled out through the point of view of the warring party using the civilians for their own advantage and protection. So, what characterizes the conduct of combatants using human shields? The law considers several types of actions. First, the warring party may restrict the civilians' movements or hold them prisoner in or close to an area considered a military target and thus exposed to fire: "detained in areas where he may be exposed."<sup>10</sup>

Second, the combatants may direct civilians towards military objectives or combat lines: a civilian "may (...) be sent to (...) areas where he may be exposed;"<sup>11</sup> or a combatant may "direct the movement of the civilian population or individual civilians in order to (...) shield" a target.<sup>12</sup>

These two first options imply that the warring party exercises control over the civilians' movements: they can move them towards the combat zones or keep them there. The following options, on the other hand, do not require contact or coercion by belligerents on protected persons. This means that those protected persons could be used as shields without their knowledge.

Indeed, the third option is that combatants may use the mere presence of protected persons and position military targets next to them. This time, it is not the civilians being moved and placed tactically, but the military positions, which are stationed according to the civilians' location. This possibility is mentioned in the three above articles.

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<sup>10</sup> Convention (III) relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), Article 23(1)

<sup>11</sup> *Ibid.*, Article 23 §1

<sup>12</sup> Protocol Additions to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) , Article 51(7)

Fourth and lastly, Additional Protocol I states that “the (...) movements of (...) civilians shall not be used” for human shielding.<sup>13</sup> Again, this would imply that the warring party moves military objects according to the movements of the protected person. We can, for instance, imagine a combatant following the movements of Internally Displaced Persons (IDPs) to avoid military attacks.

### On the Intent

- *Why is the intent critical in the prohibition of human shields?*

The notion of movement is crucial in these prohibitions: each listed form of human shield involves intentional, forced, or impeded movement. The intent of the warring party is also a key component of those legal dispositions. It is necessary for combatants to deliberately move their targets or control the movement of civilians to shield particular objects or areas. There is no mention of human shields ‘by coincidence:’ a military objective and civilians colliding unintentionally are not considered. Such coincidence could not be regarded as a method of warfare or characterize a warring party’s transgression. The specific intent to shield is also essential to differentiate the breach of the prohibition of human shields from other violations:

*The decisive factor for distinguishing the use of human shields from non-compliance with the obligation to take passive precautions is whether the intermingling between civilians and combatants, and/or military objectives, is the result of the defender’s specific intention to obtain “protection” for its military forces and objectives, or simply of a lack of care for the civilian population.<sup>14</sup>*

However, Lafazani underlines that differentiating the use of human shields and the failure to take passive precautions can be challenging in the field.<sup>15</sup> She explains that intent is a subjective element that cannot be determined with certainty on the ground. There are some well-known historical instances where shields were easily identifiable, such as people “chained to canons or wearing targets on their t-shirts.”<sup>16</sup> But these are rare occurrences. Gordon and Perugini also remind us that most of the human shields displayed in the media are human shields by ‘proximity,’ which could very well result from a coincidence.<sup>17</sup> As will appear in the case studies, there are situations where there is no difference between proximate shields and the endangerment of civilians. It is then a matter of classification –

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<sup>13</sup> *Ibid.*, Article 51(7)

<sup>14</sup> International Committee of the Red Cross (ICRC) Casebook – Conduct of Hostilities, available at [https://casebook.icrc.org/law/conduct-hostilities#i\\_8](https://casebook.icrc.org/law/conduct-hostilities#i_8), II.8.- Introductory Text

<sup>15</sup> Lafazani, 2021

<sup>16</sup> Stephanie Bouchié de Belle, ‘Chained to Cannons or Wearing Targets on their T-Shirts: Human Shields in International Humanitarian Law’ (2008) 90(872) *International Review of the Red Cross* 883-906

<sup>17</sup> Neve Gordon, Nicola Perugini, ‘Proximate ‘human shields’ and the challenge for humanitarian organizations’ (2021) *ICRC Blogs*

and these classifications, regardless of the law, often do not consider the ‘intent’ component of the concept of human shielding.

**c. Omissions and Ambiguities of the Law**

On Human Shields as Subjects

- *What characterizes human shields? What is their status?*

It is worth noting that none of these dispositions use the term human shields: not only this method of warfare is not mentioned by name, but the individuals used to shield military objectives are also not defined clearly. They are determined solely by the belligerents’ conduct towards them. After all, these articles were introduced to prohibit, and not to define human shields.

Nonetheless, these dispositions tell us that human shields are initially protected persons, with the Article of Geneva Convention III covering prisoners of war and the Article of Additional Protocol I covering civilians. However, does this status change once a protected person is used as a shield? Is ‘human shield’ a status in itself? The law does not answer those questions. The Additional Protocol I also underscores that isolated individuals and groups of people can be used as human shields, mentioning both “civilian population or individual civilians.”<sup>18</sup> However, it does not mention a threshold and fails to specify whether human shields are restricted to the hostile party’s population. For example, does it cover civilians used by their National Army? One can assume that it encompasses both: accusations of human shielding are common in NIACs or conflicts involving Non-State Armed Groups, as will appear in the case studies.

- *Are voluntary human shields included in the scope of the law?*

The representation of protected persons used as human shields in these articles is passive in nature. The shield is either held somewhere or sent somewhere, and may not even be aware of its function as a shield when another party utilizes its mere presence or movement. The human shield appears to have no agency whatsoever in its characterization as such. In fact, the formulation suggests that human shields are necessarily used by a party to the conflict and not acting as shields independently. It thus excludes from the scope of the law voluntary human shields acting independently from the Armed Forces.

However, it may include voluntary shields acting for the sake and with the knowledge of a warring party. It is indeed not specified that human shields should necessarily be constrained. In other words, it means that a warring party using shields willing to take on this role also comes into the scope of this law. Nonetheless, the way the law is worded

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<sup>18</sup> Additional Protocol I, Article 51(7)



leaves little doubt: human shields (voluntary or not, collaborating with the Armed Forces or not) cannot be accused of violating the prohibition because it is characterized by the conduct and the intent to use another party -and not oneself. That does not preclude that other dispositions could be used against voluntary shields.

### On the Shielded Object

- *How is the shielded object characterized?*

The shielded object is also not defined precisely. According to the Geneva Conventions III and IV, these can be “points” or “areas.” There is no specification on the scale of these objects. It could thus encompass all sorts of targets: combatants, weapons caches, strategic areas, or infrastructures. The Additional Protocol I clarifies the function of the shielded object, stating that it is safeguarded in an attempt to protect “military objectives from attacks or to shield, favour or impede military operations.”<sup>19</sup> The shielded “points” or “areas” are then associated with military gains and have a (military) function in the course of hostilities. It also indicates that human shielding is evaluated in relation to the military advantage of the warring party employing this method of warfare. In other words, in prohibiting human shields, the law considers that the party using them is advantaged. Logically, it means that the opponent is disadvantaged. The paper will examine these assumptions at a later stage.

- *Can the opponent target shielded objects?*

Nonetheless, according to Gordon and Perugini, the law not only prohibits the human shielding of military objectives but also “reiterates that it is legitimate for militaries to attack areas protected by human shields.”<sup>20</sup> It can be hard to see a strict “reiteration” of the legitimacy of shielded military objectives in the articles. However, this assertion can be deduced from them and especially from their omissions. First, although the law states that making objectives “immune” from attack is the purpose of the party using shields, it does not say that shielding makes these objectives immune or makes them lose their quality of military objectives. It is as if the civilians used as shields slip into the combat zones and do not change the nature of it: the objectives and strengths of armies remain the same. Only the decision to fire of the army facing the shields could be affected. This is also not specified by IHL principles, which allow collateral damages when they are proportional to the expected military advantage. It would also be specified if it was forbidden to fire at military objectives in these circumstances.

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<sup>19</sup> *Ibid.*, Article 51(7)

<sup>20</sup> Neve Gordon, Nicolas Perugini, ‘Human Right to Kill’, in *The Human Right to Dominate*, (New York: Oxford Studies in Culture and Politics, 2015) 71-100, p. 172

Second, the fact that there is a prohibition on using civilians as human shields implies a potential danger for civilians if it is not respected. Logically then, the military objectives are not entirely immune from fire due to shielding. After all, these articles protect civilians upstream -before their use as shields-: by prohibiting human shielding, they deter belligerents concerned about respecting International Law from using them. The articles say nothing about the protection of civilians once they are used as human shields.

Finally, one could see an ambiguity in the sentence stating that civilians or *hors de combat* individuals may not “be used to render certain points or areas immune from military operations.”<sup>21</sup> This excerpt could be interpreted in two ways. First that using protected persons as human shields to make a military object unassailable is forbidden. Second, as spelled out by Gordon and Perugini, that the shields do not make the military objects immune from military operations.<sup>22</sup> In other words, using human shields does not absolutely prevent an attack on the shielded objective. Two paradoxes can be seen: first, a law that aims to protect civilians would admit that they can be killed in certain circumstances. Second, it implies that human shields would be used even when it does not always make the military object immune from attack. Then, what is the advantage of using shields if it does not necessarily render a target immune from attack?

- *When can the opponent target a shielded object? How can the opponent identify shields?*

This can give us a clue as to how IHL approaches the attacker’s point of view: the attacker facing human shields does not necessarily have to renounce the shielded military objectives. However, such a stance is not clarified in the law: there is no indication as to when an army should give up on a shielded objective. This understanding of the article can also be seen as an indication of the protection of human shields themselves: they would not be absolutely protected from the enemy’s strikes. Now, is this only due to the principle of proportionality? Or do human shields benefit from a diminished protection as opposed to other civilians who do not take on a shielding function? Is this compatible with IHL? Civilians benefit from an unconditional protection according to the Law of Armed Conflicts, as long as they do not directly participate in hostilities. The articles do not clarify this matter.

Notwithstanding, the law does not offer additional information that the attacker facing human shields could use in the field. How to recognize them and classify them as human shields with certainty? There are not many details on the shielded object, solely identifiable in relation to the potential advantage of the enemy; nor are there many hints on the shields

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<sup>21</sup>Additional Protocol I, Article 51(7); Geneva Convention III, Article 23(1); Geneva Convention IV, Article 28

<sup>22</sup> Neve Gordon, Nicola Perugini, ‘The politics of human shielding: On the resignification of space and the constitution of civilians as shields in liberal wars’ (2016) 34(1) *Environment and Planning D: Society and Space* 168-187, p.172

themselves, whose status as protected persons is the only definite criterion. The enemy's intent, the essential requirement of the law on the prohibition of human shields, can be as opaque from the attacker's point of view. The only element of human shields that could be assessed on sight is their movement (or lack thereof). However, the fact remains that the evaluation of movement alone may not be sufficient, as it cannot inform with certainty about the enemy's intentions.

#### d. Other Legal Sources

##### NIACs

With regard to NIACs, there is no explicit written ban on human shields. The ICRC asserts that the practice is indirectly prohibited by **Additional Protocol II** with respect to the Protection of Victims of Non-International Armed Conflicts:

Article 13(1) on the Protection of the Civilian Population — *The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.*

Exposing civilians to fire through their use as shields for military objectives prevents them from enjoying protection from military operations. There is also a history of human shielding being considered a violation of the dispositions on hostages of the Protocol (Article 4(2)(c)). This analogy seems especially relevant for the codification of the prohibition of human shields came in part from worries concerning the fate of hostages.<sup>23</sup> Without a specific prohibition, Additional Protocol II does not enrich the definition of human shields, especially in the context of NIACs.

Apart from the written law, the use of human shields is considered prohibited in Customary Law, with respect to both IACs and NIACs. This prohibition has been reunited under Rule 97 in the ICRC's International Humanitarian Law database.<sup>24</sup> This means that human shielding is prohibited whether a State is a party to the above treaties or not.<sup>25</sup> The ICRC also underlines that it is contrary to the principle of distinction and to the obligation of separating civilians and military objectives, as established by Customary Law. Finally, it is worth noting that in International Human Rights Law, it violates the non-derogable right not to be arbitrarily deprived of the right to life.<sup>26</sup>

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<sup>23</sup> Gordon & Perugini, 2020, p. 83

<sup>24</sup> International Committee of the Red Cross (ICRC) Databases – Rule 97: Human Shields, available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule97>

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

## ICL

This exclusive focus on the prohibition of human shields is reinforced by the fact that apart from Humanitarian Law, human shields only clearly appear in International Criminal Law – in which they are considered a grave breach of the Geneva Convention. It is thus prohibited as a war crime during IACs in the **Rome Statute**:

Article 8-2. (b)(xxiii) — *Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.*

Since this rule repeats the wording of the Law of Armed Conflicts, no further analysis is needed. Regarding NIACs nevertheless, one can first highlight that despite not being spelled out in the Rome Statute, it remains a criminal offense in Customary Law. On top of that, it is prohibited in various states' legislation.<sup>27</sup> Similarly to IHL, one can also imagine that the use of human shields by a warring party in NIACs could be equated, in some cases, to the war crime of taking hostages in Article 8-2. (c)(iii) of the Rome Statute. Hostages, however, could be solely associated with someone taken from the opposing party's population. But if human shields are chosen within the warring party's own population, one can wonder whether they will be classified as hostages. The *Ntaganda* case at the ICC has opened the door to criminalizing conducts that were now excluded (as war crimes) by piercing the compartmentalization of victims in IHL and ICL. It established that the conduct of an armed force against its population and members of the same armed forces (so not necessarily protected persons), here child soldiers, can be criminalized as a war crime.<sup>28</sup> One can assume that this could also apply to the crime of human shielding.

## Jurisprudence

There is very little jurisprudence on the crime of human shielding. The ICTY ruled on the matter in the Radocan Karadzic and Ratko Mladic case, and the Timomic Blaskic case. The former were accused of planning, instigating, or aiding and abetting the use of UN peacekeepers as human shields to safeguard potential NATO air targets.<sup>29</sup> As regard Tihomic Blaskic, the ICTY established in the appeal trial that even if the human shields had not been harmed and their location was not targeted, the crime of human shielding was characterized.<sup>30</sup> This element highlights the importance of the intent. Even if the human

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<sup>27</sup> Ibid.

<sup>28</sup> ICC, 01/04-02/06, *Prosecutor v. Ntaganda*, Trial Chamber VI, Appeal Judgement, 8 July 2019, available at [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019\\_03568.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF), §47

<sup>29</sup> ICTY, IT-95-5-I, *Prosecutor v. Karadzic & Mladic*, Initial Indictment, July 1995, available at <https://www.icty.org/x/cases/mladic/ind/en/kar-ii950724e.pdf>, §47

<sup>30</sup> ICTY, IT-95-14-A, *Prosecutor v. Tihomir Blaskic*, Appeals Chamber, 29 July 2004, Appeals Chamber available at <https://cld.irmct.org/assets/filings/Judgement-Blaskic.pdf>, §654

shields and the shielded objective were not targeted, the intent to use civilians that way is enough.

Apart from this jurisprudence and from emphasizing the seriousness of the crime of human shielding in all theatres of war, ICL brings little elements as to defining the concept of human shields.

#### **e. Conclusion**

This thesis argues that Law of Armed Conflicts is limited insofar as it does not define human shields or consider the attacker's point of view. Human shields are reduced to an unethical method of warfare. In fact, it does not really encompass the possibility of the law being breached and human shields being used. For Butler, "international legal definitions precede and inform the practices and strategies of war."<sup>31</sup> But when the law fails to provide such definitions, what happens? One of the consequences of the lack of definition is the debated status of human shields, that will be examined in the next section.

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<sup>31</sup> Judith Butler, 'Human Shields' (2015) 3(2) *London Review of International Law* 223–243, p. 226

## 1.2. The Debated Status of Human Shields

This section will assess the status of human shields, which is crucial for understanding how they are (not) protected in the course of hostilities. Only then can we assert the conduct adopted by the attacking party facing human shields.

### a. Nature of Human Shields

- *Can a human shield be considered a weapon?*

Human shields embody a process of weaponization of the body.<sup>32</sup> This idea of weaponization has to be understood in relation to the pursuit of the military objective, which can be achieved through both offense and defense. Indeed, the role of the defense in the success of an attack is key: “almost every offensive is dependent on some sort of protection, the shield also functions as a necessary instrument of combat, making it easier for its possessor to injure or kill the enemy.”<sup>33</sup> And in this specific case, human shields indirectly impact the enemy’s offense, whose decision to attack may be affected: human shielding “epitomizes the dialectic between armed offense and defense within the framework of violence and war.”<sup>34</sup> Another aspect distinguishing a human shield from a regular shield or defensive weapon is that they can be killed. And it is this vulnerability, the fact they can but should not be killed, that makes it possible to use them as shields. Another key difference is that they are not inanimate;<sup>35</sup> they can obtain this status of shields as quickly as they can lose it when their shielding function ends. A shield is usually an inanimate object with one function. However, human shields are not lifeless material but animate bodies. This humane quality differentiated them from regular weapons.

Thus, although human shields can be considered a defensive weapon, it is not their nature. As opposed to generic weapons, human shields only undertake the function of weapons. And this function is not permanent. Thus, one should focus on the status of human shields. Is this status linked to the role they undertake as a weapon? Or is the status related to their condition as civilians in the context of conflicts?

### b. Function and Status of Human Shields

#### Human Shield: a Civilian or a Combatant?

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<sup>32</sup> Gordon & Perugini, 2020, pp. 3-5

<sup>33</sup> Gordon & Perugini, 2016 (‘The Politics of Human Shielding’), p. 169

<sup>34</sup> Ibid, p. 169

<sup>35</sup> Ibid, p. 169

The status of human shields in International Humanitarian Law is still debated. The law spells out that individuals used as shields must be protected persons to constitute the crime of human shielding. In other words, the status of protected persons is a prerequisite for shields to come under the application of the prohibition of human shielding. When civilians are being used as human shields, they take up a new function on the battlefield. Indeed, civilians will be framed as shields, a protective tool serving the interests of one of the warring parties. Nonetheless, civilians are not supposed to take up any function during hostilities. Thus, civilians used human shields pierce the traditional divide between civilians and combatants.

And indeed, what is the difference between forcefully conscripted inexperienced combatants and human shields? Major General Dunlap asks whether “should “conscripted” human shields be considered equivalent to any other unwilling member of an enemy force?”<sup>36</sup> Gross also argues that “nonstate actors “conscripting human shields” are essentially the same as nation-states conscripting unwilling citizens for traditional military service.”<sup>37</sup>

The recent assault on Bakhmut in Ukraine is an eloquent illustration, qualified in October 2022 as a “meat grinder.”<sup>38</sup> There, Russia sent its new recruits to the front lines. These soldiers were requisitioned in the last few months, sometimes enrolled from prisons. They were sent towards the Ukrainian positions without initial tactical preparation and even without knowing the exact location of the enemy’s artillery. Their primary purpose was not to kill but to be killed or at the least targeted by the enemy to identify the Ukrainian artillery’s location. A more experienced unit can then launch another assault. This strategy requires the sacrifice of many lives, which are entirely disregarded to focus on the army’s progress: “even if the first nine [attacks] fail, if the tenth succeeds, that is enough to push the front line slowly but inexorably.”<sup>39</sup> Both the use of canon fodder and human shield are methods of warfare that imply the sacrifice of human lives. The key difference here is that despite their similar function, the former has the status of combatants, and the latter supposedly has the status of civilians or protected persons.

### Human Shield: a Civilian that can be Killed?

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<sup>36</sup> Charles J. Dunlap, ‘No Good Options Against ISIS Barbarism? Human Shields in 21<sup>st</sup> Century Conflicts’ (2016) 110 *AJIL Unbound* 311-316, p. 313

<sup>37</sup> *Ibid.*, p. 313

<sup>38</sup> James Beardsworth, ‘‘It’s a Meat Grinder’: Fighting Rages in Eastern Ukraine as Russian Forces Eye Bakhmut’, The Moscow Times (28 October 2022) available at <https://www.themoscowtimes.com/2022/10/28/its-a-meat-grinder-fighting-rages-in-eastern-ukraine-as-russian-forces-eye-bakhmut-a79225>

<sup>39</sup> Cédric Mas, ‘Sept mois de combats pour Bakhmut’, Médiapart (10 March 2023), available at <https://www.mediapart.fr/journal/international/100323/sept-mois-de-combats-pour-bakhmout>. Translated from French : “même si les neuf premières [attaques] échouent, si la dixième réussit, cela suffit pour pousser le front, lentement mais inexorablement”

Gordon and Perugini underline the antinomy and ambivalence of the concept of human shields regarding this civilian/combatant divide. According to them, the classification of civilians into human shields transforms them, legally, into killable subjects:

*Human shields are in fact framed as civilians who, in specific circumstances of war, acquire a particular function (namely, shielding) and this function produces their liminal status in such a way that they come to occupy a legal threshold. They are civilians, but they are no longer simply civilians since willingly or unwillingly a new function has been added to their definition as civilians. For this function to actually work they have to continue to be considered civilians (if they were transformed into combatants or inanimate objects there would not be a quandary), but they are now—however passively—considered an integral part of the hostilities, which transforms them into killable subjects.<sup>40</sup>*

In other words, when civilians are classified as human shields, they remain civilians, but they become killable. Then what differentiates them from combatants? If human shields were combatants, there would be no dilemma about whether to kill them or not.

This paper presented the codification of human shields as both the consecration of the prohibition of the use of protected persons as human shields, and the (underlying) affirmation that the use of human shields does not render immune from attack the shielded points or areas. For Gordon and Perugini, there is something paradoxical in these dispositions that were written to improve the protection of civilians and limit the recourse to violence against them<sup>41</sup>. Indeed, if the shielded targets are not immune from attack, it means that the army facing human shields may attack them, killing civilians. The Article, which is supposed to prevent the utilization of civilians as shields to protect their lives, establishes that it may be possible and allowed to kill civilians when the prohibition is breached.

If civilians are used as human shields in the first place, it is because they are considered as both protected and vulnerable. However, the instrumentalization of this vulnerability becomes meaningless if the civilians can be killed. According to Butler, this vulnerability is then given and presupposed in order to be denied when human shields are ultimately killed.<sup>42</sup>

Then what is the status of the human shields? Do they legally remain civilians when they are used as shields? And if yes, are they protected the same way as civilians who do not undertake the function of shields? As mentioned in the first section, civilians' protection is supposedly absolute as long as they do not directly participate in hostilities. Does this

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<sup>40</sup> Gordon & Perugini, 2016 ('The Politics of Human Shielding'), p. 184

<sup>41</sup> Gordon & Perugini, 2020, p. 85

<sup>42</sup> Gordon & Perugini, 2016 ('The Politics of Human Shielding'), p. 184



apply to human shields? To answer those questions, this section must first look at the different categories of human shields in the field.

**c. Voluntary and Proximate Shields: Forms of Shielding that Escape the Scope of the Law?**

Voluntary Shields

Scholars have increasingly underscored the differentiation between involuntary human shields from voluntary ones. Although voluntary human shields represent a minority of human shields deployed in contemporary conflicts,<sup>43</sup> they have been at the heart of the debate on the status of human shields. Indeed, voluntary shields imply that the civilian willingly undertakes this role as a shield. The law is mute on this matter, framing shields as protected persons used by a party to the conflict. Nevertheless, voluntary shields exist, with the well-known instance of Serbian civilians positioning themselves on Belgrade bridges to shield them from NATO bombing.<sup>44</sup> The notion also increasingly appears in military manuals, as will be shown later.

As Bouchié de Belle holds, there is one situation where voluntary human shields could come under the legal prohibition of human shields. This would involve protected persons acting as shields voluntarily to support one of the parties to the conflict. The authorities of this party, aware of that, would not take any measures to prevent their actions as shields. Bouchié de Belle spells out the following:

*If the authorities allow such a thing to happen without taking any action, that could be considered all the more revelatory of an intention to use human shields, since, in addition to the absolute negative obligation never to do so, the authorities also have positive obligations, albeit relative ones this time, to take various precautionary measures, including keeping civilians away from military targets.*<sup>45</sup>

- *How to distinguish voluntary and involuntary shields?*

According to some scholars, the voluntariness of the shields determines the status one should attribute to them. However, voluntary human shields will not systematically wear targets on their T-shirts like the civilians in Belgrade.<sup>46</sup> How is it possible to determine the intent of the civilians? And even if they wear targets, how can one be certain they are not

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<sup>43</sup> Gordon & Perugini, 2021

<sup>44</sup> George Nash, 'Human shields defend Belgrade bridges', UPI Archives (15 Avril 1999), available at <https://www.upi.com/Archives/1999/04/15/Human-shields-defend-Belgrade-bridges/2094924148800/>

<sup>45</sup> Bouchié de Belle, 2008, p. 890

<sup>46</sup> Nash, 1999

coerced to do so? The Manual of Norwegian Armed Forces reiterates the difficulty in determining the voluntariness of human shields, even if they appear this way:

*It may be difficult to determine whether civilians are acting as human shields against their will, or whether they are doing so entirely voluntarily to hinder enemy operations. There are several examples of regimes recruiting human shields through the threat of persecution, either against the persons themselves or their families.*<sup>47</sup>

- *A new form of resistance?*

Besides, voluntary shields cannot be reduced to shields siding with one party to the conflict.<sup>48</sup> This excludes voluntary human shields acting in the frame of a non-violent resistance action against war and violence. Military manuals do not consider this form of voluntary human shield. According to Bargu, “it articulates a resistance against organized violence by risking lives, and (...) transforming those lives into the means of protecting others”, such as vulnerable populations, critical infrastructures necessary for civilian survival, and symbolic sites of cultural, religious, or political significance.<sup>49</sup> Protecting civilians or civilian populations cannot be reduced to taking a side to a party of the conflict.

This form of shielding is not covered by the legal prohibition of human shields in its current terms. On top of that, the civilian constituting as a shield in an act of resistance hardly fits the categories set out in IHL, as it pierces the dichotomy between passive civilians and conscripted combatants.

### Proximate Shields

It is necessary to mention the emerging notion of ‘proximate shield’, prominent on the field but often absent from military manuals. Proximate shields are characterized by their proximity to military objectives, and this sole proximity determines their denomination as human shields. Unlike voluntary or involuntary human shields, “proximate shields become human shields without doing or being forced to do anything.”<sup>50</sup> Despite the advantage this proximity can generate, there is no intent to shield, either from the civilian or from a party to the conflict. When there is no concurring intent from the enemy to exploit this proximity, shields appear to escape the scope of the law. Despite that, according to Gordon and Perugini’s computations, they represent 99% of the shields mentioned in the media and

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<sup>47</sup>Norwegian Defence University College/Norwegian Defence Command and Staff College, ‘Manual of the Law of Armed Conflict’ (2013) for The Chief of Defence, English translation (2018) available at [https://usnwc.libguides.com/ld.php?content\\_id=47416967](https://usnwc.libguides.com/ld.php?content_id=47416967), p. 61

<sup>48</sup>Banu Bargu, ‘Bodies Against War: Voluntary Human Shielding as a Practice of Resistance’ (2016) 110 *AJIL Unbound* 299-304, pp. 299–304

<sup>49</sup>*Ibid.*, p.301

<sup>50</sup>Gordon & Perugini, 2021

most of those in the field.<sup>51</sup> It is particularly striking that most human shields do not have any legal existence. One can even wonder if the classification of ‘human shield’ is adapted in this case. It is thus critical to examine the status of proximate shields too.

#### **d. Human Shields: Loss of Civilian Status**

Civilians are protected in IHL as long as they do not directly participate in hostilities. To establish whether human shields retain their protection and status as civilians, the paper needs to address that point.

#### Application of Direct Participation in Hostilities to Human Shields

- *What is direct participation in hostilities?*

*In international humanitarian law the concept of “direct participation in hostilities” refers to conduct which, if carried out by a civilian, suspends his protection against the dangers arising from military operations. Most notably, for the duration of his direct participation in hostilities, a civilian may be directly attacked as if he were a combatant.*<sup>52</sup>

The general protection of civilians is established, among others, in Article 51 of Additional Protocol I, which also forbids human shields. As for it, the loss of protection in the event of direct participation in hostilities is spelled out in Additional Protocol II and in Customary Law.<sup>53</sup> Here is the disposition in treaty law:

*Article 13§3 – Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.*<sup>54</sup>

The ICRC provides interpretative guidance on what consists of “direct participation in hostilities.” The act examined must meet the following cumulative criteria:

- a. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death,*

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<sup>51</sup> Ibid.

<sup>52</sup> International Committee of the Red Cross (ICRC) Casebook – Glossary: Direct Participation in Hostilities, available at [https://casebook.icrc.org/a\\_to\\_z/glossary/direct-participation-hostilities#:~:text=In%20international%20humanitarian%20law%20the,dangers%20arising%20from%20military%20operations](https://casebook.icrc.org/a_to_z/glossary/direct-participation-hostilities#:~:text=In%20international%20humanitarian%20law%20the,dangers%20arising%20from%20military%20operations)

<sup>53</sup> Ibid.

<sup>54</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977)

- injury, or destruction on persons or objects protected against direct attack (threshold of harm);*
- b. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and*
  - c. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).<sup>55</sup>*

- *Do human shields meet the belligerent nexus?*

The belligerent nexus is met when the act is committed to favor a party to the conflict *and* disadvantage another. This criterion could be met in the case of voluntary human shields supporting one of the parties. However, it undoubtedly excludes civilians who act as shields in non-violent resistance to war and violence in general.

The belligerent nexus is also not met in the case of proximate shields, whose actions are independent of the classification as human shields and are not “*specifically designed to directly cause*” harm to a party of the conflict or support the other.<sup>56</sup> In the case of involuntary human shields, as the civilians themselves have no say in their actions, I would argue that it also cannot meet this requirement.

However, this is not a universal view. Dunlap thus argues that human shields’ actions, whether involuntary or voluntary, meet the requirements for direct participation in hostilities. Their state of mind should be absent from the considerations, with a sole focus on their actions. And according to him, “it is hard to think of what action could be more directly participating in hostilities than attempting to shield a *bona fide* military objective from an otherwise legitimate attack.”<sup>57</sup> Yet, does such an approach cover civilians whose movements or positions are used without their will or knowledge? Are intent and knowledge not necessary at all when characterizing an act of direct participation in hostilities? Besides, in the case where civilians are aware but coerced, it seems inappropriate to consider that they should lose their civilian protection for forced actions they did not consent to. It was also not the drafters’ intention, whose purpose was to increase the safety of hostages and civilians in general.<sup>58</sup> In contrast with Dunlap, some scholars argue that the notion of intent is crucial to this consideration, as it could be considered that voluntary human shields “aid and abet” the enemy.<sup>59</sup>

- *Do human shields meet the rules on the threshold of harm and direct causation?*

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<sup>55</sup> ICRC Casebook – Direct Participation in Hostilities

<sup>56</sup> Ibid.

<sup>57</sup> Dunlap, 2016, p. 313

<sup>58</sup> Gordon & Perugini, 2020, p. 83

<sup>59</sup> Bargu, 2016, p. 302

With respect to the rules on direct causation and threshold of harm, two issues can be underlined regardless of the type of human shields:

First, as per the ICRC, to meet the requirement for direct participation in hostilities, the act must involve “a physical chain of causality,” or in other words, represent a physical threat or hinder.<sup>60</sup> Most human shields will rather represent a ‘moral’ or ‘legal’ hinder to the enemy’s operations. As such, “the mere fact of altering ‘the parameters of the proportionality assessment to the detriment of the attacker, thus increasing the probability that the expected incidental harm would have to be regarded as excessive in relation to the anticipated military advantage’ is insufficient.”<sup>61</sup>

Second, Lafazani maintains that even when human shields physically obstruct ground operations, it is hard to consider that their actions could meet the threshold of harm by directly affecting military operations or inflicting damage.<sup>62</sup>

### Loss of Protection and Logical Fallacies

If civilians framed as human shields lose protection as civilians, there is no dilemma on whether an army should target human shields or not. Hence, using human shields would appear pointless: the civilians would de facto be treated as combatants and killed. The army facing human shields would not have to act any differently as if there were no shields, so why would an army use shields in the first place? Notwithstanding this, according to Dunlap, systematically considering shields as a legitimate target is the appropriate response because it would deter the use of human shields.<sup>63</sup>

The ICRC underlines another logical fallacy regarding the direct participation in hostilities of the shields in these terms:

*The theory considering voluntary human shields as civilians directly participating in hostilities is self-defeating. If it were correct, the presence of human shields would not have any legal impact on the ability of the enemy to attack the shielded objective – but an act which cannot have any impact whatsoever upon the enemy cannot possibly be classified as direct participation in hostilities.*<sup>64</sup>

One can dissect that argument in the following terms:

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<sup>60</sup> ICRC Casebook – Conduct of Hostilities – II.8. Introductory Text

<sup>61</sup> Zoi Lazafani, ‘Human shields under IHL: a path towards excessive legalization’ (2021) *ICRC Blogs*

<sup>62</sup> *Ibid.*

<sup>63</sup> Dunlap, 2016, pp. 311-316

<sup>64</sup> ICRC Casebook – Conduct of Hostilities – II.8. Introductory Text

**Human shields affect the adversary's operations** because the enemy has to reevaluate whether they can strike an objective or not due to the presence of civilians



Civilians' actions as human shields meet the threshold for direct participation in hostilities



Civilians lose their general protection



The adversary can strike regardless of the presence of human shields



**Human shields do not affect the adversary's operations**



Civilians do not meet the requirements for direct participation in hostilities

Furthermore, suppose human shields are considered as directly participating in hostilities. In that case, Lafazani rightly reminds us that “they could also be targeted separately from the shielded objective, for the duration of the act of shielding.”<sup>65</sup> This appears excessive. Lastly, one should also note that if human shields are not considered civilians, since they do not fall into the category of combatants either, they could be seen as “unlawful combatants.”

According to some States, “these persons who directly participate in hostilities, when they have no right to do so, are neither civilians, and therefore are not protected by Geneva Convention IV, neither combatants, and therefore not protected by Geneva Convention III.”<sup>66</sup> This would imply that human shields that are not given civilian status and protection would end up with even fewer protections than combatants. It is however worth noting that the Supreme Court of Israel established in the *Targeted Killings* case that the status of unlawful combatants does not exist. It is just the function of the civilians taking direct part in hostilities.<sup>67</sup> But the result remains the same: those civilians lose the civilian status protections and do not have access to ‘lawful’ combatants privileges. As such, Bargu states the following:

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<sup>65</sup> Lafazani, 2021

<sup>66</sup> International Committee of the Red Cross (ICRC) Casebook – Principle of distinction, available at <https://casebook.icrc.org/law/principle-distinction>

<sup>67</sup> Supreme Court of Israel, HCJ 769/02, *Public Committee against Torture in Israel v. Government of Israel*, (*Targeted Killings* Case), 13 December 2006. See: International Committee of the Red Cross (ICRC) Casebook – Israel, The Targeted Killings Case, on *Public Committee against Torture in Israel v. Government of Israel*, Case No. HCJ 769/02, Supreme Court of Israel, 13 December 2006, available at <https://casebook.icrc.org/case-study/israel-targeted-killings-case>, §31 & §35

*The ambiguity of the status of human shields helps expose the ambiguity of the exception clause, bringing into view the problematic implications of relaxing civilian protections and establishing gradations in the status of persons in international law.*<sup>68</sup>

**e. Conclusion**

For these reasons, this thesis maintains that all types of human shields retain their status as civilians. First, their actions do not meet the criteria of direct participation in hostilities. Second, the logic behind this theory does not stand. On the other hand, when human shields remain civilians and retain their protection, does it mean they should be treated like any other civilian? It entails that using human shields as a method of warfare, despite being illegal, would efficiently affect the other party's decision to attack. The following section will explore the question of belligerents' obligations vis-à-vis human shields.

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<sup>68</sup> Banu Bargu, 'Human Shields' (2013) 12 *Contemporary Political Theory* 227-295, p285

## 2. The obligations of combatants vis-à-vis human shields

Now that this thesis has established the status of human shields, one can appraise the obligations of belligerents facing human shields. After a general overview, there will be a specific focus on the principle of proportionality.

### 2.1. Legal duties regarding the Protection of Civilians

It is essential for this paper's argument to assess what are the legal obligations of an army facing human shields. These obligations will affect whether and when the shielded object and the human shields can be attacked or not, and under which conditions.<sup>69</sup>

#### a. Presumption of Civilian Status

- *Does the presumption of civilian status apply to human shields?*

This section established that human shields should logically be considered civilians. But examining the presumption of civilian status is still crucial. This principle concerns anyone in the course of hostilities, including human shields. In fact, the presumption of civilian status mainly applies when combatants are unsure of the status of individuals who might be affected by their military operations. This principle is thus relevant to practical issues regarding the identification of human shields on the battlefield.

Article 50(1) of Additional Protocol I on the definition of civilian and civilian populations establishes that:

*In case of doubt about whether a person is a civilian, that person shall be considered to be a civilian.*

In the field, it is sometimes challenging to distinguish civilians from combatants.<sup>70</sup> Accordingly, one can easily imagine that distinguishing between different types of shields is particularly intricate. Hence, this principle should apply in most cases involving human shields.

Even when one considers that voluntary human shields would take direct part in hostilities and lose their civilian status, the presumption of civilian status should still apply. Indeed, voluntary shields represent a minority and are almost impossible to distinguish from others. As mentioned in the earlier sections, even when they wear targets on their T-shirts,

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<sup>69</sup> This section was partly inspired by Van Schaack's appraisal of complementary duties under IHL concerning human shields (Van Schaack, 2016).

<sup>70</sup> ICRC Casebook – Principle of Distinction



it is difficult to determine their intent with certainty, for there always is a risk of coercion. Realistically speaking, the presumption of civilian status will apply in most cases. Besides, since there is no consensus about whether voluntary shields can be considered civilians or not, belligerents should, either way, treat them as such.

It is worth noting that this principle does not apply in NIACs. However, the related principle of distinction does.

### Principle of Distinction

The presumption of civilian status can be associated with the principle of distinction. This principle obliges armies to identify their targets and to differentiate the players on the battlefield. In other words, “one must know who and what may be targeted and who and what may not, and what protection to afford depending on the category which a person belongs to.”<sup>71</sup> In practice, the obligations of an army will vary depending on what or whom they face. However, this assessment must necessarily come before an attack.

The strategy on which the use of human shields relies is also linked with those IHL principles. The party using human shields assumes that the attacking party respects the principles of distinction and the presumption of civilians. Otherwise, the use of human shields would be ineffective and pointless. Kinsella explains it in these terms:

*All forms of human shielding are informed by the same proposition: shielding is presumed to deter the opposing forces from exercising violence or, at the very least, to moderate that violence. Thus, all forms of shielding rely in some way upon the strategic invocation of civilian status—and the protections and immunities it provides—to intervene in potential or actual military operations. Such invocation is made possible by the fact that the distinction between combatant and civilian is a fundamental predicate of international humanitarian law. Therefore, the efficacy of human shielding depends upon combatants’ compliance with the principle of distinction and their capacity and willingness to uphold the provisions that civilians “shall enjoy general protection against dangers arising from military operations ... [and] shall not be the object of attack.”<sup>72</sup>*

But distinction and presumption of civilian status are not the only dispositions applicable in this case. Accordingly, this section will now examine the principle of precautions in attack.

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<sup>71</sup> ICRC Casebook – Principle of Distinction

<sup>72</sup> Helen M. Kinsella, ‘Gender and Human Shielding’ (2016) 110 *AJIL Unbound* 305-310, p.305

**b. Principle of Precautions in Attack**

- *Which rules apply in the planning of an attack on a shielded target?*

During IACs

Once individuals used as shields are presumed civilians, it is possible to look at the principles applicable to civilians specifically. The principle of precautions in attack applies once a party to the conflict assumes they face civilians, and before launching an attack. It is established in Article 57 of Additional Protocol I for IACs:

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

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

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

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

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

*(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;*

*(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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;*

*(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.*

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

*4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.*

*5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.*

In light of these provisions, it appears that an attack causing civilian casualties should be avoided at all costs. Such an attack can only be conducted at the last resort, that is if:

- a similar objective that would not cause civilian harm cannot be chosen instead
- all feasible precautions have been taken
- civilian casualties are not excessive in relation to the military objective.

Even then, a warning should be released. There is no indication in the law that those provisions would not apply, or apply differently if the civilians affected by the potential attack are classified as human shields. Consequently, an attack causing harm to human shields present near the target should come as a last resort.

### During NIACs

For NIACs, the codification of the principle of precautions in attack was abandoned.<sup>73</sup> Despite that, several dispositions aim to protect civilians from attacks. Article 13 of the 1977 Additional Protocol II provides:

*1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.*

*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.*

Those provisions do not explicitly require “precautions in attack.” But they prohibit attacks against civilians, which would be difficult to apply without exercising precaution.<sup>74</sup> Other treaties applicable in NIACs do spell out the principle of precautions: the Amended Protocol II to the Convention on Certain Conventional Weapons and the Second Protocol to the Hague Convention for the Protection of Cultural Property.<sup>75</sup> Finally, the ICRC

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<sup>73</sup> International Committee of the Red Cross (ICRC) Databases – Rule 15: Principle of Precautions in Attack, available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule15>

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

further clarifies the principle of precautions under Rule 15 of Customary Law.<sup>76</sup> Hence, there is no reason not to apply precautions in attacks during NIACs.

Therefore, one can assume that civilians, including those classified as human shields, are protected against military attacks during armed conflicts of an international and non-international character. Even when the principle is not spelled out word for word, precaution should apply to any operations targeting shielded objects and potentially harming civilians constituted as shields.

### **c. Reprisals and Reciprocity**

- *Do reprisals and reciprocity apply to situations involving human shielding?*

#### Reprisals and Human Shields

This section will now focus on reprisals. Some scholars consider it applies to the case of human shields.<sup>77</sup> Reprisals are measures taken in response to the opposing party's violation of international law. These measures would normally be prohibited, but they are tolerated insofar as they aim to force the opposing party to end its illegal conduct. Nowadays, there is a growing tendency to ban the use of reprisal in IHL completely.<sup>78</sup>

Reprisals could be relevant to situations involving human shields because they imply a violation of IHL. More precisely, one could imagine an army facing human shields would resort to forbidden attacks to force the other party into compliance. Some jurists are in favor of this view, and argue that firing at shielded objects would constitute a “lesser evil.” According to them, this would end the growing use of human shields by rendering this prohibited method of warfare inefficient. Indeed, the shielded object would be targeted regardless. Dunlap goes further by questioning the ban on chemical and biological weapons, some of which could be used against shielded objects. For him, such actions and attacks against shielded targets could be requalified as “‘law enforcement’ situations (...) as opposed to a means or method of warfare.”<sup>79</sup> Nevertheless, Dunlap’s “law enforcement situations” appear to circle back to reprisals. Furthermore, this way of framing the issue disregards the civilians that may be harmed in the process.

#### Restrictions on Reprisals

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<sup>76</sup> Ibid.

<sup>77</sup> Dunlap, 2016; or see section II.1.2.

<sup>78</sup> International Committee of the Red Cross (ICRC) Databases – Rule 145: Reprisals, available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule145>

<sup>79</sup> Dunlap, 2016, p. 315

Additionally, even when reprisals would be allowed, they have to respect five conditions, according to Customary Law:

- The purpose of reprisals must be to induce the adversary to comply with the law in reaction to its breach
- It must be a measure of last resort
- Reprisals should not be excessive in regard to the action it aims to stop
- The decision must be made at the highest level of government
- Reprisals must be terminated as soon as the other party complies with the law<sup>80</sup>

As such, systematic attacks against shielded objects in order to force the opponent into compliance would not meet these conditions. Especially, they would not be of last resort. Furthermore, the ICRC has underlined a tendency to abandon reprisals due to their inefficiency and the risks it entails:

*The reticence of States to resort to reprisals can be explained by the fact that they are ineffective as a means of enforcement, in particular, because reprisals risk leading to an escalation of violations.<sup>81</sup>*

And indeed, if combatants are willing to use human shields and break the law in the first place, can they be forced into compliance? The ineffectivity of the use of shields would not necessarily stop these combatants from breaking the law further. On the contrary, wouldn't the combatants resort to an even more radical method of warfare? Would they try to use even more civilians to form "bigger human shields"? Then, would the attacker on the other side be willing to cause these many casualties? At that point, the target's military advantage may no longer be proportional to civilian losses.

### Reprisals on Civilians

This brings us to an essential point: if we assume that shields are civilians, reprisals are prohibited no matter what. Article 33 of Geneva Convention IV establishes, among others, that:

*Reprisals against protected persons and their property are prohibited.*

This rule, as well as Customary Law, only applies to IACs. But according to Van Schaack, there is little reason not to apply it to all conflicts:

*The ICRC considers this CIL rule to be applicable only in international armed conflicts, but there is little justification for not applying this rule across the*

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<sup>80</sup> ICRC Databases – Customary Rule 145: Reprisals

<sup>81</sup> Ibid.

*conflict spectrum. An even broader ban on reprisals against civilians finds support from the Vienna Convention on the Law of Treaties, which states that a material breach of humanitarian treaty provisions dedicated to “the protection of the human person” does not entitle the other party to suspend its own obligations, particularly when it comes to any form of reprisals against persons protected by such treaties.*<sup>82</sup>

This means that although using human shields is a prohibited method of warfare, it is forbidden to strike back at them as a form of reprisal. This principle could nonetheless be nuanced, as human shields could now be considered a substantial part of their armament, associated with the objective. Then, an attack on a shielded target could be seen as a regular offensive against the enemy in general and its armament rather than retaliation. However, it would mean that the shielding function would overtake the civilian status of the human shields. This reasoning cannot possibly overrule the protection of civilians under Article 33,<sup>83</sup> especially in light of the growing prohibition of reprisals.

### Reciprocity and Human Shields

In a similar vein, Van Schaack appraises the applicability of reciprocity. She argues that, like reprisals, reciprocity does not apply to the case of human shields. Reciprocity can be defined as “exchanges of roughly equivalent values in which the actions of each party are contingent on the prior action of the others in such a way that good is returned for good and bad for bad.”<sup>84</sup> With the ban on reprisals, and specifically in the case of protected persons, reciprocity of the “bad for [the] bad” becomes more difficult to apply.<sup>85</sup> In other words, respond to a violation of the law by another breach. In this sense, in his commentary on Additional Protocol I, Pictet provides that “the prohibition against invoking reciprocity in order to shirk the obligations of humanitarian law is absolute.”<sup>86</sup> The ICRC reiterates this point by stating that “there is no reciprocity in respect for treaties.”<sup>87</sup> This also figures in Rule 140 of Customary Law.<sup>88</sup> Thus, the growing restrictions established by IHL had a substantial impact on reciprocity, which cannot be invoked to violate IHL treaties.

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<sup>82</sup> Van Schaack, 2016, p.321.

<sup>83</sup> Convention (IV) relative to the Protection of Civilian Persons in Times of War (Geneva, 12 August 1949)

<sup>84</sup> Bryan Peeler, ‘Reciprocity and IHL Compliance’, in *The Persistence of Reciprocity in International Humanitarian Law* (Cambridge: Cambridge University Press 2019) 12-58, p.29, referring to: Robert O. Keohane, ‘Reciprocity in International Relations’ (1986) 40(1) *International Organization* 1-27, p. 8

<sup>85</sup> “bad for bad”: *Ibid.*, p.20, referring to: Keohane, 1986, p. 8

<sup>86</sup> *Ibid.*, referring to: Claude Pilloud, Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (The Hague: Martinus Nijhoff 1987), p. 38.

<sup>87</sup> International Committee of the Red Cross (ICRC) Casebook – Glossary: Reciprocity, available at [https://casebook.icrc.org/a\\_to\\_z/glossary/reciprocity](https://casebook.icrc.org/a_to_z/glossary/reciprocity)

<sup>88</sup> International Committee of the Red Cross (ICRC) Databases – Rule 140: Principle of Reciprocity, available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule140>

Furthermore, according to Van Schaack, it perverts IHL to consider that using shields allows the attacking party to kill these same shields. “Punishing” the party using shields in the name of reciprocity would end up killing the shields. They would be the first and the most affected by this “punishment”:

*Even when the defending party is in breach of these rules, the attacking party remains subject to its own IHL obligations vis-à-vis the shields. It is axiomatic that reciprocity plays no role in determining whether a party must obey IHL, and tu quoque is no longer a viable defense. As such, the attacker’s obligations are owed erga omnes and remain intact even in the face of breaches by the adversary and even though the defender violates IHL. The law would be perverse indeed if it were to allow the attacker to “punish” the party using human shields by attacking those very shields.<sup>89</sup>*

Finally, it is worth noting that reprisals and reciprocity would only apply in the hypothesis in which human shields are used by the enemy. It is not relevant for proximate shields nor for voluntary human shields acting independently. But even for involuntary shields, reciprocity and reprisals no longer stand as a legal justification for an attack.

#### **d. Rome Statute**

- *Which dispositions of ICL are relevant when planning an attack on human shields?*

The above principles applicable to human shields are reiterated and reinforced by ICL. It prohibits intentional attacks against civilians both during IACs (Article 8-2.b.i. of the Rome Statute) and NIACs (Article 8-2.e.i. of the Rome Statute):

*Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.*

This further reinforces the ban on reprisals and reciprocity in situations involving human shields. Indeed, such attacks conducted in the name of reciprocity and reprisals would constitute a grave breach of the Geneva Conventions or a serious violation of the laws and customs applicable in IACs, according to ICL.

#### **e. Conclusion**

To conclude, as mentioned in the previous sections, there is no legal basis to attribute a different status than civilians to human shields. On top of that, even if there was a distinction in theory, the presumption of civilian status should always guide the military

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<sup>89</sup> Van Schaack, 2016, p.321

operations of the attacking party. As a result, this thesis argues that human shields should still benefit from civilian protection and that the above principles should apply when planning an attack against a shielded object. One of these principles, precautions in attack, involves proportionality calculations. The next section will show that the application of proportionality in the case of human shields has been debated.



## 2.2. On the principle of proportionality

The section above examined the principles that apply to belligerents facing shielded objectives when planning to launch an attack. This part will focus on a specific principle entailing the precautions in attack disposition.<sup>90</sup> This is the principle of proportionality. Some scholars have argued that proportionality applies differently, or does not apply, to human shields. This paper will examine that claim.

### a. Definition of the Principle

In addition to Article 57, this principle appears in Article 51-5(b) of Additional Protocol I on the Protection of Civilian Populations, which defines indiscriminate attacks as:

*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.*

In other words, the (in)discriminate character of an attack is defined according to the principle of proportionality. It also means that a certain amount of collateral damage is accepted as long as it is not excessive in relation to the military advantage of the attack. The principle of proportionality is also recognized in Rule 14 of Customary Law.<sup>91</sup> Lastly, it is reinforced by Article 8(2)(b)(iv) of the Rome Statute in ICL as regards to IACs:

*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 anticipated.*

Accordingly, in ICL, an attack whose collateral damage is excessive in relation to the military advantage constitutes a serious violation of the laws and customs applicable in IACs. The principle of proportionality can then make the difference between a legal and an illegal attack, or between legal and illegal civilian deaths. This principle is used every day by commanders concerned about the legality of their attacks. However, many commentators have highlighted that this principle lacks precision. What is considered

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<sup>90</sup> Additional Protocol I, Article 57

<sup>91</sup> International Committee of the Red Cross (ICRC) Databases – Rule 14: Proportionality in attack, available at <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule14>

proportional or not can vary depending on the actor, and there is no “set formula” to measure it.<sup>92</sup> The ICRC 1987 Commentary offers some guidance in this respect:

*In some situations there will be no room for doubt, while in other situations there may be a reason for hesitation. In such situations the interests of the civilian population should prevail.*<sup>93</sup>

This, however, does not change the fact that proportionality could be evaluated differently depending on the commander. The subjective dimension remains, as “making a determination as to what amounts to ‘excessive’ harm may appear to be the least defined concept within the principle of proportionality.”<sup>94</sup> And the law does not offer clear guidelines and restrictions as to how the principle should be implemented.

## **b. Proportionality and Human Shields**

- *Does proportionality apply the same way to human shields?*

### In the Law

Attacks are not prohibited against shielded objectives. Thus the principle of proportionality applies to attacks on human shields too. Specifically, the law provides that “if the defender violates the prohibition to use human shields, the “shielded” military objectives or combatants do not cease to be legitimate objects of attack merely because of the presence of civilians or protected objects.”<sup>95</sup> This means that the attacker can still launch an attack on a shielded military objective, on the condition that the civilian losses, i.e., human shields, are not excessive in relation to the military advantage gained. This adds up to all the other duties mentioned in the above section, especially the precautions taken during an attack.

Nevertheless, the application of the principle of proportionality to human shields has given rise to many debates. Some of these discussions are linked to the civilian status of shields: if human shields are not considered civilians, the principle of proportionality does not apply. Others consider that despite shields retaining civilian status, the principle of proportionality would apply differently facing human shields in comparison with other civilians. This paper will go through these different stances and examine their legal basis.

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<sup>92</sup> International Committee of the Red Cross (ICRC), Université Laval, ‘International Expert Meeting Report: The Principle of Proportionality in the Rules Governing The Conduct of Hostilities under International Humanitarian Law’ (2016) available at [file:///C:/Users/Coline%20Proy/Downloads/4358\\_002\\_expert\\_meeting\\_report\\_web\\_1.pdf](file:///C:/Users/Coline%20Proy/Downloads/4358_002_expert_meeting_report_web_1.pdf), p. 8

<sup>93</sup> ICRC & Université Laval, 2016, p. 8

<sup>94</sup> *Ibid.*, p. 9

<sup>95</sup> ICRC Casebook – Conduct of Hostilities, II. 8. Introductory Text

## In Military Manuals

In military manuals, there is no unanimous position, and the instructions differ. In France, the new military manuals published in 2022 consider that the proportionality test should be conducted for all types of human shields:

*No civilian, not even, for example, those who voluntarily assume the role of human shields, should be excluded from the calculation of proportionality. The same applies when a party to an armed conflict violates IHL by positioning “involuntary human shields.” In any case, the command has the obligation to anticipate and assess the damage that would result from the attack with regard to the information reasonably available.<sup>96</sup>*

On the other hand, the US Military Manual of 2015 provides that:

*In some cases, a party to a conflict may attempt to use the presence or movement of the civilian population or individual civilians in order to shield military objectives from seizure or attack. When enemy persons engage in such behavior, commanders should continue to seek to discriminate in conducting attacks and to take feasible precautions to reduce the risk of harm to the civilian population and civilian objects. However, the ability to discriminate and to reduce the risk of harm to the civilian population likely will be diminished by such enemy conduct.<sup>97</sup>*

The manuals then consider that attacks involving human shields are more likely to cause collateral damage. In other words, it is clear that commanders will not be able, and will not have to discriminate targets adequately. Thus, according to Gordon and Perugini, “human shielding, in other words, increases the scope of legitimate “collateral damage” (i.e., killing of civilians), and, as the debates about the Manual indicate (...), produces a legal grey zone”.<sup>8</sup> The US Manuals were subsequently amended; the new version provides the following:

*The enemy’s use of voluntary human shields may be considered as a factor in assessing the legality of an attack. Based on the facts and circumstances of a*

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<sup>96</sup> Direction des affaires juridiques Etat-major des armées, ‘Manuel de droit des opérations militaires’(2022) for Ministère des Armées available at <https://www.defense.gouv.fr/sites/default/files/ministere-armees/Manuel%20de%20droit%20des%20op%C3%A9rations%20militaires.pdf>, p. 221. Citation translated from French : “Aucune personne civile, pas même, par exemple, celles qui s’érigent volontairement en boucliers humains, ne doit être exclue du calcul de proportionnalité. Il en va de même lorsqu’une partie à un conflit armé viole le DIH en positionnant des « boucliers humains involontaires ». En tout état de cause, le commandement a l’obligation d’anticiper et d’évaluer les dommages qui résulteraient de l’attaque au regard des informations raisonnablement disponibles.”

<sup>97</sup> Neve Gordon, Nicola Perugini, ‘Human Shields, Sovereign Power, and the Evisceration of the Civilian’ (2016) 110 *AJIL Unbound* 329-334, p. 330

*particular case, the commander may determine that persons characterized as voluntary human shields are taking a direct part in hostilities.*<sup>98</sup>

This time, the manuals provide that a commander can discriminate among shields depending on whether they take a direct part in hostilities. This implies that some human shields participate in hostilities. It also means that some shields would lose their civilian status. The manual also reiterates that a “party that employs human shields in an attempt to shield military objectives from attack assumes responsibility for their injury.”<sup>99</sup> This affirmation may shift the debate further: when civilian deaths arise, there should be a comprehensive investigation. The fact that one party was using human shields does not mean that the attack from the other party was legal. Responsibilities on both sides should be established. Stating that the responsibility for human shields’ injuries or deaths systematically lies with the party using them might create a blind spot and shields the attacker from liability for war crimes. Furthermore, it might lead attacking commanders (or commanders in charge of an attack) to disregard IHL principles when they face human shields.

If one looks at the guidelines of the Norwegian armed forces, they maintain a similar position to the US. For them, when intelligence allows establishing with certainty that human shields are voluntary, they “lose their status as protected persons and become lawful targets.”<sup>100</sup> As such, they are not “included in any proportionality assessment, i.e. not be regarded as potential civilian losses.”<sup>101</sup> However, they highlight that attacks on voluntary human shields remain politically sensitive and “therefore require approval at the operational or strategic level.”<sup>102</sup> But Norwegian Manuals fails to consider the consequences of shields losing their civilian status adequately. They assume that the matter of proportionality is “the most important consequence,” because:

*The question of attacking [human shields] will rarely arise independently of the target they are protecting.*<sup>103</sup>

However, a shield losing its civilian status becomes a legitimate target independently from the initial target. Then the question would arise. Suppose a commander can launch surgical strikes that will only hit the initial target and spare the shields. The commander could decide to target both the shields and the initial target anyway. Indeed, because of their involvement in the conflict, it could be considered that they represent a “threat” to the enemy. Furthermore, since they become lawful targets, some combatants might avoid taking any precautions even if they could.

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<sup>98</sup> Dunlap, 2016, p. 313

<sup>99</sup> *Ibid.*, p. 312

<sup>100</sup> Norwegian Manual of the Law of Armed Conflict, p. 61

<sup>101</sup> *Ibid.*, p. 61

<sup>102</sup> *Ibid.*, p. 61

<sup>103</sup> *Ibid.*, p. 61

Overall, the contradictions between the manuals shows how the lack of restrictions to the principle of proportionality can be interpreted or instrumentalized by the state parties. This also suggests that the practice on the field can vary greatly.

**c. Proportionality: a Means to target Shields legally?**

- *How is proportionality instrumentalized to target shields? What are the dangers of this practice?*

Indeed, as Butler underlines, when it is legal to kill, people may kill even when it is not necessary.<sup>104</sup> More and more actors calculate precisely how many victims they can cause within the limits of legality.<sup>105</sup> This brings us to Pictet's concept of continuum of violence:

*If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.*<sup>106</sup>

Since this principle was never adopted, no provision in international humanitarian law explicitly states that one should not kill if a solution involving less harm is possible. The ICRC itself recognizes that it would difficultly be applied, although for practical reasons:

*The ICRC acknowledges that it is unlikely that this requirement will be feasible in conventional battlefield settings, and that it is most likely to apply "where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts."*<sup>107</sup>

As such, one can easily imagine that if it is considered legal to kill human shields, this will open the door to systematically killing them. In other words, armies would simply not exercise caution in these cases.

Nonetheless, as Gordon and Perugini note, even the ICRC considers that the test of proportionality is affected and that one is "entitled" to evaluate the use of human shields as a factor affecting it:

*The International Committee of the Red Cross notes in a manual entitled Fight It Right that the "attacking commander is required to do his best to protect*

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<sup>104</sup> Butler, 2015, p. 226

<sup>105</sup> *Ibid.*, p. 226

<sup>106</sup> Milton C. Regan, 'From Protecting Lives to Protecting States: Use of Force Across the Threat Continuum' (2019) 10 *Journal of National Security Law & Policy* 171-236, p. 193

<sup>107</sup> *Ibid.*, p. 194

*[civilian shields] but he is entitled to take the defending commander's actions into account when considering the rule of proportionality.*"<sup>108</sup>

However, one can wonder whether military commanders will take this factor into account, and whether they will do their best to protect the civilians. How will this factor be weighed with the other obligations of precautions in attack? Recognizing it as a factor affecting proportionality could diminish other IHL principles or duties in the process. It could be used as a justification to stretch IHL limitations.

Similarly, Rubinstein and Roznai argue for a "proportionate proportionality" in the case of human shields.<sup>109</sup> According to them, it would "realign the balance between the two conflicting principles of humanity and military necessity and make the laws of war compatible with modern warfare."<sup>110</sup> Human shielding can indeed affect the balance of powers between the warring parties. But currently, there is nothing in the law addressing this situation. Thus, there is no legal basis for a "proportionate proportionality." The law should be applied as it applies to any civilian.

- *Humanitarian reasons or military necessity?*

On the other hand, Dunlap states that a plan to have "zero casualties" is a bad strategy. He argues that such a plan can allow "an enemy to survive and to inflict horrors on civilians that are worse" than the civilians who would have died in an attack. For him, civilian losses resulting from an "attack conducted in compliance with the more permissive law of war" are the better solution. He specifies that such attacks are permitted because IHL allows "strikes that do not produce casualties that are "excessive in relation to the concrete and direct military advantage anticipated."<sup>111</sup> Thus, Dunlap seems convinced that attacks inflicting casualties have more chances of preventing harm in the future. According to him, proportionality is also the way out to target human shields without debating on their status in IHL:

*Still, is it possible to address the dilemma of human shields without getting enmeshed in arguments about whether or not human shields are directly participating in hostilities? Perhaps. If one takes the view that in evaluating the "concrete and direct military advantage anticipated" in conducting a particular attack, a commander might conclude that discouraging the use of human shields is one of those advantages anticipated.*<sup>112</sup>

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<sup>108</sup> Gordon & Perugini, 2015, p. 98

<sup>109</sup> Yaniv Roznai, Amnon Rubinstein, 'Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality' (2011) 22(1) *Stanford Law & Policy Review* 93-128, pp. 93-128

<sup>110</sup> *Ibid.*, pp. 93-127

<sup>111</sup> Dunlap, 2016, p. 312

<sup>112</sup> *Ibid.*, p. 314

Dunlap further argues that shields could be killed when it is proportional in relation to the military advantage. This, in turn, would discourage the use of human shields. However, this way of framing the problem could still qualify as reprisals. Furthermore, one can doubt whether “discouraging the use of human shields” would be considered a “direct” and “concrete” military advantage as required by the law. There is no insurance that the army would stop and that the attack would not escalate into more casualties. Dunlap’s argument is nonetheless interesting to the extent that the justification he provides is of humanitarian nature:

*This approach would obviously cause civilian casualties, but it might avoid a situation where “several hundred [ISIS fighters] escaped” as was the case in Manbij. Given the potential of ISIS fighters to inflict every imaginable brutality on civilians.<sup>113</sup>*

According to him, causing civilian casualties now might avoid causing more in the future. He understands that as the lesser evil. Dunlap is not the only one arguing for introducing such “humanitarian necessity” to justify misconduct. Similarly, Blum argues for a “choice-of-evils paradigm in IHL,” noting that “IHL was designed to protect combatants and civilians from the scourge of war, even while accepting the inevitability of war as a necessary evil in human life.”<sup>114</sup> She underscores that it is ironic that military necessity is considered a factor affecting obligations to protect civilians, while humanitarian necessity is not. For example, she provides that “the current ICC Statute recognizes a form of military necessity exemption from liability, “ which is not the case for humanitarian reasons.<sup>115</sup> However, one can only highlight that it is antinomic to provide that we could kill civilians for humanitarian reasons. Despite this proposal, Blum recognizes the “possible dangers of malevolent exploitation” that a humanitarian exemption clause would entail.<sup>116</sup> And in the end, the argument of J. Dunlap Jr revolves back towards military considerations:

*In any event, (...) the real problem is that the detractors offer no alternative for rule-of-law nations, except to accept that ISIS and other nonstate actors who flaunt the law of war are able, de facto, to create an impregnable legal “fortresses” to safeguard their key fighters and vital military equipment if they acquire enough human shields and position them in such a way as to create a “proportionality” conundrum.<sup>117</sup>*

Dunlap thus seems to regret the disadvantages that a law-abiding army would face against an opponent willing to violate the laws of war. Regardless of whether the enemy violates

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<sup>113</sup> *Ibid.*, p. 314

<sup>114</sup> Gabriella Blum, ‘The Laws of War and the “Lesser Evil”’ (2009) 103 *International Law As Law* for the Proceedings of the Annual Meeting (American Society of International Law) 274-277, p. 275

<sup>115</sup> *Ibid.*, p. 275

<sup>116</sup> *Ibid.*, p. 277

<sup>117</sup> Dunlap, 2016, p. 315

the laws of war however, an army should still follow IHL principles. Furthermore, it is hard to conceive that maintaining “an impregnable legal ‘fortress’”<sup>118</sup> with shields would be sustainable in the first place. Such a use of human shields is yet to be seen. Besides, the author argued that the law should adapt to new challenges, such as the barbarity of ISIS. But the US army had the advantage facing ISIS, especially technologically. So bending the Law justifiable in the face of “barbarism”? Does it also mean that the law can be tampered with as soon as difficulties arise on the battlefield? These ideas can appear very problematic. Facing “barbarism,” it should be considered even more vital to stand by the law and one’s principles.

#### **d. Subjectivity of Proportionality**

- *Is proportionality affected by non-legal factors? Which populations does it expose to being used or classified as human shields?*

Another difficulty is represented by the subjectivity of the test of proportionality eventually run by the military commander in charge. To offer an example, because of gender considerations, women might weigh more than a man in proportionality calculations. Indeed, women are usually associated with civilians, while men represent the figure of combatants.

The function of human shields could also be attributed to civilians who find themselves in the field by coincidence. This could be linked to erroneous assessments, for instance, when the adversary is categorized as a ‘barbaric’ enemy. This qualification could result from certain racialized prejudice of a colonial undertone. Besides, irregular armies are generally more likely to be qualified as ‘barbaric’ than regular ones. Let’s take the case of Mosul under the rule of ISIS: the whole city was framed as a human shield by international observers, including the UN.<sup>119</sup> It was however unlikely that all the inhabitants actually took on a shielding function. On the other hand, when Iraqi soldiers occupied the city, no such accusations were ever raised.<sup>120</sup> One can then imagine that proportionality calculations might have been affected when facing ISIS, even though most of the potential collateral victims were probably not actual human shields.

The patterns of thoughts of the attacker are also taken into account by those using human shields. First, they assume that the attacker will respect the law. Second, they might select their human shields based on the supposed bias of the attacker. For example, the party using shields might choose children or women, that fit the image of civilian par excellence.

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<sup>118</sup> *Ibid.*, p. 315

<sup>119</sup> United Nations Office of the High Commissioner of Human Rights (OHCHR), ‘Mosul: Protection of civilians paramount as ISIL intensifies use of human shields’ (Press release 2016) available at <https://www.ohchr.org/en/press-releases/2017/03/mosul-protection-civilians-paramount-isil-intensifies-use-human-shields>

<sup>120</sup> Gordon & Perugini, 2016 (‘Human Shields, Sovereign Power’), p. 330



In general, they can also select individuals who are considered valuable in the eyes of the attacker. In 1871, France was occupied by Germany. To avoid sabotage, the Germans decided to tie up French dignitaries to the trains<sup>121</sup>. This means that the Germans assumed that the French would be less likely to attack the trains if figures of authority were in danger. Gordon and Perugini explain this process:

*The term [of human shields] both reflects and is constituted through social and political hierarchies. It is the value ascribed to the lives of some people that explains why their vulnerability can become a weapon of deterrence, while the lives of others are perceived to be expendable and therefore they cannot be used as shields.*<sup>122</sup>

This once again reinforces the idea that various non-legal factors influence proportionality calculations. Now if we come back to the notion of colonial legacies, according to Nesiah: “within the moral arithmetic of colonization, the test for proportionality and distinction calculates who qualifies as a legitimate target.”<sup>123</sup> Not only are most of the conflicts happening in previously colonized territories, but the classification of human shields is almost systematically deployed there:

*Beyond the prominence of proximate human shielding, the LexisNexis search also exposed that the phrase human shield has been mobilized almost exclusively in conflict zones that have been taking place in decolonized areas of the globe.*<sup>124</sup>

And as such, one can notice that the character of human shields might more easily be given to those whose lives are considered less valuable, “often along racial lines.”<sup>125</sup> And when their lives would not be less valuable in the first place, they become even less valuable because of the classification as shields. Conversely, the defender using human shields will choose them strategically from among those whose lives are considered most valuable. Such a contrast is striking.

#### **e. Conclusion**

To conclude, this thesis argues that there is no legal basis for establishing that the rule of proportionality is affected by the use or the presence of human shields. So why is it claimed repeatedly? The uncertainties of the status of human shields due to the absence of legal definition are easily led astray. Furthermore, the principle of proportionality, based

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<sup>121</sup> Gordon & Perugini, 2020, p.5

<sup>122</sup> Gordon & Perugini, 2020, p.5

<sup>123</sup> Vasuki Nesiah, ‘Human Shields/Human Crosshairs: Colonial Legacies and Contemporary Wars’ (2016) 110 *AJIL Unbound* 323-328, p. 325

<sup>124</sup> Gordon & Perugini, 2016 (‘Human Shields, Sovereign Power’), p. 333

<sup>125</sup> *Ibid.*, p. 333

on the concept of military necessity, is not defined and restricted properly. This vagueness opens the door to subjectivity and instrumentalization. Thus, the number of acceptable deaths in relation to the military advantage can vary greatly. The prohibition of human shields appears to be used in lawfare to legalize operations causing civilians losses that would not have been deemed legal otherwise. But lawfare actually comes in the picture much earlier: when the army using human shields assumes that the attacking party will reconsider its decision to attack in order to respect the law and the protections afforded to civilians. Accordingly, Kinsella writes that:

*There is reason to debate whether calculated use of human shielding can devolve into a form of lawfare—“the use of law as a weapon of war”—as parties to a conflict seek to interfere with the military operations of their enemy by influencing the evaluation of military necessity and proportionality, and make their violation of the principle of distinction more probable.<sup>126</sup>*

Having looked at the legal classification and status of human shields, and at the IHL principles applicable to the conduct of the belligerents facing them, this thesis will now confront these findings to two relevant case studies. This is essential to appraise how legal gaps and ambiguities are exploited in practice.

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<sup>126</sup> Kinsella, 2016, p. 306

## Chapter II: Case Studies

This chapter will be divided in two parts: first a case study on the civil war in Sri Lanka, and then a case study on the conflict between Israel and Palestine.

### 3. The Case Study of Sri Lanka

This case study will be divided in two sections: the first one will look at the validity of the classification of human shields, and the second one will analyze the legal arguments backing the conduct of the Army of Sri Lanka (SLA).

#### 3.1. The Classification of the No- Fire Zones into ‘Shielding Zones’ and the conduct of the Sri Lankan Army

##### a. Introduction

This section will look at how the SLA classified an entire region as a “human shield” during the last phase of the Civil War in 2009. This conflict is classified as a NIAC for the sake of this research.

Sri Lanka comprises a majority of Sinhalese and a minority of Sri Lankan Tamils (around 11,2%).<sup>127</sup> During the British Rule over the country, the divisions between the two communities grew, among other things, from the British display of favoritism for the Tamils.<sup>128</sup> After the independence, the Sinhalese-led Government enacted various discriminatory policies towards Tamils, ostracizing them gradually.<sup>129</sup> Coupled with persecutions,<sup>130</sup> this led to the growth of separatist movements among the Tamils, out of which the Liberation Tigers of Tamil Eelam (LTTE) emerged. This group sought to establish an independent State, “Tamil Eelam,” in the north of the country where most Tamils live. This escalated into a civil war in July 1983, until May 2009. The conflict ceased with the defeat of the LTTE and the army taking back control over the North of Sri Lanka. Since then, persecutions against Tamils have perdured.<sup>131</sup>

This case study will not go through the whole 26 years of conflict but will focus on the last few months, which involved allegations of human shielding and massive civilian

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<sup>127</sup> Nithyani Anandakugan, ‘The Sri Lankan Civil War and Its History, Revisited in 2020’ (2020) *Harvard International Review*

<sup>128</sup> Senthil Meyyappan, ‘The Overlooked Human Rights Problem: Sri Lankan Tamils’ (2021) *International Relations Review*

<sup>129</sup> The Sinhalese-Only Act for instance.

<sup>130</sup> Which culminated in the Black July anti Tamils Programs in 1983 (government-orchestrated).

<sup>131</sup> Anandakugan, 2020

casualties. Both the LTTE and the SLA have been accused of human rights abuse throughout the conflict. Still, this section will primarily look at the behavior of the SLA towards Tamil civilians during the last phase of the war. Between January and May 2009, the SLA unilaterally created three no-fire zones (NFZ) in LTTE-occupied territories but shelled them profusely. The rest of the region to conquer back was also shelled indiscriminately. Among the arguments to justify this conduct -when it was not purely denied- the government argued that the civilians in the NFZs and the whole region were held hostage and used as human shields by the LTTE. This section will look at this claim and its legal implications.

Heavy casualties marked the last five months of the war: 40 000, according to a UN Panel of Experts.<sup>132</sup> There are, however, “signs that the final death toll could be a lot higher”,<sup>133</sup> based on the variations of the population’s figures before and after the war.<sup>134</sup> The point of view of the civilians who stayed in the war zones remained relatively ignored as both the journalists and NGO workers had been sent back or banned from accessing the area:<sup>135</sup> “independent witnesses were deliberately excluded, to distort the writing of history.”<sup>136</sup> Despite the lack of accurate death count and absence of external observers, some government actions were accounted for: it has been reported that the government heavily shelled densely populated areas, intentionally and indiscriminately, with weapons that did not permit distinction in the first place.<sup>137</sup> The shelling continued despite the government being warned about humanitarian or hospital positions’ coordinates and the presence of civilians. The No-Fire Zones were indistinctively shelled on a daily basis.<sup>138</sup>

## **b. Restrictions on the Movements of Civilians**

### *- Was the LTTE holding the civilians in the NFZs?*

As the LTTE controlled-areas and the NFZs grew smaller and smaller (NFZs: from 35,5 sq. km for the first to 2,5sq.km for the third)<sup>139</sup>, the government considered that the civilians that remained there were necessarily prevented from leaving by the LTTE. They

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<sup>132</sup> United Nations (UN) Secretary-General’s Panel of Experts on Accountability in Sri Lanka, ‘Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka’ (2011) available at <https://www.securitycouncilreport.org/un-documents/document/poc-rep-on-account-in-sri-lanka.php>, §137

<sup>133</sup> Frances Harrison, *Still Counting the Dead – Survivors of Sri Lanka’s Hidden War* (Portobello Books 2012), ‘Introduction’

<sup>134</sup> *Ibid.*, ‘Introduction’

<sup>135</sup> *Ibid.*, ‘Sri Lankan Government Statements’: “31 JANUARY 2009 Defence Secretary Gotabhaya Rajapaksa warns Western diplomats, foreign journalists and aid groups that they will be ‘chased’ out of the country if they appear to favour the rebels”; aid workers were also accused of purposely prolonging the conflict to make it a lucrative business. Also see: Callum Macrae (Director), *Sri Lanka’s Killing Fields* (Channel 4 2011) available at <https://www.channel4.com/programmes/sri-lankas-killing-fields>

<sup>136</sup> Harrison, 2012, ‘Introduction’

<sup>137</sup> Gordon & Perugini, 2020, 142-143

<sup>138</sup> UN Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 2011, §105

<sup>139</sup> See figure below.

were all taken hostage by the enemy. That includes the NFZs, even though the government had invited the civilians to reunite in those zones in the first place.

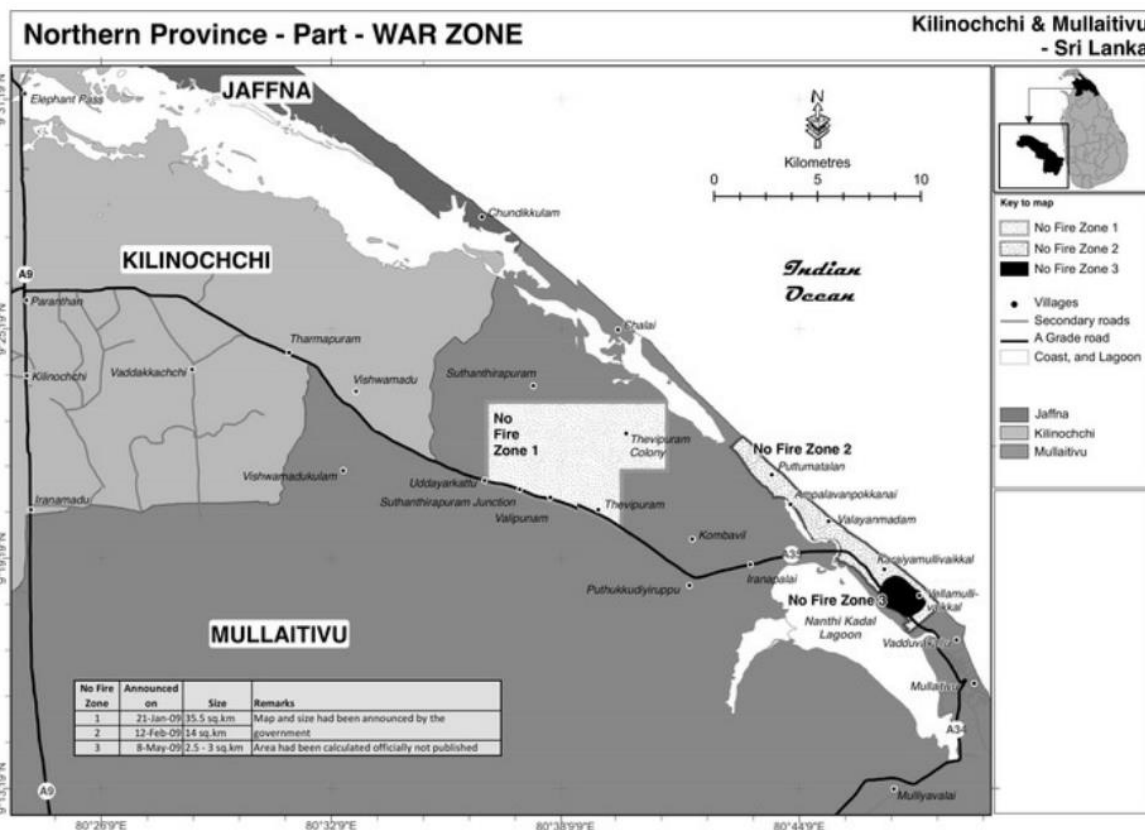


Image from *Still Counting the Dead*, 'Maps.'<sup>140</sup>

The civilians indeed had difficulties leaving the remains of the LTTE territory. However, it was reported that the reasons civilians stayed in the No-Fire Zones or more globally in the LTTE-controlled areas are multiple reasons. There were cases where civilians were caught or driven back by LTTE shootings or shot directly. But there is no indication it was part of an official policy,<sup>141</sup> and the other reasons did not necessarily involve coercion. Regarding the NFZs, the most obvious reason is that the civilians assumed they were in a safe area. Furthermore, when the LTTE-controlled areas grew smaller, civilians were surrounded by the sea and the frontlines, with nowhere else to go. Here is a list of possible reasons according to the OISL report:<sup>142</sup>

- fear of LTTE punishment
- belief that LTTE would win / a ceasefire would occur
- awaiting international community intervention

<sup>140</sup> Harrison, 2012

<sup>141</sup> Office of the High Commissioner on Human Rights Investigation on Sri Lanka (OISL), 'Report of the OHCHR Investigation on Sri Lanka' (2015) available at [https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session30/Documents/A.HRC.30.CRP.2\\_E.docx](https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session30/Documents/A.HRC.30.CRP.2_E.docx), §907

<sup>142</sup> *Ibid.*, 'XIV. Controls on movement'

- “sense of moral obligation” toward LTTE, whom they believed to be “fighting for the Tamil people”
- fear of being caught in the crossfire if they left
- family member with LTTE (including forcibly)
- difficulties leaving due to old age, sickness, or injury
- fear of being accused of being LTTE after leaving
- fear of being abused or kidnapped by SLA
- fear of being sent to IDPs camps

The OISL report points out that LTTE propaganda might have discouraged people from leaving. Nonetheless, groups of civilians still tried or managed to escape despite shootings from both sides. There are also instances of civilians who left without any attempt from the LTTE to stop them and occurrences of SLA shootings fired at civilians fleeing when there was no counterfire.<sup>143</sup> Gordon and Perugini also mention civilian populations that stayed willingly in the LTTE-controlled area because they sympathized with the LTTE or were afraid of the government forces.<sup>144</sup> Lastly, one can question whether it was practically possible to leave the zone safely since there was no ceasefire or point of passage. And indeed, the OISL report provides that by the end of 2008, “the civilians in the Vanni<sup>145</sup> were already enduring severe controls and restrictions on movement: they had no option but to stay in the LTTE-controlled territories, whether they wanted to or not.”<sup>146</sup>

### c. **Population Figures and Scale**

- *How many civilians were trapped in LTTE territories? How many were killed?*

At the end of April, while the Army of Sri Lanka only had a few sq. km to conquer back, the UN considered that there were still over 127,000 people trapped in the LTTE-controlled area, while the government gave the figure of 10,000.<sup>147</sup> These numbers were ultimately clearly underestimated insofar as 290,000 IDPs emerged from the war zone at the war’s end.<sup>148</sup> The considerable gap between the government’s numbers and the figures of IDPs that emerged suggests that it was not a mere miscalculation. It shows a will to minimize the civilian concentration in the areas controlled by LTTE, consequently diminishing the potential casualties figures. The figure of 40,000 deaths is based on the “Situation Report / Mullaitivu District” Report from 2 February 2009, providing there were 330,000 civilians in the district at the time<sup>149</sup>. If this figure is correct, it means that in the last four months of the war, 12% of the civilians present were killed. On the other hand,

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<sup>143</sup> *Ibid.*, §926

<sup>144</sup> Gordon & Perugini, 2020, pp. 141-142

<sup>145</sup> Mainland area of Northern Province of Sri Lanka

<sup>146</sup> OISL, 2015, §905

<sup>147</sup> UN Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 2011, §127

<sup>148</sup> *Ibid.*, §127

<sup>149</sup> *Ibid.*, §127

Harrison evaluates the number of people unaccounted for between 26,000 to 146,679.<sup>150</sup> Despite that, the Government claimed to follow a “zero civilian casualty policy” and denied there were civilian deaths for months after the end of the war.<sup>151</sup> The 2011 Government-led Report of the Commission of Inquiry on Lessons Learnt and Reconciliation disqualified the numbers from various sources as undocumented, maintaining that it is impossible to calculate the civilians’ deaths.<sup>152</sup> It also did not recognize any responsibility for those deaths:

*This appears to be due to crossfire, the LTTE’s targeted and deliberate firing at civilians, as well as due to the dynamics of the conflict situation, the perils of the geographical terrain, the LTTE using civilians as human shields and the LTTEs refusal to let the hostages get out of harm’s way.*<sup>153</sup>

In 2012, another governmental report on the “Enumeration of Vital Events” recognized that there had been 7000 war casualties and 2500 missing, without distinguishing between civilians and combatants.<sup>154</sup> But the direct consequence of downplayed population figures was the lack of humanitarian assistance given to the trapped civilians. The Panel reports that those numbers were deliberately minimized to deny food and medical supply to the civilians.<sup>155</sup> On top of that, the government systematically found excuses to hinder any humanitarian aid convoys:

*When impartial and neutral aid organizations such as the UN humanitarian agencies and the Red Cross persistently attempted to gain access to the Vanni Tamils with land- and seaborne convoys, the government found many ways to obstruct them, whether by declaring that they could not guarantee the safety of aid personnel, by outright refusal to allow certain kinds of aid or by finding numerous ways to slow, delay or spoil humanitarian operations.*<sup>156</sup>

As a result, not only some civilians died from hunger but more died from lack of medical assistance.<sup>157</sup>

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<sup>150</sup> Harrison, 2012, ‘The War the United Nations Lost’

<sup>151</sup> *Ibid.*, ‘The War the United Nations Lost’

<sup>152</sup> *Ibid.*, ‘Appendix One: Casualties’

<sup>153</sup> Lessons Learnt and Reconciliation Commission (appointed by Sri Lankan President Mahinda Rajapaksa), ‘Report of the Commission of Inquiry on Lessons Learnt and Reconciliation’ (2011) available at <http://www.slembassyusa.org/downloads/LLRC-REPORT.pdf>, p. 145

<sup>154</sup> Harrison, 2012, ‘Appendix One: Casualties’

<sup>155</sup> UN Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 2011, §124

<sup>156</sup> Gordon Weiss, *The Cage: The fight for Sri Lanka & the Last Days of the Tamil Tigers*, Gordon Weiss (The Bodley Head 2011), ‘Chapter Eight – Managing the Siege’

<sup>157</sup> *Ibid.*, ‘Chapter Eight – Managing the Siege’





**4. IDP settlement near Putumattalan Hospital in second No Fire Zone, March 2009**

*Source: submission to the Panel by the photographer*

Screenshot from the *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, p. 29.<sup>158</sup>

The fact that 290,000 people, excluding casualties, emerged from such a small strand of land at the war's end shows how dense the civilian presence was in those areas. Such numbers make it practically less likely and realistic that every civilian present was used as a shield. Despite that, the Government has repeatedly alleged that all the civilians in the LTTE-controlled area were trapped and used as such. However, the Government only recognized a fraction of the civilians who were actually there.

Until now, allegations of human shielding would generally cover specific groups of people whose function as human shields was recognizable, such as people tied up to trains. Classifying all the civilians in the same territory as human shields, even if they were “just” 10,000, is already a huge step away from that. Then the gap between the numbers presented by the government and the actual number of civilians could disqualify those allegations. How could hundreds of thousands of people be used as shields simultaneously? Despite that, the human shield allegations were taken seriously, and actors recognizing higher population figures extended the allegations to them. This includes international organizations:

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<sup>158</sup> UN Secretary-General's Panel of Experts on Accountability in Sri Lanka, 2011



*Human Rights Watch had spoken about “several hundred thousand people [used] as human shields,” thus arguing that the no-fire zones had, in effect, become shielding zones.*<sup>159</sup>

**d. Allegations of Human Shielding: the Expandability of the Concept in the Field**

A Classification based on Proximity

- *How is classification of human shields applied to the NFZs?*

The accusation of human shielding made by the Government is based on the idea that the LTTE held the civilians. This would then come into the category of involuntary shields used by the LTTE for their advantage. To support this narrative, the Government omits other explanations that would construe the civilians to remain in LTTE territories. It also reverses the narrative as to why civilians assembled in the NFZ:

*When the NFZs were declared, the LTTE deliberately clustered the civilian population into these zones.*<sup>160</sup>

The government had urged the civilians to go to the NFZs by “dropping leaflets from planes and notifying through (...) wireless and loudspeakers”.<sup>161</sup> But they still claim the civilians went there because the LTTE forced them. There have been credible reports that LTTE militants “intermingled with the displaced people and built barricades in their midst” or even fired from the NFZs, but nothing close to the LTTE coercing people into the NFZs.<sup>162</sup> This allegation, however, is used as a basis to make the NFZ’s primary function, which is a safe zone, null and void.

On the other hand, the citation from Amnesty suggests that the proximity of combatants to the NFZ transforms that area’s function from a safe zone into a “shielding zone.” In other words, it means that because of the presence of combatants, the function of the NFZ to civilians, i.e. a safe zone, is overtaken by the alleged military function, i.e. shielding zone. It thus appears that “the factor determining how a person is transformed into a shield had been radically modified”.<sup>163</sup> Since it is practically impossible that each civilian in the zone was coerced, proximity to combatants rather than coercion seems to determine involuntary human shields in this case.<sup>164</sup> And that is how the classification of human shields can go

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<sup>159</sup> Gordon & Perugini, 2020, p. 144

<sup>160</sup> Lessons Learnt and Reconciliation Commission, 2011, p. 143

<sup>161</sup> Gordon & Perugini, 2020, p. 142

<sup>162</sup> *Ibid.*, p. 144

<sup>163</sup> *Ibid.*, p. 144

<sup>164</sup> *Ibid.*, p. 144

from applying to a specific group of coerced civilians to being used for a densely populated area. Indeed, according to Gordon and Perugini:

*If in the past specific individuals or a group were forced to become shields through coercive acts, such as tying people on trains (France, 1870–71) or forcing a group of civilians to march in front of soldiers (Belgium, 1914), in Sri Lanka civilians became shields due to the space they occupied and its proximity to the fighting.<sup>165</sup>*

Here, the definition of human shields is articulated “within a specific spatial framework” and “coextensive with the no-fire zones because these spaces were used by the insurgents to hide and launch rockets, while at least some of the civilians were prevented from leaving them”.<sup>166</sup> It is similar to Mosul, where the whole city was designated a human shield when ISIS fighters were present.<sup>167</sup> In both these cases, it is hard to believe that each civilian in the area was close to a military objective. In this sense, proximity can mean many things and be approached at different scales: is it a matter of meter or of being close to a street, neighborhood, city, or region, etc.? As for proximate shields, when proximity is seen as the critical element of the definition of involuntary human shields, it affects the scope and the scale of what human shields can be.

In terms of scope, anything close to a military target can be framed as a shield: not only an individual or a group, but also a populated area all the way to a city or a region. In terms of scale, it can include much more civilians than otherwise and apply to broader geographic areas. What constitutes human shields becomes expandable. And when it does, coupled with the debates on human shields and proportionality, it can have dire consequences on the protection of civilians. Such an expansion of what constitutes human shields is only possible because there is no clear legal definition. There is nothing in the law that limits their scope or scale. And this allowed the Government of Sri Lanka to use it for its sake.

The framing of civilians as proximate shields has not stopped with the situation in Sri Lanka. If proximity truly is what defines human shields, accusations would multiply in urban warfare or in any situation where the military penetrates civilian spaces. The recent conflict in Ukraine shows that it is the case already, as human shielding accusations have started to flourish.<sup>168</sup>

### Human shielding, Taking of Hostages or Endangerment of Civilians?

- *Is this classification legally valid? Can it amount to another crime?*

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<sup>165</sup> *Ibid.*, p. 144

<sup>166</sup> *Ibid.*, p. 144

<sup>167</sup> OHCHR, 2016

<sup>168</sup> Gordon & Perugini, 2022

The UN Panel looked at the different allegations and provided that:

*These actions did not, in law, amount to the use of human shields insofar as it did not find credible evidence of the LTTE deliberately moving civilians towards military targets to protect the latter from attacks as is required by the customary definition of that war crime.*<sup>169</sup>

However, the Panel states that there are credible allegations that the LTTE violated the ban on hostages “insofar as they forced thousands of civilians, often under threat of death, to remain in areas under their control during the last stages of the war and enforced this control by killing persons who attempted to leave that area.”<sup>170</sup> The report only mentions thousands of civilians, which is rather vague. And as for human shields, it is difficult to believe the entire hundred thousand civilians in LTTE territories were used as hostages. Apart from the fraction the LTTE coerced to stay, this section showed that the reasons to remain in the area could be multiple. It also appears difficult to apply the hostage classification to the IDPs who fled to the NFZs created by the government for safety.

Interestingly, despite not recognizing human shielding, the Panel is of the opinion that there are credible allegations of breach of Customary Rules 23 and 24.<sup>171</sup> These rules provide that “each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas”<sup>172</sup> and that “each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives.”<sup>173</sup> The customary rules indicate that it should be avoided when “feasible.” In the present case, and especially towards the last few weeks of the conflict when the territory grew smaller and smaller, one can wonder if the proximity of combatants to civilians was always intentional.

But then what distinguishes human shielding from locating military objectives within or near densely populated areas? Is it the intent to use those populated areas as protection? How to distinguish it from a warring party that disregards the protection of civilians? In urban conflicts, is it even possible to recognize such an intent? This is also problematic regarding the emerging concept of proximate shields: intent and coercion are absent in these cases. Human shields are then constituted through the proximity of civilians and combatants, without the intent and knowledge of both. This would mean that urban conflicts would de facto involve human shields. This definition of human shields thus

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<sup>169</sup> UN Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 2011, §237

<sup>170</sup> *Ibid.*, §237

<sup>171</sup> *Ibid.*, 239

<sup>172</sup> International Committee of the Red Cross (ICRC) Databases – Rule 23: Location of Military Objectives outside Densely Populated Areas, available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule23>

<sup>173</sup> International Committee of the Red Cross (ICRC) Databases – Rule 24: Removal of Civilians and Civilian Objects from the Vicinity of Military Objectives, available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule24>

appears to empty the notion of its substance: in IHL, human shields are mentioned through their prohibition. This means that under current IHL principles, human shields are interlinked with the enemy's intent. And if the intent is absent, this opens the door to a downward slide.

This also implies that proximate shields might not come under the IHL prohibition of human shields. And if proximate shields are not covered by the IHL dispositions, we can question the adequacy of this classification. From a legal perspective, the qualification of proximate shields do not make sense. Then, should civilians close to military objectives by coincidence be classified as shields in the first place? This shows that there is an urgent need to rethink the concept of human shields. But in the case at hand, the use of this classification was not the only manipulation of the facts. As the next sub-section will show, it was part of an overall narrative that contradicts the facts.

**e. Narrative-Building at the Expense of the Facts**

*“Hostage Rescue Operation”*

The government did not only classify the civilians as human shields but also as hostages, claiming it was on a hostage-rescue operation. On 7 May 2009, President Mahinda Rajapaksa stated:

*The manner of rescuing the hostages would indeed be an example to others engaged in military operations. It may also be one of the greatest rescue operations in the world.*<sup>174</sup>

Later on 19 May 2009, he repeated:

*Our troops went to this operation carrying a gun in one hand, the Human Rights Charter in the other, hostages on their shoulders, and the love of their children in their hearts.*<sup>175</sup>

Whether civilians were hostages or shields would affect the methods used to resolve the situation. The fact that, in the end, it is the accusations of human shielding that legal experts retain allows the government to avoid having to justify why the army did not try to negotiate the “hostages” liberation in the first place. In fact, the SLA repeatedly refused initiatives that might have given the civilians a chance to flee:

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<sup>174</sup> Harrison, 2012, ‘Sri Lankan Government Statements’

<sup>175</sup> *Ibid.*, ‘Sri Lankan Government Statements’

*It roundly rejected calls for a ceasefire, or what came to be called “a pause in fighting,” which might have given civilians the chance to flee, or for the UN to help evacuate the zone.<sup>176</sup>*

For instance, Brigadier-General Shavendra Silva stated on 23 February 2009:

*We have a job to do. We are not bothered about any truce at the moment.<sup>177</sup>*

On top of that, as the next section will show, the Government probably privileged the classification of “human shields” for it could be used as an argument that affects the proportionality test, according to some jurists. One can wonder why some treat these two statuses differently. Overall, the diverse classification used for civilians, whether hostages or human shields, seem to have been chosen for issues of image and accountability. In both cases, it is arguable to a certain extent that potential casualties would be the fault of the opposing party -although, in Law, it does not free the attacking party from its duties. It is at least a discourse that could be used in the media. But one can thus easily question the good faith of the Government of Sri Lanka.

### Terrorism

In building a narrative for their Sake, the Government also drew among the lexical field of terrorism. It rebranded the conflict as part of the “war on terror,” omitting the ethnical aspect and avoiding looking for a political solution.<sup>178</sup> Sri Lanka’s model represented “a new way of crushing terrorism using brute military force rather than a political approach.”<sup>179</sup> Instead of considering it an armed conflict with two warring parties fighting each other, one party is demonized and described as having to be annihilated. The non-state party is not on an equal footing; it is not considered a proper opponent. This circles back to the reasoning of J. Dunlap about ISIS barbarism. Civilians’ deaths, especially among human shields, are justified as ‘the lesser evil’ to end the terrorist menace. In other words, the opponent is presented as such a threat that all means become good to win, even if it means killing the civilians that were threatened in the first place. As such, on 2 February 2009, the Defense Secretary of Sri Lanka stated that “to crush terrorists, there is nothing called unproportionate.”<sup>180</sup> Later on 28 April 2009, President Mahinda Rajapaksa maintained:

*We were then compelled to use force, the force that is the right of the State, force that is the only language that the terrorist seemed to understand.<sup>181</sup>*

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<sup>176</sup> Weiss, 2011, ‘Chapter Nine – The Watching World’

<sup>177</sup> Harrison, 2012, ‘Sri Lankan Government Statements’

<sup>178</sup> *Ibid.*, ‘Introduction’

<sup>179</sup> *Ibid.*, ‘Introduction’

<sup>180</sup> UN Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 2011, §93

<sup>181</sup> Harrison, 2012, ‘Sri Lankan Government Statements’

The military vocabulary to describe assaults is thus abandoned for phrases such as “hostage rescue mission.” In this narrative, it is deemed impossible that civilians would stay in the LTTE territories willingly. The fact that LTTE was employing guerilla-like methods of warfare and that there were instances where they prevented civilians from leaving did not help those accusations. And those accusations often prevailed over the truth, which is that it is a regular army that caused most of the deaths among the civilians rather than the non-state armed group with guerilla-like tactics:

*The government could point to the multiplying instances in which the Tigers killed their own, and shift blame for the bulk of civilian deaths. Yet whatever the sins perpetrated by the Tamil Tigers, the evidence that has emerged so far indicates that it was the SLA that wrought the bulk of deaths upon the captive population.*<sup>182</sup>

Yet, things can be depicted completely differently: Weiss presented the last phase of the war as a state of “siege.”<sup>183</sup> This implies that the Government would be the main responsible for trapping civilians in the LTTE territories. This qualification overturns the image of hostage rescue mission.

### Civilians

While the LTTE was demonized, how did the Government actually perceive the civilians? Despite the official claim that rescuing civilians was the priority of the SLA, the civilian presence in NFZs was minimized. Even statements that were intended to consider civilians positively were sometimes problematic. On 30 April 2009, President Mahinda Rajapaksa stated:

*We can't use heavy weapons. And we can't do air attacks, because we are worried about the innocent people there. They may be Tamils. But they are citizens of this country. My heart would not allow any civilians to be killed by bullets.*<sup>184</sup>

The fact that the president underlined that “they may be Tamils” clearly shows that he considers them second-class citizens compared to Sinhalese. It sounds like being Tamil is a fault, but still, they should not be killed for it. However, one can wonder if the Government considered the civilians innocent. They were not treated as such, as they were shelled indiscriminately. Thus Weiss asks:

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<sup>182</sup> Weiss, 2011, ‘Preface’

<sup>183</sup> *Ibid.*, ‘Chapter Eight – Managing the Siege’

<sup>184</sup> Harrison, 2012, ‘Sri Lankan Government Statements’

*Did the government and its military planners believe that the failure of civilians to make the perilous crossing of the front lines in effect amounted to complicity with the tactics of the Tamil Tigers? Did this failure confirm suspicions that these civilians were (...) guilty because of their acquiescence to the orders of the Tiger command?*<sup>185</sup>

And indeed, these thoughts were on point. It appears that “high-level statements have indicated that the ethnic Tamil population trapped in the war zone can be presumed to be siding with the LTTE and treated as combatants.”<sup>186</sup> This hypothesis becomes hard to counter if we actually look at how the civilians emerging from the war zone were treated. Human Rights Watch reported on the fate of IDPs taken into SLA’s custody:

*Instead, they are finding government internment centers masquerading as “welfare villages.” While the government for security reasons should be screening new arrivals, it is instead secretly taking away LTTE suspects to arbitrary detention or possible enforced disappearances.*<sup>187</sup>

The report adds :

*As Human Rights Watch has reported previously, these are military-controlled, barbed-wire camps in which those sent there, including entire families, are denied their liberty and freedom of movement. Humanitarian agencies have tenuous access, but do so at the risk of supporting a long-term detention program for civilians fleeing a war.*<sup>188</sup>

And indeed, the question of the fate of civilians who do not evacuate conflict zones arises. Even when they are not trapped like in this case study, what do we make of individuals who stay in their homes? When human shields are defined by proximity, the fate of the civilians who remain in war zones in urban warfare seems settled. However, cities have functions for civilians; it is initially a place of livelihood. Would the proximity of the fight mean that these so-called human shields override these primary functions? This reasoning also applies to specific infrastructures like hospitals: the SLA seemingly targeted hospitals because there supposedly were injured LTTE combatants in them -although the SLA systematically targeted hospitals.<sup>189</sup> At the expense of the Law of Wars, those hospitals

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<sup>185</sup> Weiss, 2011, ‘Chapter Six – Inside the Cage’

<sup>186</sup> Human Rights Watch, ‘War on the Displaced Sri Lankan Army and LTTE Abuses against Civilians in the Vanni’ (2009) available at [file:///C:/Users/Coline%20Proy/Downloads/0DD59C211D92201B4925759F000CC4C8-Full\\_Report.pdf](file:///C:/Users/Coline%20Proy/Downloads/0DD59C211D92201B4925759F000CC4C8-Full_Report.pdf), p. 1

<sup>187</sup> *Ibid.*, p. 2

<sup>188</sup> *Ibid.*, p. 2

<sup>189</sup> UN Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 2011, ‘Executive Summary’

were indeed shelled as if the presence of these combatants, despite them being *hors de combat*, entirely transformed the hospital into an extension of the military target.<sup>190</sup>

This appears to be part of the same process that avoids looking at civilians individually and instead sees a 'zone' as a human shield. This process dehumanizes potential targets that are solely seen from the military lens. It is like civilians lose their civilian quality if they are in a war zone: they become an extension of it like any other obstacle in the field. But this would mean that civilians who remain home despite their hometown becoming a war zone would systematically be excluded from the proportionality calculations. This surely would make it easier for armies and armed groups. However, the laws of war and principles to protect civilians were not written to be used only when the combat zone is clearly separated from civilian areas: they were written for situations like this, in which civilians are in the midst of the action.

### *Back to the facts*

The Army of Sri Lanka had a “strategy of driving civilians away from the front lines by issuing “warning bombardments” (which often killed people)” during the previous phase of the war.<sup>191</sup> The strategy was initially supposed to limit the deaths of combatants but could not work anymore for the civilians now had nowhere to escape. Despite that and the victory being close, the Army did not change its tactical approach:

*As victory neared, this tactic was not abandoned, but rather its use was intensified, even though the LTTE was now immobilized and surrounded in an area of high civilian density.*<sup>192</sup>

All while using weapons of unprecise nature:

*The army continued to pummel the front lines using weapons that were inherently indiscriminate, such as multibarrel rocket launchers.*<sup>193</sup>

The UN reports that shelling within the third NFZ was so intense that it made maritime rescue missions impossible.<sup>194</sup> Furthermore, due to the lack of space in the NFZ, the “civilians had nowhere to hide from the shelling, which was coming from all sides.”<sup>195</sup> Clearly, the purpose of the SLA was to reclaim the northeast tip of the island, not to liberate civilians with a “zero civilian casualty policy.”<sup>196</sup> But on top of that, several pieces

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<sup>190</sup> This was not a legitimate target in the first place because the combatants were *hors de combat*.

<sup>191</sup> Weiss, 2011, ‘Chapter Six – Inside the Cage’

<sup>192</sup> UN Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 2011, §101

<sup>193</sup> Weiss, 2011, ‘Chapter Six – Inside the Cage’

<sup>194</sup> UN Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 2011, §117

<sup>195</sup> *Ibid.*, §118

<sup>196</sup> Harrison, 2012, ‘The War the United Nations Lost’



of evidence show that the government not only shelled indiscriminately but actually targeted civilians' positions:

*Satellite images in Annex 3 show that SLA artillery batteries were constantly adjusted to increasingly target the NFZs.*<sup>197</sup>

Hospitals were targeted deliberately, and those still standing in the NFZs were systematically destroyed.<sup>198</sup> This also applies to other civilian gatherings, such as queues for supplies.<sup>199</sup> These elements are disturbing as they do not seem justified by the military goal to reclaim the North of the island: how could the shelling of civilians queueing for food supplies be considered a military necessity of the SLA? Unfortunately, it is not in the scope of this thesis to analyze what was the intent of the Government of Sri Lanka in targeting civilians. But this implies that the narratives of human shields are potentially used to shield perpetrators from responsibility for core crimes in International Criminal Law. And indeed, on top of war crimes, there have been various accusations against the Government of Sri Lanka for crimes against humanity and/or genocide directed at Tamils during the last phase of the war.<sup>200</sup> It naturally goes against the purpose of IHL to be instrumentalized to justify civilian deaths that would otherwise be deemed illegal and violate peremptory norms.

## **f. Conclusion**

This part examined the classification of NFZs as shielding zones. It concluded that this classification is not only at the expense of the facts, but also relies on the concept of "proximate shields." This concept does not include the element of intent, and is thus not covered by the legal prohibition of human shielding. This thesis however argues that it is the lack of a legal definition limiting the scale and the scope of human shields that allows the deployment of this classification for entire areas. And this classification is now instrumentalized to justify wide-scale civilian casualties and avoid responsibility for war crimes.

In the case at hand, it can actually appear very coarse to have tried to make up for that many civilian deaths. And the process indeed involved more than the classification of human shields: sending eye witnesses away, building a parallel narrative and manipulating the facts. But it was apparently not enough, because the Government of Sri Lanka subsequently hired foreign legal experts to justify its conduct. The next section will examine their legal opinions.

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<sup>197</sup> UN Secretary-General's Panel of Experts on Accountability in Sri Lanka, 2011, §101

<sup>198</sup> Human Rights Watch, 2009, p. 18

<sup>199</sup> UN Secretary-General's Panel of Experts on Accountability in Sri Lanka, 2011, §105

<sup>200</sup> People's Tribunal of Sri Lanka's Website, 'The Charges', 'Verdict' (Bremen 2013) available at <https://www.ptsrilanka.org/>

### 3.2. The Instrumentalization of the Classification as human shields: a Shield against Responsibility

After being the subject of war crimes accusations, the Government of Sri Lanka hired various international experts before publishing several reports that appraise the war's last stages.<sup>201</sup> These reports disqualify war crimes allegations directed at the SLA and their evidence. It also solely presents the civilian deaths as the LTTE's responsibility. This claim is primarily based on the idea that LTTE used the civilians who remained in its territories as human shields. Consequently, they would be responsible for the war casualties. This section will examine how legal reasoning is used to back this argument, with three experts' legal opinions.<sup>202</sup>

#### a. Nice and Nixon's Legal Opinion

##### Facts: 'Exceptional', Manipulated and Uncertain

In this legal opinion, the authors first present the circumstances at the end of the war in Sri Lanka as exceptional:

*The overall factual circumstances of the final months of the conflict are distinctive and possibly unique.*<sup>203</sup>

By stating that these circumstances should be distinguished from other armed conflicts, they also imply that the law should apply differently. And this different application is possible because the law is "not at all settled" and "may be regarded as generally undefined" regarding the "principles of distinction and legitimate targeting, military necessity and proportionality."<sup>204</sup> Specifically, they underline that "there is no hard and fast rule on the precise limits of acceptable civilian casualties under IHL," which should then be assessed on the merits of the situation.<sup>205</sup> In short, they introduce their argument by establishing that the law is not defined and that the facts are exceptions, opening the door to all sorts of interpretations.

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<sup>201</sup> Niran Anketell, Isabelle Lassée, 'Reinterpreting the Law to Justify the Facts: An Analysis of International Humanitarian Law Interpretation in Sri Lanka' in Suzannah Linton, Tim McCormack, Sandesh Sivakumaran (eds.) *Asia-Pacific Perspectives on International Humanitarian Law* (Cambridge: Cambridge University Press 2019), pp. 423-439

<sup>202</sup> These legal opinions were leaked by the newspaper *The Island*. None of the legal experts have disavowed their authorship. Source: Anketell & Lassée, 2019, p. 430

<sup>203</sup> Geoffrey Nice, Rodney Nixon, 'Legal Opinion' (2015) *The Island*, 1-9 available at <https://www.justsecurity.org/wp-content/uploads/2017/01/Sri-Lanka-Legal-Opinion-March-10-2015.pdf>, p.2

<sup>204</sup> *Ibid.*, p. 1

<sup>205</sup> *Ibid.*, p. 2

They then look at the key factual circumstances and establish as a recognized fact that the integrality of the civilians in the LTTE territories was taken hostage to be used as human shields, based on the Government's stance. However, they not only use the numbers provided by the UN, which are much higher than the Government's figures on civilians, but also manipulate the statements of the UN Panel of Experts:

*The Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka found that there were "credible allegations" that in the time period between September 2008 and 19 May 2009 around 300,000 to 330,000 were held as hostage in the Vanni area by the LTTE and used as human shields at times to seek to avoid being vanquished.*<sup>206</sup>

It is not at all what the report says. As mentioned in the previous section, the UN Panel established that the acts of the LTTE did not, in law, amount to human shielding. Furthermore, regarding hostage accusations, the report only recognized credible allegations that thousands of civilians had been held hostage, not 300,000 or 330,000. These numbers were indeed mentioned by the UN Panel but as the figure of civilians who remained in LTTE-controlled areas, not as victims of the LTTE. The UN Panel also underlined that the LTTE locating military objectives close to densely populated areas did "not relieve the SLA of its duties to comply with various precautions noted above to ensure respect for the rules of distinction and proportionality."<sup>207</sup>

The legal opinion then clearly emphasizes all the wrongdoings of the LTTE, especially their history of violence towards civilians and their practice of forcefully conscripting civilians. Coupled with the fact that LTTE militants did not wear uniforms, the authors sustain that the distinction between civilians and combatants was blurred, clearly affecting the application of the principle of distinction.<sup>208</sup> They further state that it is impossible to know how many killed civilians actually took a direct part in the hostilities.<sup>209</sup> They then counter the number of 40,000 casualties, asserting that there are no identifiable credible sources and that it omits "the circumstances of each of these deaths, the basis for their alleged 'civilian status', or who may be responsible."<sup>210</sup> In fact, their argumentation not only implies that the casualties may not have been that high but also that a proportion of those casualties did not retain their civilian status, meaning a proportion of deaths were legal in the first place. They also mention that, although it was impossible to establish during the course of hostilities, some of the human shields may have been voluntary, which would have stripped them of their civilian status.<sup>211</sup> Lastly, they insist that the number would have been essential for the legal conclusions regarding the SLA's conduct:

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<sup>206</sup> *Ibid.*, p. 2

<sup>207</sup> UN Secretary-General's Panel of Experts on Accountability in Sri Lanka, 2011, §239

<sup>208</sup> Nice & Nixon, 2015, p. 2

<sup>209</sup> *Ibid.*, p. 4

<sup>210</sup> *Ibid.*, p. 4

<sup>211</sup> *Ibid.*, p. 7

*The true number of people killed in the conflict is of critical significance to the application of the laws of war, especially in respect of whether any civilian loss of life (as opposed to deaths of persons who were killed while participating in hostilities) was proportionate to the military advantage of any particular attack or series of attacks (assuming that such persons were killed in these attacks and not by other means).<sup>212</sup>*

Since, according to them, this unavailable number is critical to draw conclusions about the army's conduct, they imply that it is impossible to assert this conduct. This sole consideration could make the rest of the reasoning null and void. But instead of stopping there, they go further in defending the actions of the Government of Sri Lanka. Overall, the exact details of the conduct of the SLA are absent from the factual outline. Similarly, the legal reasoning analyzed below will focus on the dispositions that favor the Government.

#### A Succession of Humanitarian and Military-related Arguments to raise the Threshold of Acceptable Casualties

The report then looks at the applicable IHL rules. Their focal point is the principle of proportionality. The report conveniently omits to look deeply into precautions before attack. Likewise, the principle of distinction is only approached from the lens of the LTTE's conduct, and whether the Government actually tried to apply it remains untold. Regarding proportionality, it is first reminded that there are no set standards for what constitutes reasonable casualties in relation to military advantage.<sup>213</sup> It is then argued that the enemy's conduct should be considered in the proportionality test.<sup>214</sup> The expected outcome of this argument is that since human shields were being used, a higher amount of civilian casualties is accepted. Nonetheless, their claim is not that simple. They list several human shields sub-arguments affecting, according to them, the ratio of acceptable civilian deaths. This list makes it appear that each of these sub-arguments could be added on top of each other, increasing the number of acceptable casualties higher and higher. Some of these points are based on military advantage, but others are based on alleged humanitarian reasons.

#### *Military advantage-related arguments:*

In the range of military advantage, the authors argue that because human shielding gives an advantage to the party breaching the law, a balance should be re-established by reconsidering the principle of proportionality:

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<sup>212</sup> *Ibid.*, p. 4

<sup>213</sup> *Ibid.*, p. 5

<sup>214</sup> *Ibid.*, p. 6

*A leading expert and publicist Major General A.P.V. Rogers similarly states that a court approaching the issue should take into account the use of human shields and give the necessary weight to this consideration so as to redress the balance between the rights and duties of the opposing parties "which otherwise would be tilted in favour of the unscrupulous." <sup>215</sup>*

This implies that because a party breaches IHL duties, the other party should have more rights or see its own duties mitigated. This circles back to the principle of reciprocity, which is gradually invalidated in IHL.<sup>216</sup> The authors have also argued using the idea that the objective to end the war or to “destroy” the LTTE can be taken into consideration.<sup>217</sup> However, it was established that such an objective is not direct or concrete enough and thus invalid for proportionality calculations.<sup>218</sup> Human shields should, according to them, also be taken into account as it will de facto lead to more casualties:

*The principle of proportionality must be applied but "the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that — if an attempt is made to shield military objective with civilians — civilian casualties will be higher than usual." <sup>219</sup>*

Or:

*In other words, specific allowance can be made for the enemy's unlawful conduct in the 'proportionality' calculation as it is inevitable that civilian casualties will be higher in these circumstances.<sup>220</sup>*

This implies that when human shields are present, there would not necessarily be a need to reevaluate the military advantage. However, if any other civilians were present, a party would have to review if their initial military objective was still proportionate to the new civilian casualties. But in the case of human shields, the authors suggest that the proportionality of the military advantage is not necessarily affected, but the ratio of acceptable civilian deaths is instead. Some others have argued that there should be a “proportionate” application of proportionality for human shields.<sup>221</sup> But their suggestion implies that there will be more deaths de facto, meaning that the military advantage and objective will not be reviewed at all.

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<sup>215</sup> *Ibid.*, p. 6

<sup>216</sup> See section I.2.1.

<sup>217</sup> Nice & Nixon, 2015, p. 1: “Any attack, aimed as it was at defeating and finally destroying the LTTE, would only have been lawful if civilian casualties were not excessive and disproportionate in the circumstances”

<sup>218</sup> See section I.2.2.

<sup>219</sup> Nice & Nixon, 2015, p. 6

<sup>220</sup> *Ibid.*, p. 6

<sup>221</sup> Roznai & Rubinstein, 2011, pp. 93-128

*Humanitarian arguments:*

In the range of humanitarian-related arguments, they maintain that putting an end to the use of human shields is a justifiable reason to attack despite the civilian casualties it would cause:

*Ongoing and systematic use of civilians as human shields would justify this adjusted assessment, since it would also create an incentive to lessen the use of the human shields tactic, ultimately enhancing civilian protection during armed conflicts.*<sup>222</sup>

In fact, they assert that not attacking the opponent despite their repeated use of human shields encourages them to continue using that method.<sup>223</sup> Besides the fact that stopping the other party's violations of IHL is not considered an acceptable concrete and direct military advantage under the law, humanitarian reasons are not recognized in calculations of proportionality –and especially not as something that would weigh for higher civilian casualties. Another argument of humanitarian nature used by the authors is based on the past, subsequent, and overall conduct of the LTTE:

*It might also be argued as reasonable for Government forces to have assessed the specific circumstances (involving tens of thousands of civilians being marshaled by the LTTE to avoid defeat at any cost in the final weeks of the conflict) to be at that end of the spectrum which would most favour a marked adjustment in the 'proportionality' calculation to take account of the widespread unlawful conduct of the LTTE and of the revealed past conduct of the LTTE to expose innocent civilians to death, for example by its policy of suicide bombings. As noted above, this policy continued in the final phases of the conflict and thereafter. The military objective of putting an end to the implementation of this policy and the obvious danger it caused to citizens, would be a factor that Government forces could have taken into account when assessing the proportionality of any attacks aimed at destroying the perpetrators of this policy and the collateral effects of such attacks on any civilians.*<sup>224</sup>

In short, the authors maintain that the conduct of the LTTE toward civilians justifies substantial adjustments to the proportionality calculations to encompass more casualties. Again, this is irrelevant as humanitarian reasons are not considered a factor in the calculations. The anticipated outcome of ending these policies is also not guaranteed. What's more, the past behavior or exactions of the LTTE are not valid factors that can be considered in the proportionality calculations. It has no incidence on the military advantage

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<sup>222</sup> Nice & Nixon, 2015, p. 7

<sup>223</sup> *Ibid.*, p. 7

<sup>224</sup> *Ibid.*, p. 7

of the army at stake. Additionally, mentioning that the LTTE continued its exactions afterwards is irrelevant as the proportionality calculations intervene before the attack. This statement also disproves their point, according to which the attack, even if it involves civilian casualties, would end the enemy's mistreatment of civilians. Finally, this idea is based on the fact that the civilians killed now would prevent more deaths. However, the casualties were so massive that it is hard to imagine that such a number would have been killed otherwise, let alone more.

Lastly and in the same range of ideas, the authors mentioned the past conduct of the SLA as a factor in assessing the events at the end of the war:

*As a starting point, at least, it would have to be taken into account that the Government of Sri Lanka stated throughout the conflict that it was actively distinguishing between civilians and those involved in hostilities in its planning of attacks.<sup>225</sup>*

Not only is this statement very dubious in terms of facts, but it is again irrelevant to assessing the events at the end of the war. The fact that the LTTE breached the law and that the SLA supposedly did not does not affect each party's duties at the war's end.

To conclude on that legal opinion, the authors assert that while the circumstances of the civil war were particular and the law remains undefined, the actions of the LTTE and especially human shielding should affect the proportionality calculations. Each argument seems to be written to legalize more civilians deaths. However, the interpretation of IHL presented as absolute in this legal opinion is far from unanimous and contradicts recognized legal principles. Furthermore, the report does not examine the conduct of Sri Lanka and fails to give a realistic account of the facts. Overall, the civilians' fate and the IHL principles regarding their protection are disregarded or used ideologically.

## **b. Crane and de Silva's Legal Opinion**

### Characterization of the Crime of Human Shielding

The authors first examine whether the actions of the LTTE amount to human shielding. For this, they mention that the LTTE fired from the NFZs and intermingled with civilians. They argue that:

*As Blaskic noted, Geneva Convention IV, Art. [Article number missing from the leaked report, but it should be Article 28] stands for the premise that even the mere presence of protected persons cannot be used to render a military*

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<sup>225</sup> *Ibid.*, p. 8

*target immune from attack. In other words, a belligerent who hides within an area with high concentrations of civilians is committing the crime of Human Shielding even if the belligerent party is not 'actively placing them into a location.'*<sup>226</sup>

This citation can be seen as problematic. To the extent that a combatant is not firing, taking part in a specific military operation, or running from bullets, it appears ill-adapted to generalize that a combatant going into an area with a high concentration of civilians is guilty of using human shields. Combatants sometimes retire to nearby cities or civilian areas when combat happens in a specific frontline or location. Likewise, when the SLA targeted hospitals because there were injured combatants in it, it would not be justifiable that the hospital was being used as a shield.

Furthermore, the fact that the Geneva Convention IV provides that the “presence of protected persons cannot be used to render a military target immune from attack” does not mean that a combatant being close to a civilian should be considered as systematically endangering the civilian and thus constitute human shielding.<sup>227</sup> Especially in urban conflicts, combatants sometimes interact with civilians for activities other than combat. It cannot be systematically interpreted as the combatant trying to avoid an attack and endangering the civilian. This section of the Geneva Convention should be interpreted as a way to remind us that a shielded object can still be a legitimate target for attack.

According to the author’s conclusions, the conduct of the militants “would likely support LTTE liability for the crime of Human Shielding.”<sup>228</sup> However, the authors fail to assert whether human shielding is an isolated act that would solely concern the civilians involved closely in the activities they describe, or, on the contrary, if these acts transform the whole area and the entirety of the civilians into human shields.

They then look at the protection of involuntary human shields:

*The prevailing view holds that persons used as involuntary human shields do not lose their protected status and thus casualties resulting from an attack are only defensible as collateral damage provided they are not excessive when compared to the military advantage anticipated by the attack. (...) By contrast, a view which has gained some recognition holds that requiring the impeded party to factor involuntary human shields into the proportionality equation at all would allow the shielding party to profit from a clear violation of the laws of war, and thus should not be allowed.*<sup>229</sup>

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<sup>226</sup> David Crane, Desmond de Silva, ‘What the international experts say (3) ‘War Crimes in Sri Lanka’’ (2015) The Island, 1-12 available at <https://www.justsecurity.org/wp-content/uploads/2017/01/Sri-Lanka-Legal-Opinion-March-18-2015.pdf>, p. 4

<sup>227</sup> Geneva Convention IV, Article 18

<sup>228</sup> Crane & De Silva, 2015, p. 4

<sup>229</sup> *Ibid.*, p. 4



Those two points seem contradictory: while involuntary human shields should still be protected, they should not be considered in the proportionality calculations?

### Proportionality Calculations

The authors further argue -like the previous legal opinion- that the proportionality calculations should at least be reevaluated to allow more casualties as, with the presence of human shields, those casualties would de facto be higher:

*Of the many opinions that exist, the Rubenstein approach, which diminishes the protection requirement in the face of clear and present danger, is the best approach.*<sup>230</sup>

It is subsequently maintained that parties positioning military targets or sending combatants in densely populated areas are solely responsible for the deaths that may occur in case of attack:

*The ultimate responsibility for civilian casualties should fall upon the shielding party rather than on the impeded party.*<sup>231</sup>

They also highlight Israel's reaction to war crimes accusations after the death of civilians in Lebanon in 2006:

*The Israeli Ministry of Foreign Affairs adopted the above principle in a statement which declared: "the deliberate placing of military targets in the heart of civilian areas is a serious violation of humanitarian law, and those who choose to locate such targets in these areas must bear responsibility for the injury to civilians which this decision engenders."*<sup>232</sup>

It is worth noting that the authors have chosen a party accused of war crimes as an authoritative example. Besides, this concept of ultimate responsibility is problematic. It mitigates the wrongs that the attacking party might have committed. It also omits that some principles might have made an attack provoking civilian casualties illegal in the first place. The civilian casualties among human shields may result from a legal attack where civilian casualties were deemed proportional to the military advantage by the attacker. But it may also result from the attacker's carelessness or unwillingness to apply proportionality. Another example could be that according to the principle of precautions in attack, when

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<sup>230</sup> *Ibid.*, p. 11

<sup>231</sup> *Ibid.*, p. 5

<sup>232</sup> *Ibid.*, p. 5

choosing between similar targets, a warring party has to select the target that would not cause civilian casualties.

Similarly to their colleagues, the authors argue that the military advantage of ending the LTTE policies and exactions against the civilians is so compelling that it would justify higher civilian casualties than other objectives:

*It is clear the termination of such insidious and wholesale threats to civilian life represents a compelling military objective which already sets the bar fairly high relative to the acceptable level of civilian casualties in achieving that objective.*<sup>233</sup>

They also state that the SLA complied “with proportionality by endeavoring to create NFZs.”<sup>234</sup> This statement does not make sense, as proportionality has to be based solely on the attack. Previous actions of the army to protect civilians are irrelevant. Otherwise, it would mean that if you protect civilians once, you can kill them the next time. It would be absurd to consider that the law allows this.

#### Number of ‘Rescued’ Civilians and the Lesser Evil

They go further by explaining that, with such a compelling military objective, whatever the number of casualties, the operation was successful because the majority of the civilians were “rescued:”

*Even taking the highest figures ascribed to the deaths of Vanni civilians, assuming that there were up to 330,000 civilians in the NFZ as the Darusinan Report contends --7,000 of whom were killed-- this presumes a loss of life of approximately 2% of that civilian population. The respected UTHR report compiled by a group of Tamil academics places the "hostage" population at 300,000. (...) If there were as many as 40,000 killed, this would be a loss of approximately 12% of that population. Whatever the figure in terms of a hostage rescue operation where some 295,000 were saved — it is a successful operation.*<sup>235</sup>

As shown in the previous section, the number of 7000 casualties is unrealistically low. It is also unrealistic that all the civilians in the region were hostages. This reasoning, however, seems to be based on the idea that since they were hostages, they risked death and that as most of them emerged alive, the operation was successful. However, as demonstrated, the “operation” was nothing close to a hostage rescue: the government did not create any safe

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<sup>233</sup> *Ibid.*, p. 6

<sup>234</sup> *Ibid.*, p. 11

<sup>235</sup> *Ibid.*, p. 6

passage and repeatedly refused ceasefires. People who emerged were not “rescued” but put into internment camps. Rather, it was a series of indiscriminate attacks launched in the context of an armed conflict. And for attacks to cause that many casualties among civilians in just a couple of months, they cannot have been led successfully. Or rather, their success would not have been calculated based on the casualties.

Furthermore, 12% of death, that is more than 1 out of 10 people in the region, is a very high proportion. It is also fairly unrealistic to imagine that this many people would have died if this attack was not pursued (or not pursued in the same way). Therefore, this argument completely reverses the situation. Rather than seeing civilian deaths as something for which the government should be investigated and condemned, it focuses on the survivors and maintains that the operation was successful. Such reasoning is very dangerous: if proportionality is now calculated based on a “greater evil”, which would be the death of all the civilians, it becomes a tool “for legitimizing the wide-scale killing of civilians.”<sup>236</sup> With this reasoning, as long as some civilians survive, the operation could be presented as a success. However, the standard should be no casualties, especially when the operation is presented as humanitarian.

### Responsibility for the Casualties

They also argue that a certain amount of these deaths could have been attributed to the LTTE or have been actual LTTE militants:

*It is now impossible to estimate what proportion of those civilians were killed by the LTTE firing upon them with a view to achieving an international propaganda victory by assigning those deaths to SLA forces. Indeed the arithmetic is further complicated by the number of LTTE fighters not in uniform whose deaths could be treated as civilian when in fact they were full combatants.*<sup>237</sup>

Furthermore, they maintain that voluntary human shields should be deduced from the calculations as directly participating in the hostilities. For that, they use the argument that not all civilians could have been hostages:

*As a matter of logic, there is a powerful case for saying that it is extremely unlikely that some 20,000 cadres of LTTE, at that stage, could have taken up to 330,000 hostages against their will.*<sup>238</sup>

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<sup>236</sup> Gordon & Perugini, 2020, p. 149

<sup>237</sup> Crane & De Silva, 2015, p. 7

<sup>238</sup> *Ibid.*, p. 9

This point can be agreed on. However, they subsequently sustain that “a large portion” of the civilians would have stayed with the LTTE to play a part in the war effort.<sup>239</sup> Hence, they imply that a significant fraction of the deaths were probably legal. Nonetheless, the fact that most civilians were not hostages does not mean they stayed in LTTE territories to participate in the hostilities directly. As shown in the previous section, the reasons for staying were multiple. Furthermore, the number of IDPs reuniting in the NFZs to seek protection would suggest otherwise.

Finally, the authors argue that the LTTE is liable for the civilian deaths because of their prior breaches of IHL:

*With the LTTE's liability for perfidious conduct and forced recruitment of civilians; in addition to the execution of civilians who were trying to escape and the placement and firing of their weaponry from within civilian and hospital zones, it is necessary to consider who properly bears liability for the civilian deaths that resulted from hostilities between the parties<sup>240</sup>.*

The Israeli's practice and jurisprudence once again inspire this point:

*In 2009, the Israeli High Court of Justice found that the principle of distinction was not violated during "Operation Cast Lead" when the IDF hit medical transports, buildings, and ambulances with its rocket attacks toward Hamas. The Court reasoned that, because Hamas militants had resorted to using such locations traditionally protected by IHL, they became legitimate military targets and that the civilian deaths that occurred as a result were the responsibility of Hamas.<sup>241</sup>*

This reasoning fails to consider that both parties can bear responsibility for casualties and that the wrongs of one party, even if considered a more serious breach, do not strip the other party from responsibility. On top of that, how militants use protected locations should be considered. And even if it is military in nature, it should not automatically override the protection of the designated location.

The authors conclude that civilian casualties can be considered collateral damage because the Government respected the principle of proportionality. They add that the responsibility would lie with the LTTE “due to their grave breaches of IHL.”<sup>242</sup> Overall, the principle of proportionality appears to be easily manipulable. Coupled with human shields, it can be used to render legal the deaths of vast numbers of civilians. The authors even finish by stating that “Sri Lanka and the situation it faced in the recent past should help pioneer

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<sup>239</sup> *Ibid.*, p. 8

<sup>240</sup> *Ibid.*, p. 11

<sup>241</sup> *Ibid.*, p. 11

<sup>242</sup> *Ibid.*, p. 11

thinking” in IHL to face the West’s current threats such as ISIS.<sup>243</sup> It seems that armies responsible for massive casualties and war crimes can now become IHL ‘pioneers’, according to some legal experts.

**c. Newton’s Legal Opinion**

Ending the Conflict: a ‘Higher’ Military Advantage that justifies ‘Higher’ Casualties

The legal opinion of Newton is in accordance with his counterparts. His main argument is that ending the conflict can be considered a legitimate military advantage in the frame of the proportionality principle. This military ‘advantage’ is considered so high that it entirely justifies the conduct of the SLA:

*It is my unqualified opinion that the overarching necessity of ending the multi-generational struggle against the LTTE permitted Sri Lanka commanders to consider means of attack that accomplished the vital goal of "final victory", even as they sought to protect their own forces.*<sup>244</sup>

However, as Van Schaack maintains, the goal of prevailing in the hostilities is too “amorphous and remote” to be considered a concrete and direct advantage.<sup>245</sup> It also appears very problematic to consider that the military ‘advantage’ of ending the conflict is such an overarching goal that it would suddenly allow massive casualties. The SLA had a fair advantage of winning and had confined the LTTE towards the northern tip of the island before the shelling of the NFZs. It then appears unrealistic that the SLA’s only option was to shell indiscriminately. Yet, Newton maintains that the SLA had no legal obligation to choose another option:

*It would be ludicrous to suggest that there is some precept of international law that required them to send ground forces into the NFZ to respond to the LTTE artillery fire.*<sup>246</sup>

Against the elements provided by the reports examined in the first section, he also sustains that no evidence suggests “that the government used inherently indiscriminate weapons.”<sup>247</sup> He also maintains that commanders are “experts” at artillery use and that all

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<sup>243</sup> *Ibid.*, p. 12

<sup>244</sup> Michael Newton, ‘A Legal opinion for the Commission Inquiring into Disappearances’ (2014) The Island, 1-9 available at: <https://www.justsecurity.org/wp-content/uploads/2017/01/Sri-Lanka-Legal-Opinion-Sept-28-2014.pdf>, p. 9

<sup>245</sup> Van Schaack, 2016, p. 320

<sup>246</sup> Newton, 2014, p. 9

<sup>247</sup> *Ibid.*, p. 5

precautions were taken.<sup>248</sup> In such circumstances, how is it possible that hospitals or civilian groups were specifically shelled without being targeted in the first place?

### 'Positive Punishment' against Human Shielding

Regarding human shields, the author argues that the changed role of “otherwise protected civilians” cannot be ignored by the attacker, as it would be inconsistent with “the broader legal and moral principles to reward” intentional misconduct.<sup>249</sup> In fact, according to him, the so-called widespread use of human shields gave an “asymmetric advantage” to the LTTE.<sup>250</sup> This is, again, very unrealistic as the SLA was already clearly dominant on the battlefield. It also implies that because a party breaches the law, the opponent has a right to “reward” the other party for its misconduct at the expense of civilians’ lives. Indeed he states:

*In other words, if the law exists to protect innocent civilians to the greatest degree possible given the realities of modern conflicts, it cannot be construed to reward the party that intentionally endangers civilians.*<sup>251</sup>

He also uses the term of “positive punishment”, stating that the attacks should have been seen like that.<sup>252</sup> Because of this -inexistent- right to “reward” or “punish” the other party’s misconduct, this same party would then bear any casualty. He also argues that this responsibility is reinforced because “only the LTTE was properly positioned to accurately assess the precise likelihood of death or injury to civilians located in the area.”<sup>253</sup> However, the fact that a party knows about the civilians’ movements does not mean that they should systematically be responsible for those deaths. This argument also appears like bad faith as the SLA fired at NFZs, i.e. areas they created for civilians to reunite. They necessarily would have known that the civilians were posted there.

In the same vein, Newton argues that the party facing human shields has to make a “forced choice” to either cede an unlawfully gained military advantage with probable losses or undertake “careful strikes” toward military objectives.<sup>254</sup> According to him, the law would be obsolete if it did not permit any recourse. In fact, it would “undermine respect for the fabric of jus in bello by creating a fatalistic sense of unavoidable death at the hands of an adversary that uses human shields to enhance the enemy war effort.”<sup>255</sup> And it does not, since the principle of proportionality “provides the intellectually consistent and time-tested

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<sup>248</sup> *Ibid.*, p. 6

<sup>249</sup> *Ibid.*, p. 2

<sup>250</sup> *Ibid.*, p. 5

<sup>251</sup> *Ibid.*, p. 5

<sup>252</sup> *Ibid.*, p. 5

<sup>253</sup> *Ibid.*, p. 5

<sup>254</sup> *Ibid.*, p. 3

<sup>255</sup> *Ibid.*, p. 5

framework for reconciling the competing priorities at hand when faced with human shields.”<sup>256</sup> Lastly and similarly, he maintains that the choice of Sri Lanka to attack this way and end the conflict “likely saved many more civilian lives.”<sup>257</sup> This paper already reflected on this argument in the previous parts.

### The Status of ‘Areas’ in IHL

Newton also focuses on an interesting point regarding the NFZs and the status of areas in IHL. He provides that:

*The law is clear, however, that there is no cognizable tenet of international law that treats the status of an entire area as being legally relevant. In the case against Dragomir Milosevic, the perpetrator attempted to argue that the presence of military targets in a designated zone warranted military strikes with no further analysis. In rejecting that claim, the Appeals Chamber of the ICTY reinforced the principle that the designation or functional description of a zone or area can never serve as a legal basis for attack: (...) The Appeals Chamber recalls that it is well established that the principle of distinction requires parties to distinguish at all times "between the civilian population and combatants, between civilian and military objectives, and accordingly direct attacks only against military objectives."*<sup>258</sup>

He adds that the principle of distinction must be made on a “case by case basis”<sup>259</sup> and mentions Article 51(5)(a) of Protocol I on the Protection of the Civilian Population, which provides:

*Among others, the following types of attacks are to be considered as indiscriminate:*

- a) *an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.*<sup>260</sup>

He then concludes that “just as the Israelis” have to make “individualized assessments of the proportionality grounds” before targeting objectives in Gaza, the SLA had to do the

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<sup>256</sup> *Ibid.*, p. 4

<sup>257</sup> *Ibid.*, p. 5

<sup>258</sup> *Ibid.*, p. 3

<sup>259</sup> *Ibid.*, p. 3

<sup>260</sup> Protocol I, Article 51(5)(a)

same.<sup>261</sup> This appears as a counter-productive argument according to his initial claim. The next step of this reasoning could be that the SLA cannot treat the NFZs as an objective in itself but has to specifically target the legal objectives, either within the NFZ or next to it. Thus, the SLA's continuous and indiscriminate shelling of the NFZs would violate those dispositions. However, he finishes his argument by stating that the SLA can fire at the NFZs without more precisions:

*The mere labeling of an area as a safe area or protected zone had no legal effect on the underlying authority of the Sri Lanka forces to attack lawful targets using lawful weapons in a lawful manner as permitted under the laws and customs of warfare.*<sup>262</sup>

This reasoning appears incomplete. Although labeling an area as a safe zone or military zone does not foresee if an attack directed at this area is legal, the law appears to primarily underline that a whole zone cannot be seen as one main objective. The author omits this point. Furthermore, he could have reached his conclusion by simply stating that since the NFZs had been created unilaterally and were not recognized by the other party, they are not recognized under IHL. Going through this long reasoning then appears useful and off track.

To conclude, Newton's legal opinion observes the same pattern as the other authors. Human shields are to protect SLA from accusations in three ways:

- to disqualify the status of civilians and render casualties legal, ex: voluntary shields
- to affect the proportionality's calculations and raise the threshold of higher casualties
- to attribute the responsibility for the deaths to the LTTE

#### **d. Conclusion**

The arguments displayed in those legal opinions are all based on the idea that the civilians in the LTTE territories were hostages and/or human shields. This is in contradiction with the facts, which are generally appraised with bad faith by the legal experts. Since human shields and their status are not clearly defined by the law, the authors use this classification to present the civilians' deaths as legal because human shields would affect the proportionality's calculations. And proportionality indeed has a key role: interlinked with other legal arguments, it is used to raise the threshold of acceptable casualties. This is also possible because the principle of proportionality, and in general, military necessity, are not defined in clear terms either, as the authors recognized themselves. They can then influence proportionality calculations with all sorts of arguments: the conduct of the enemy, the advantage of winning the war, or even humanitarian arguments. In fact, the use

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<sup>261</sup> Newton, 2014, p. 3

<sup>262</sup> *Ibid.*, p. 3



of two undefined legal concepts, human shields and proportionality, seem to be more efficient together: it is their association that allows the development of new forms of legal violence towards civilians. They are crucial in the instrumentalization process to shield the Government of Sri Lanka from responsibility and make the LTTE as the sole responsible for the civilian deaths.

Lastly, Israel appears to be an authoritative reference on the matter as it was mentioned by several of the authors. The next section will reveal why.

## 4. The Case-Study of Israel

This case study will be divided in two sections: the first section will look at voluntary human shields and specifically Corrie's case. The second one will examine Israel legal defense strategy based on involuntary human shields.

### 4.1. Voluntary Human Shields

#### a. Introduction

##### Context

Before 2005, Gaza was under Israeli occupation. These years were marked by Israeli incursions, the second intifada, and the gradual isolation of Gaza from the rest of the world – with, for instance, the bombing of its international airport by Israel.<sup>263</sup> In 2005, Israel unilaterally withdrew its troops, claiming it put an end to the occupation.<sup>264</sup> Nonetheless, Gaza is still recognized as an occupied territory, with the West Bank.<sup>265</sup> Since then, there is an ongoing conflict between Gaza and Israel, also called Gaza Wars, with regular attacks from each side, killing mainly Palestinians.<sup>266</sup> In 2006, Hamas came into power, and quickly after, in 2007, Israel ended up imposing a blockade on Gaza: it is now described as a 'state of siege.'<sup>267</sup>

It is still debated whether the conflict in Gaza can be classified as an International or Non-International Armed Conflict.<sup>268</sup> For the case-study, this paper will encompass both legal frameworks: the Israeli military applies both to its operation in Gaza.<sup>269</sup>

##### Israel and Voluntary/Involuntary Human Shields

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<sup>263</sup> Al Jazeera, 'Gaza Strip: A beginner's guide to an enclave under blockade' (14 March 2021), available at <https://www.aljazeera.com/news/2021/3/14/a-guide-to-the-gaza-strip>

<sup>264</sup> Ibid.

<sup>265</sup> United Nations Office for the Coordination of Humanitarian Affairs (OCHA), 'Crisis Context and Impact', Based on the 2023 Humanitarian Response Plan, available at <https://www.ochaopt.org/country/opt>

<sup>266</sup> United Nations Office for the Coordination of Humanitarian Affairs (OCHA) for the Occupied Palestinian Territories (OPT) – 'Data on Casualties', available at <https://www.ochaopt.org/data/casualties>

<sup>267</sup> Al Jazeera, 2022

<sup>268</sup> Rebecka Buchanan, 'Classifying the Israeli-Palestinian Conflict' (2015), for the Human Security Centre, available at <http://www.hscentre.org/middle-east-and-north-africa/classifying-israeli-palestinian-conflict/>

<sup>269</sup> International Committee of the Red Cross (ICRC) Casebook – The Report of the Israeli Ministry of Foreign Affairs, on 'The Operation in Gaza, Factual and Legal Aspects', Report, Israeli Ministry of Foreign Affairs (2009), available at <https://casebook.icrc.org/case-study/israelgaza-operation-cast-lead>, §30

For the case study on Israel, this paper will distinguish involuntary and voluntary human shields. Although the law does not differentiate them, the Government of Israel and the domestic courts do. According to them, and as will be shown, voluntary human shields side with terrorists and can be assimilated as such. On the contrary, involuntary human shields are victims of the terrorists. Hence, voluntary shields lose the protections associated with civilian status, while involuntary shields retain them. One could then assume that Israel would emphasize protecting and sparing involuntary human shields during military operations. But this is not the case. Every time Israel raised the figure of human shields, whether voluntary or involuntary, it was to justify the deaths of Palestinian civilians.

It is worth mentioning that Israel has a history of using human shields among and against Palestinian civilians. The army used to force Palestinian civilians to walk in front of soldiers or to scout buildings for booby traps before the soldiers' intervention.<sup>270</sup> In a trial in 2005, the Government argued that some Palestinian were volunteering for those tasks. Nonetheless, this was ruled as a breach of IHL by the Israeli High Court.<sup>271</sup>

This section will focus on voluntary human shields. Back in 2006, the Israeli Supreme Court recognized in the *Targeted Killings* Case that civilians taking part in human shielding out "of their own free will, out of support for the terrorist organization, (...) should be seen as persons taking a direct part in the hostilities."<sup>272</sup> It is then specified that "a civilian taking part in hostilities is endangering his life, and he might -like a combatant- be the objective of a fatal attack."<sup>273</sup> In short, "killing is permitted" as "proportionality is not required in that case."<sup>274</sup> This paper will examine Rachel Corrie's case, classified as a voluntary human shield.

## **b. Corrie's Case**

Rachel Corrie was an American student working on a senior-year project in the Gaza Strip. With activists from the International Solidarity Movement (ISM), she protested the mass demolition of Palestinian homes at the border with Egypt. On 16 March 2003, she was run over to death by a military bulldozer in her attempt to prevent the destruction of the house of a local pharmacist.<sup>275</sup> Initially, the Israeli investigation results concluded that there was no proof that a bulldozer had killed her. A second investigation overturned this and recognized that the bulldozer was the cause of her death. Corrie's death was subsequently

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<sup>270</sup> Chris McGreal, 'Israeli high court bans military use of Palestinians as human shields', The Guardian (7 October 2005), available at <https://www.theguardian.com/world/2005/oct/07/israel>

<sup>271</sup> Ibid.

<sup>272</sup> *Targeted Killings* Case – Analyzed in the ICRC casebooks, §36

<sup>273</sup> Ibid., §46

<sup>274</sup> Ibid., §46

<sup>275</sup> Gordon & Perugini, 2020, p.1

ruled out as an accident in a civil suit at the Israeli District Court of Haifa,<sup>276</sup> a decision confirmed by the Supreme Court of Israel.<sup>277</sup> Neither the bulldozer operator nor the State were held responsible. According to Amnesty International and Human Rights Watch, these rulings established a precedent for the impunity of Israeli military personnel and violated IHL.<sup>278</sup>

### Destruction Campaign

The Israeli Military has argued that the campaign of demolition intended to “clear a “buffer zone” along the Egyptian border (...) to prevent the use of tunnels by Palestinian armed groups for military purposes.”<sup>279</sup> Human Rights Watch, however, documented that the pattern of destruction of the homes of 16,000 Palestinian between 2000 and 2004 “suggests that Israeli forces demolished homes wholesale, regardless of whether they posed a specific threat, in violation of international law” and “in most cases without military necessity.”<sup>280</sup> Human Rights Watch also questioned whether “the operation that the bulldozer operator was participating in when it crushed Corrie can be considered a lawful military action.”<sup>281</sup> The Courts did not address this matter.

### Facts and Trial Anomalies

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<sup>276</sup> Haifa District Court, T.A. 371/05, *Estate of the Late Rachel Corrie et al. v. The State of Israel - Ministry of Defence*, 28 August 2012. See: Haifa District Court, T.A. 371/05, *Estate of the Late Rachel Corrie et al. v. The State of Israel - Ministry of Defence*, 28 August 2012, English translation of the Judgement by Irène Solomon, available at <https://fr.scribd.com/document/110404220/Judgment-in-the-Case-of-Rachel-Corrie-the-Haifa-District-Court>, p. 64

<sup>277</sup> Supreme Court of Israel, Civil Appeal 6982/12, *Estate of the Late Rachel Corrie et al. v. The State of Israel - Ministry of Defence* (Appeal), 12 February 2015. See: Supreme Court of Israel, Civil Appeal 6982/12, *Estate of the Late Rachel Corrie et al. v. The State of Israel - Ministry of Defence* (Appeal), 12 February 2015, English translation for Rachel Corrie Foundation, available at <https://rachelcorriefoundation.org/trial>, p.18

<sup>278</sup> Human Rights Watch, ‘Israel: Dangerous Ruling in Rachel Corrie Case – Appeal Court Said No Liability for Civilian Death’ (2015) available at <https://www.hrw.org/news/2015/02/17/israel-dangerous-ruling-rachel-corrie-case>; Amnesty International ‘Rachel Corrie verdict highlights impunity for Israeli Military’ (Press Release 2012) available at <https://www.amnesty.org/es/wp-content/uploads/2021/06/pre014132012en.pdf>

<sup>279</sup> Human Rights Watch, 2015

<sup>280</sup> *Ibid.*, 2015

<sup>281</sup> *Ibid.*, 2015



A. Corrie was photographed standing in front of a bulldozer on 16 March 2003. Figure A: [BBC](#),<sup>282</sup> Figure B: [Arab News](#).<sup>283</sup>

The pictures above show Corrie wearing a fluorescent orange safety vest and holding a megaphone. Apart from the bulldozer, no combatants or military objects are visible.<sup>284</sup> Out of context, these images do not suggest that the events take place in the circumstances of an armed conflict. Instead, Corrie looks like a protester.

Whether this happened in a war zone or not can be debated.<sup>285</sup> There were regular combats in the area. However, nothing close to that had been reported for the 16<sup>th</sup> of March.<sup>286</sup> On that day, Corrie and other activists protested the destruction of civilian houses for several hours. She ended up climbing on the “top of a mound of earth created by the front blade of a bulldozer, which continued forward, crushing her.”<sup>287</sup> The Plaintiffs and witnesses thus argue that the operator would have seen her. On top of that, the other activists shouted at the operator to stop. Instead, he continued and drove over her twice, forward and backward. According to the Defendant and the operator, he could not have seen Corrie; it was an accident. It is worth noting that Israeli investigators refused to call Palestinian witnesses and threatened other foreign activists with charges during the inquiry.<sup>288</sup> From this, it appears that the rules of a fair trial were not respected in the first place.

### c. Domestic Law at the Basis of the Decisions

- *How did the Courts justify their decision to exonerate the bulldozer operator?*

<sup>282</sup> BBC, ‘Profile: Rachel Corrie’ (28 August 2012) available at <https://www.bbc.com/news/world-middle-east-19395651>

<sup>283</sup> Olivia Cuthbert, ‘Little has changed in Gaza since peace activist Rachel Corrie was crushed beneath and Israeli bulldozer 15 years ago’, Arab News (5 May 2018), available at <https://www.arabnews.com/node/1297216/middle-east>

<sup>284</sup> It appears there were no groups of soldiers present that day, only bulldozers and their operators – Source: Human Rights Watch, 2015

<sup>285</sup> Neve Gordon, ‘No justice for Rachel Corrie’, The Nation (31 August 2012), available at <https://www.thenation.com/article/archive/no-justice-rachel-corrie/>

<sup>286</sup> Human Rights Watch, 2015

<sup>287</sup> *Ibid.*, 2015

<sup>288</sup> *Ibid.*, 2015

Despite recognizing that the events happened in the course of “wartime activity,” the Courts decided not to examine the application of IHL. Indeed, they argued in their decision that the Laws of War were overridden by domestic legislation. The rulings provided that the Law on ‘civil wrongs’ “override the provisions of international law.”<sup>289</sup> Section 5 of the Civil Wrongs Ordinance states that:

*The state shall not be responsible in damages for actions taken through war related activities of the Israeli Defence Force.*<sup>290</sup>

Accordingly, they maintained that the bulldozer’s mission consisted of a “war-related activity,” since the law defines it as “an activity for the prevention of terror, hostile acts or uprising undertaken in circumstances where there is a risk to life and limb.”<sup>291</sup> The ruling then maintains that although the Bulldozer operator was not in any danger from the ISM activists, it could not delay its operations due to the permanent terrorist threat in the area.<sup>292</sup>

In short, IHL was discarded by the judge. This contrasts with the cases examined until now, in which IHL was used to justify the death of human shields. In this case, the claimants argued that Corrie’s death violated the principle of proportionality. Based on the *Targeted Killings* Case ruling, the Defense could have argued that because Corrie was a voluntary human shield, she could be excluded from the proportionality considerations. They decided to use domestic law instead, but the figure of human shield was still used to avoid responsibility for her death, as will be shown later.

Evidently, the Law of the Civil Wrongs Ordinance used in the trial is contrary to the Law of Armed Conflict and the dispositions on protected persons. These dispositions apply to war zones and war-related activities. HRW also reminds us that in IHL, “a state is required to make full reparation for the loss or injury caused by its violations of such laws.”<sup>293</sup> This Civil Law is then very worrying. We can imagine that in the context of the Conflict between Israel and Palestine, Israel could use it to avoid responsibility for any deaths in Palestinian or occupied territories, especially in densely-populated ones. Again, it implies that civilians who do not leave conflict areas are as good as dead and without consequences. This is especially a problem in the context of urban conflicts. Finally, this Law opens the door to any form of abuse and unnecessary killings from the army, who now has Civil Law’s immunity during their activities.

Since then, the law has been widened further to include the whole Gaza Strip:

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<sup>289</sup> *Ibid.*, 2015

<sup>290</sup> *Estate of the Late Rachel Corrie et al. v. The State of Israel - Ministry of Defence*, 28 August 2012, Judgement in English, p. 29

<sup>291</sup> *Ibid.*, p. 29

<sup>292</sup> *Ibid.*, p. 29

<sup>293</sup> Human Rights Watch, 2015

*A July 2012 amendment to the Civil Wrongs law redefined the definition of “wartime actions” for which the state was immune from damages to include any actions by Israeli forces in the Gaza Strip – “whether or not,” according to the law’s explanatory notes, “they were carried out in circumstances of danger to life or limb.”*<sup>294</sup>

This means the army can kill anyone in Gaza (or the West Bank) with total impunity. The classification as human shields could thus become irrelevant to justify civilian deaths. Still, Israel has kept using this law to avoid crime accusations under IHL (/pretend to respect IHL). This could also be to maintain its image of civilized warring nation involved in a “just war.” Either way, both this Civil Law and the human shields classification make it easier for Israel to fight in densely populated areas -since they do not have to worry about killing people.

#### **d. Application of International Humanitarian Law**

- *How can we assess the conduct of the Bulldozer operator facing Corrie?*

Despite the domestic basis of the rulings, this section will now examine how the Law of Armed Conflicts would apply in the case at hand. It will argue that it explicitly breaches several dispositions.

#### Civilian Status and Participation to the Hostilities

First, according to the presumption of civilian status, the bulldozer operator should have treated her as a civilian if nothing disproves her status as such.<sup>295</sup> Even if he did not, let us suppose that voluntary human shields do not automatically take part in hostilities. In that case, it is arguable that Corrie, who was involved in a non-violent protest, retained her civilian status. It could be seen as absurd that someone would lose their protection as a civilian for standing non-violently and with a megaphone between a bulldozer and a civilian house. Let us look specifically at the cumulative criteria to characterize the direct participation to hostilities: the threshold of harm, direct causation and belligerent nexus.<sup>296</sup> The belligerent nexus is met when the act is committed to favor a party to the conflict *and* disadvantage another. There is no indication that Corrie was working with Hamas or any terrorist group.<sup>297</sup> Regarding the threshold of harm, the Courts recognized that Corrie did not represent any threat or cause any harm. Thus, this criterion is not met either. Finally, with respect to direct causation, there needs to be a physical chain of causality.<sup>298</sup> As

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<sup>294</sup> *Ibid.*, 2015

<sup>295</sup> Additional Protocol I, Article 50(1)

<sup>296</sup> ICRC Casebook – Direct Participation in Hostilities

<sup>297</sup> See section II.2.1.e.

<sup>298</sup> ICRC Casebook – Conduct of Hostilities – II.8. Introductory Text

Corrie was standing passively and not causing any harm, this seems impossible to prove. Therefore, Corrie was not taking a direct part in hostilities and retains her status as civilian.

### Precautions in Attack and Proportionality

In that case, the principle of precautions in attack applies. According to this principle, an attack causing civilian casualties is only legal if:

- a similar objective that would not cause civilian harm cannot be chosen instead
- all feasible precautions have been taken
- civilian casualties are not excessive in relation to the military objective<sup>299</sup>

Accordingly, the bulldozer operator could have decided to postpone the operation or destroy another house instead. He should also have released a warning before going further.<sup>300</sup> Moreover, looking at the principle of proportionality included in these dispositions, we can question the operator's actions. It is hard to find a direct and concrete anticipated military advantage in destroying that house on this specific day, especially an advantage that would be proportionate to her death. Corrie did not represent an imminent threat. Moreover, the Military had other options than killing Corrie and could, for instance, have taken her out of the way or arrested her instead.<sup>301</sup> The group of activists had been there for several hours, meaning the Military had the opportunity to do something about it way earlier. Thus, if IHL were to be applied, this case would at least breach the principle of precautions in attack and the principle of proportionality.

#### **e. Narrative Building: Terrorism and Human Shields**

Similarly to Sri Lanka, the terrorism narrative is key in the Israeli case. The same process of narrative building to demonize the enemy, or here the voluntary shield, is being used. Gordon consulted the summation submitted by the Defense, i.e., the State of Israel – Ministry of Defense.<sup>302</sup> In this summation, the Court presented the ISM as an anti-Israeli terrorist Organization. Rachel being an ISM member, she therefore supported violence and terrorism. Furthermore, Rachel Corrie willfully entered a closed military area and war zone, meaning she was there unlawfully. It is worth mentioning that no written public act established that this zone was banned from access.<sup>303</sup> In sum, she was responsible for her own death.

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<sup>299</sup> Additional Protocol I, Article 57

<sup>300</sup> *Ibid.*, Article 57

<sup>301</sup> Gordon, 2012

<sup>302</sup> I was unable to access the Defense Summation and could not use it as a primary source.

<sup>303</sup> Gordon, 2012



To support those claims, various photos of Carrie or ISM members are used to depict her as a fanatic and violent activist.<sup>304</sup> Among these, the Defense uses a picture of alleged ISM activists holding weapons. Gordon highlights that there is no information about when and where the photos were taken, who the people on them were, and if Corrie knew them. By juxtaposing this picture to those of Corrie, the State “attempted to impute guilt by association.”<sup>305</sup> It is worth noting that there is no record of ISM members being charged with terrorist activities or such allegations.<sup>306</sup>

The Defense argued that ISM activities included “positioning activists to act as “human shields” for terrorists wanted by the Israeli security services,” or “disrupting demolition or “sealing-off” of terrorist’s homes who have carried out terrorist activities causing multiple casualties.”<sup>307</sup> It is worth noting that whether those allegations are true or not, none of them apply to the case at hand. A civilian-owned the house about to be destroyed, and nobody, terrorist or not, was present. The Defense also argued that members of ISM “were willing to risk their lives for the sake of advancing their agenda” and that Carrie was no different:  
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*The deceased also knew that the death of an American citizen would create a pronounced media/political outcry around the world, far beyond the death of a local Palestinian, in ways that would advance the organization’s agenda. Therefore, although there was mortal danger in the Gaza Strip and along the Philadelphi route in particular, the deceased chose to risk her own life, and she prepared herself in advance for this risk.*<sup>309</sup>

The Defense thus argued that Corrie wanted or at least was willing to die to create an international outcry. According to Gordon, this is not different than saying that Corrie’s death was suicide.<sup>310</sup> If Corrie indeed considered this colonial dimension in her actions, she might also have thought that the Military would spare her life in fear of international reactions. Butler summarizes it by the following:

*Maybe Rachel Corrie realised that her death or injury to her body would receive greater publicity than the death or injury to any number of Palestinians who have suffered her fate. When positioning herself in front of the bulldozer intent on demolishing Palestinian homes, maybe she calculated that her value*

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<sup>304</sup> *Ibid.*, 2012

<sup>305</sup> *Ibid.*, 2012

<sup>306</sup> *Ibid.*, 2012

<sup>307</sup> *Estate of the Late Rachel Corrie et al. v. The State of Israel - Ministry of Defence*, 28 August 2012, Judgement in English, p. 12

<sup>308</sup> Gordon, 2012

<sup>309</sup> *Ibid.*, 2012

<sup>310</sup> *Ibid.*, 2012

*as a white American would attract greater media attention. Or maybe she was absolutely certain that she would not be killed.*<sup>311</sup>

And indeed, her clothes suggest she was taking precautions not to die. In the end, whether Corrie was aware and taking into account the colonial bias, her case did indeed get a lot of attention. According to Bargu, it is her “whiteness” that allowed her to play this role:

*The global attention given to the figures of Kenneth O’Keefe and Rachel Corrie over the more anonymous and local human shields of Turkey is indicative. When ‘whiteness’ creates the conditions of possibility of shielding non-white ‘others’, only those agents who are carriers of certain markers of privilege tend to work more effectively as human shields.*<sup>312</sup>

Either way, whether Corrie expected to die or not, the State claimed that Corrie’s death was her own fault, and she is responsible for it:

*The State claimed that even if it was decided that there was a causal link between the injury caused to the deceased and the actions of the army during the incident, in the circumstances the deceased should be attributed contributory negligence at a rate of 100%, which cuts the causal link completely and nullifies this claim.*<sup>313</sup>

This could create a dangerous precedent establishing that voluntary human shields are guilty of being killed. This would be the same result as considering that voluntary human shields lose their civilian status. However, in cases where human shields are deployed to protect for ex individuals that would be arrested or such, it means that even if the initial mission of the combatant was to capture someone, the shield could be killed in the process? The Plaintiffs argued that the Military continued its operations despite the presence of activists fearing it would create a “dangerous precedent” of them being “able to stop the [IDF’s] work.”<sup>314</sup> But it created another “dangerous precedent” and, more importantly, killed someone.

## **f. Peace Activists, Human Shields and Colonial Legacies**

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<sup>311</sup> Butler, 2015, pp. 227-228

<sup>312</sup> Bargu, 2013, p. 291

<sup>313</sup> Estate of the Late Rachel Corrie et al. v. The State of Israel - Ministry of Defence, 28 August 2012, Judgement in English, pp. 7-8

<sup>314</sup> Updated Written Summaries on Behalf of the Plaintiffs (2011) in preparation of the Civil Lawsuit 371/05, Haifa District Court, T.A. 371/05, *Estate of the Late Rachel Corrie et al. v. The State of Israel - Ministry of Defence*, available at: <https://www.richardsilverstein.com/wp-content/uploads/2012/08/CorrieCase-PlaintiffsSummaries-ENG.pdf>, p. 95

Corrie's case raises the matter of non-violent peace activism and human shields. Israel has depicted Corrie as complicit and siding with terrorists. It seems that, for the State, being a voluntary human shield necessarily implies being on the enemy's side. In fact, it appears that it is this allegation (siding with the enemy) that makes her guilty, and killable, rather than her non-violent activism in itself. Israel then fails to take into account that an act of resistance does not make the shield a terrorist or an enemy agent. For Butler, voluntary human shields are then systematically reconceptualized and weaponized:

*In the case of voluntary shields, in contrast, they are assimilated to combatants and their bodies conceptualised thus as weapons. So in this scenario, the claim that a population voluntarily positioned itself to shield a military target turns the population into a weapon of war—the shield becomes reconceptualised as a weapon for the purposes of waging war.*<sup>315</sup>

This appears particularly relevant to Corrie, who was presented as a terrorists' pawn while she technically did not represent a threat. Furthermore, in this case, the Court also implies that the mission of destroying a house is more important than the protester in front of it. But with such a narrative, one can wonder if Israel would not see it as killing two birds with one stone -destroying the house and getting rid of a so-called terrorist in the making. And indeed, for Butler, this weaponization of the category of human shields works as an overall war strategy:

*The discursive attribution of the status of human shield to a specific civilian population, operates to rationalise the destruction of that population, identifying the population with a weapon, or understanding the population as an extended version of a military target.*<sup>316</sup>

Furthermore, the Defense has argued that Corrie was willing to die to create an international outcry. But according to Butler, there is an "alternative way of reading the scene:"<sup>317</sup>

*But there is an alternative way of reading the scene: could it be said that those who risk their lives in practices of resistance are quite literally 'standing' for other principles that may or may not be realised and that they stand for those principles without any clear calculation that by standing in this way those principles will be realised more broadly in society, but only with the hope that they will?*<sup>318</sup>

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<sup>315</sup> Butler, 2015, p. 228

<sup>316</sup> *Ibid.*, p. 228

<sup>317</sup> *Ibid.*, p. 228

<sup>318</sup> *Ibid.*, p. 228

This is not considered by the State. Nevertheless, their argument shows that the defense was aware of the colonial stakes in Gaza, despite not mentioning it apart from that. The State is in a way recognizing that, if not for a foreigner, a death like this would have gone unnoticed -and thus not investigated. Such a statement shows how expendable Palestinian lives are. In fact, we can imagine that in the same situation, if a Palestinian was standing there, Israel would not have bothered arguing that this person was a voluntary human shield and thus killable. Here, the State prepared its defense only because Corrie's family had the means to start a lawsuit. The Palestinian civilian would probably have been depicted directly as a terrorist and it would have stopped there. And indeed, despite the numerous deaths of Palestinians over the years, I did not find any sustained allegations of voluntary human shielding: Palestinians are classified as terrorists or involuntary human shields. It is for example the case of unarmed protesters, such as children and medical personnel, who are killed and qualified as Hamas' shields.<sup>319</sup> And yet, a Palestinian civilian resisting in this situation might have had no link with terrorists and might have been there to non-violently protest the destruction of their house or other civilian houses.

#### **g. Conclusion**

Corrie's case differs from the other examples on two aspects: it involves a voluntary human shield, and IHL is not at the base of the justification for the State's conduct. In fact, this paper demonstrated that the State's conduct clearly breached IHL. But like in the case of Sri Lanka, Israel built a narrative justifying the operator's conduct. It involved the instrumentalization of the precarious human shield category to make Corrie's death acceptable, and the deployment of the terrorist figure. This case shows that classifying peaceful protesters as voluntary human shields is not only pejorative, but also puts the protester in a very dangerous position. Specifically in Gaza where everything is understood from the lens of an armed conflict, any form of resistance or protest can be framed as shield/terrorism, and as such deliberately targeted. The next section will show that this classification is as dangerous for the ones classified as involuntary shields by Israel.

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<sup>319</sup> Neve Gordon, Nicola Perugini, 'The fallacy of Israel's human shields claims in Gaza – Desperately trying to justify the killing of unarmed protesters, Israel once again uses its 'human shields' mantra', AlJazeera (18 June 2018), available at <https://www.aljazeera.com/opinions/2018/6/18/the-fallacy-of-israels-human-shields-claims-in-gaza>

## 4.2. Involuntary Human Shields

In the *Targeted Killings* Case, the Supreme Court of Israel stated that when “civilians are forced to serve as “human shields” from attack upon a military target (...), the rule is that the harm to the innocent civilians must fulfill, *inter alia*, the requirements of the principle of proportionality.”<sup>320</sup> Despite that, it was no later than one year after the High Court ruling that Israel started “appropriating the term of human shields,” during the war with Lebanon.<sup>321</sup> Since then, the classification of involuntary human shields was repeatedly used to justify Palestinian civilians’ deaths and became central to the Israel Defense Forces (IDFs) legal defense. This section will now appraise this process, from its beginning to its incorporation into Israel’s legal arsenal.

### a. Human Shields: A Justification for Indiscriminate Attacks

#### War in Lebanon

Israel’s use of the classification of human shields is not restricted to Palestine. This was revealed by several reports from the Commission of Inquiry on Lebanon by the Human Rights Council and Human Rights Watch regarding the war with Lebanon in 2006.<sup>322</sup> Israel held Hezbollah responsible for civilian deaths in densely populated areas because of its alleged use of human shields. The Report highlighted Israel’s “unwillingness to distinguish the prohibition against human shielding (...) from that against endangering the civilian population by failing to take all feasible precautions to minimize civilian harm.”<sup>323</sup> It reminds us that a “key element” of human shielding is the “intention,” i.e. “the purposeful use of civilians to render military objectives immune from attack.”<sup>324</sup> The intent to shield is absent from the endangerment of civilians. And as such, it also makes the difference between a war crime or not:

*Individuals responsible for shielding can be prosecuted for war crimes; failing to fully minimize harm to civilians is not considered a violation prosecutable as a war crime.*<sup>325</sup>

Finally, the Report underlines that most of the civilian deaths were not human shields:

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<sup>320</sup> *Supreme Court of Israel, Public Committee against Torture in Israel v. Government of Israel, 2016 – in the ICRC casebooks, §43*

<sup>321</sup> Gordon & Perugini, 2016 (‘The Politics of Human Shielding’), p. 174

<sup>322</sup> International Committee of the Red Cross (ICRC) Casebook – Israel/Lebanon/Hezbollah Conflict in 2006, available at <https://casebook.icrc.org/case-study/israellebanonhezbollah-conflict-2006>

<sup>323</sup> International Committee of the Red Cross (ICRC) Casebook – Israel/Lebanon/Hezbollah Conflict in 2006, on ‘Why They Died. Civilian Casualties during the 2006 War’, Human Rights Watch (2007), available at <https://casebook.icrc.org/case-study/israellebanonhezbollah-conflict-2006>, §9

<sup>324</sup> ICRC Casebook – On the 2007 Report ‘Why They Died. Civilian Casualties during the 2006 War’, §7

<sup>325</sup> *Ibid.*, §9

*The handful of cases of probable shielding that we did find does not begin to account for the civilian death toll in Lebanon.*<sup>326</sup>

In sum, this appears as an excuse to avoid responsibility for civilian deaths in a conflict. The Israeli Ministry of Foreign Affairs itself reiterated in 2009 this critical difference between the endangerment of civilians and human shielding in the Report on “The Operation in Gaza, Factual and Legal Aspects:”

*Fighting within civilian areas is not, by itself, sufficient for a finding that a party is using the civilian population living in the area of the fighting as a human shield. As the words of article 57 (1) show (“shall not be used to render”, “in order to attempt to shield”), an intention to use the civilian population in order to shield an area from military attack is required.*<sup>327</sup>

### Attack on Beit Hanoun

Despite that, the Government of Israel has kept on using human shielding accusations. This section will now look at the operation on Beit Hanoun, which was investigated by a high-level fact-finding mission established by the Human Rights Council.<sup>328</sup>

The attack happened on 8 November 2006, “some 24 hours after the Israeli military withdrew from the town and concluded operation Autumn Clouds.”<sup>329</sup> As such, residents were “returning to normal life” after the incursion.<sup>330</sup> While most of the inhabitants were sleeping, 12 shells were fired over a period of 30 minutes, striking several houses. Some of the inhabitants who tried helping the victims of the first shells were hit by the following ones. Nineteen civilians were killed.<sup>331</sup> The Israel version of events is that they were targeting a field near Beit Hanoun: they had received information that rockets would be fired from there and fired it as a deterrent.<sup>332</sup> Confronted with the deaths of civilians, the Israeli Military reacted this way:

*The Israeli military similarly expressed regret but stressed that “the responsibility for this rests with the terror organizations, which use the Palestinian civilian population as a ‘human shield’, carrying out terror attacks*

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<sup>326</sup> *Ibid.*, §8

<sup>327</sup> ICRC Casebook- The Report of the Israeli Ministry of Foreign Affairs, §493

<sup>328</sup> International Committee of the Red Cross (ICRC) Casebook – Israel, Human Rights Committee’s Report on Beit Hanoun, on ‘Report of the high-level fact-finding mission to Beit Hanoun established under Council resolution S-3/1, 1/HRC/9/26’, Human Rights Council (2008), available at <https://casebook.icrc.org/case-study/israel-human-rights-committees-report-beit-hanoun>

<sup>329</sup> *Ibid.*, §25

<sup>330</sup> *Ibid.*, §25

<sup>331</sup> *Ibid.*, §24-31

<sup>332</sup> *Ibid.*, §39

*and firing Kassam rockets at Israeli population centres from the shelter of populated areas.*<sup>333</sup>

Given the facts, these accusations appear very unlikely. Subsequently, the Israel Military started an investigation. Fifteen months after the shelling, the Israeli Ministry of Foreign Affairs stated that the shelling was not intentional. It was due to a “severe failure in the artillery fire-control system operated at the time of the incident,” which caused “incorrect range findings that lead, unknowingly, to fire at a different target than planned initially.”<sup>334</sup> The Military Advocate General decided that “no legal action should be taken” against military personnel.<sup>335</sup> According to the Ministry of Foreign Affairs, it is indeed “not possible to point to a legal circumstantial connection between the behaviours of the people involved in the incident and the result of the incident.”<sup>336</sup> In short: a closed case. It means that according to the Israeli military, no responsibility can be established in the case of a malfunction because of the lack of a “causal link.” But what about the responsibility of the State? Besides, the report states that many have argued that an error is very unlikely.<sup>337</sup> Indeed, how could 12 shells have been fired by mistake? It is especially questionable as Israel was closely monitoring the situation in the area, with aerial drones for instance.<sup>338</sup>

Nevertheless, the results of the Israeli investigation show that even Israel recognized that their shells were fired at lambda civilians and not human shields. This explanation contradicts their initial justification, according to which they fired at shielded military objectives. Human shields seem to have become an automatic justification for any civilian deaths. This way, Israel can claim that those deaths are solely the enemy’s responsibility. But maybe the accusations were too remote from the facts in this case. Israel thus had to come up with another explanation, which conveniently also prevented its military personnel from being held responsible. Overall, the facts point towards indiscriminate attacks. And indeed, the Report underlines that Israel’s use of artillery in densely populated areas is “wholly inappropriate” and that it would necessarily cause civilian casualties.<sup>339</sup> Notwithstanding, it is a known fact that Israel regularly fired at the densely populated zone of Gaza.

**b. Gaza: the Fine Line between Human Shielding and Endangerment of Civilians**

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<sup>333</sup> *Ibid.*, §34

<sup>334</sup> *Ibid.*, §36

<sup>335</sup> *Ibid.*, §36

<sup>336</sup> *Ibid.*, §36

<sup>337</sup> *Ibid.*, §41

<sup>338</sup> *Ibid.*, §41

<sup>339</sup> *Ibid.*, §42

Israel claims to be engaged in a “war on terror” against Palestinian Armed Groups (PAGs).<sup>340</sup> They maintain that those groups found inspiration in Hezbollah’s methods, specifically in using Human Shields.<sup>341</sup> This reference is very revealing: as we have seen, Israel used this argument against Hezbollah to justify civilian deaths. And as was reported, most of the deaths were not linked to human shielding. As such, Yousef argues that it is an attempt from Israel to refute accusations of violations of the principles of proportionality.<sup>342</sup>

In fact, some of Israel’s accusations of human shielding are very similar to those of Sri Lanka. They argue that PAGs use civilians as human shields “by forcing residents to stay at home, assimilating into civilian neighborhoods disguised in civilian attires, (...) or making military use of civilian houses during operations and firing rockets and mortar shells from there.”<sup>343</sup> In short, PAGs are trapping civilians, using civilian areas or infrastructures, and blurring the principle of distinction. There are several occurrences where it is established that Hamas has used or called for the deployment of human shields.<sup>344</sup> But given the repetitive allegations by Israel -anytime there were civilian casualties- and the situation of Gaza, it is essential to distinguish allegations of human shielding from endangerment of civilians, of just from an attack launched in an area which is, in essence, very crowded.

To look at these allegations, Yousef first lists the elements of the Crime of Human Shielding, namely:

- 1. The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict;*
- 2. The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations;*
- 3. The conduct took place in the context of and was associated with an international armed conflict;*
- 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.*<sup>345</sup>

For them, three elements: 1, 3, and 4, could easily apply to many Hamas operations in Gaza. However, the intent in element 2, on the other hand, can hardly be proved in many cases.<sup>346</sup> In most situations, it could easily be assimilated to a breach of Rule 22 of Customary Law on feasible precautions to protect the civilian population. But in fact, that

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<sup>340</sup> Yousef, 2021, p. 6

<sup>341</sup> *Ibid.*, p. 6

<sup>342</sup> *Ibid.*, p. 6

<sup>343</sup> *Ibid.*, p. 6

<sup>344</sup> *Ibid.*, p. 7

<sup>345</sup> *Ibid.*, p. 5

<sup>346</sup> *Ibid.*, p. 6



rule “places emphasis on the idea of capability and the link of responsibility to ability.”<sup>347</sup> Thus, the violation would also be difficult to prove due to the density of the Gaza Strip. Yousef reminds us that due to this dense nature, military operations in Gaza “may be carried out in close proximity to civilians, not with that same intent, but because of the nature of the place and the density of the population.”<sup>348</sup>

Gaza is an area of 360 square kilometers with 2 million people, creating “a problem of overcrowdedness” and limiting “the possibility of sparing civilians the attacks.”<sup>349</sup> Thus, according to Yousef:

*The balance of power cannot be overlooked when addressing the asymmetric capabilities possessed by the parties to the conflict, particularly the limited capacity of armed groups in Gaza.*<sup>350</sup>

It is also worth noting that civilians in Gaza have been trapped by the Israeli-Egyptian organized blockade of the Gaza Strip since 2005.<sup>351</sup> This blockade has been qualified as collective punishment by the UN, and as a stage of siege by the inhabitants.<sup>352</sup> With such a small territory and in the event of an attack, Palestinians have no escape options. Therefore, Israel’s accusations of human shielding seem to be based on the unavoidable proximity rather than the intent. And this proximity is imposed by Israel itself which constrains the freedom of movement of Gaza’s inhabitants.

This idea of proximity also suggests that the inhabitants would be unaware of their role as human shields. Very conveniently, it implies that the voice of those classified as human shields do not matter. Whether they thought they were safe or not is not taken into account in the legal debates. Gregory underlines how, during the IDF’s destruction of the Al-Jalaa tower, the opinion of the civilians involved was not heard.<sup>353</sup> Rather, the IDF’s argued that because it issued a warning, those civilians (and shields) had been taken into consideration, leaving them an opportunity. Civilians are however never asked to comment on the effectiveness of those warnings. As the author argues, this reinforces the figure of the passive and voiceless civilian.<sup>354</sup> Human shields are dehumanized in their own way, not unlike Israel’s enemies when accused of terrorism.

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<sup>347</sup> *Ibid.*, p. 7

<sup>348</sup> *Ibid.*, p. 7

<sup>349</sup> *Ibid.*, p. 7

<sup>350</sup> *Ibid.*, p. 7

<sup>351</sup> Hazem Balousha, Oliver Holmes, ‘Gaza’s generation blockade: young lives in the ‘world’s largest prison’, *The Guardian* (12 March 2019), available at <https://www.theguardian.com/world/2019/mar/12/generation-blockade-gaza-young-palestinians-who-cannot-leave>

<sup>352</sup> *Ibid.*, p. 7

<sup>353</sup> Thomas Gregory, ‘Silent shields: international humanitarian law at the limits of audibility’ (2022) 10 *International Politics Reviews* 43–50, p. 46

<sup>354</sup> *Ibid.*, p. 48

Moreover, any argument is good to justify Israel's action. IDFs also argued that because no weapons were found in the tower -which was the reason for targeting the tower-, it meant that their warnings were so effective that the militants had had time to remove the weapons. Such an explanation also allows Israel to avoid responsibility for civilian attacks or deaths. Because then, there is no proof that their target was a valid military target or not in the first place.

**c. Systematicity of the Human Shield Classification: Analysis of Israel's Narrative**

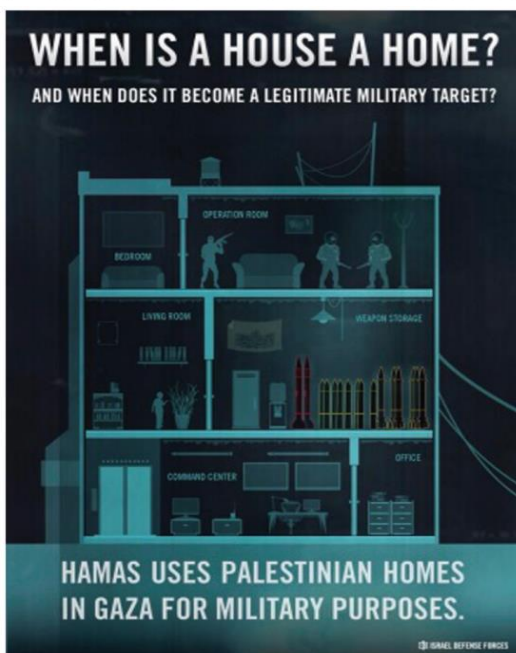
Com Operation

The above examples appear to be some of the first trials in the deployment of the category of human shields in legal defense. This practice was systematized and reinforced. During the 2014 military campaign "Protective Edge," 2133 Palestinians were killed out of which 70% of civilians.<sup>355</sup> In comparison, Palestine killed 5 civilians, namely 7,5% of the total Israeli deaths.<sup>356</sup> Israel has used the classification of civilians as human shields to justify the number of civilian deaths on the Palestinian side. To support this narrative, the IDFs have launched a communication campaign denouncing a supposed systematic use of human shields by Hamas, justifying the deaths of civilians and the destruction of civilian infrastructures.

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<sup>355</sup> Gordon & Perugini, 2016 ('The Politics of Human Shielding'), p.175

<sup>356</sup> *Ibid.*, p. 175



Source: *The politics of human shielding: On the resignification of space and the constitution of civilians as shields in liberal war.*<sup>357</sup>

This communication campaign appears to be based on several key aspects:

- the demonization of the opponent
- the idea that civilian infrastructures become military targets when used by Hamas for military activities
- the idea that Israel and Palestine are on an equal footing. For ex, in Gaza, Hamas would have the same means as Israel to protect its inhabitants in bunkers

It obviously eludes the “power differential and spatial disparity between a besieged population confined to an enclave and its besiegers.”<sup>358</sup> Moreover, similarly to the

<sup>357</sup> Gordon & Perugini, 2016 (‘The Politics of Human Shielding’), pp. 168-187 - Credits: Israeli Defense Forces blog.

reasoning in Sri Lanka, it appears that the alleged connection with the military transforms a home into a military target. In fact, it would mean that the supposed presence of weapons overrides the presence of civilians or the initial function of the home.<sup>359</sup> It then becomes more important to destroy a weapons supply rather than to spare a house and its inhabitants. From a proportionality perspective, it appears very excessive: the destruction of an object which is not in use and does not represent an imminent threat is more important than a human life. Furthermore, due to the geography of Gaza, the combatants have no choice but to fight from civilian areas. Thus, according to Gordon and Perugini, “all houses in Gaza can be legitimate targets since, all houses are potentially non-homes,” and this is the way “the IDF resolves the ethical dilemma of bombing civilian sites.”<sup>360</sup> As such, according to Gordon, for Israel: “there are no civilians in Gaza, (...) they are either militants or human shields”<sup>361</sup>. And it seems confirmed by the discourse of the Military. According to IDF’s Chief of Staff Lt. Gen. Benny Gantz:

*Even as we carry out strikes, we remember that there are civilians in Gaza. Hamas has turned them into hostages.*<sup>362</sup>

This citation has been displayed on one of the com images of the IDF. Similarly to Sri Lanka, the official discourse is that the civilians in Gaza are held hostages, in this case by Hamas. This appears factually incorrect, given that Israel is responsible for Gaza’s civilians being trapped. Furthermore, Butler reminds us that human shields are used as a discursive category and not necessarily consistent with the facts on the ground:

*It remains unclear that any part of the civilian Palestinian population in Gaza during the military bombardment of the summer of 2014 was, in fact, acting as a human shield.*<sup>363</sup>

But this category, as we have seen, is not without dangerous consequences. To be classified as a human shield is probably one of the most precarious statuses to be given to a civilian. And indeed:

*When all civilians are potential human shields, when each and every civilian can become a hostage of the enemy, then all enemy civilians become killable.*<sup>364</sup>

## A Reconceptualization of Civilian Spaces

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<sup>358</sup> *Ibid.*, p. 176

<sup>359</sup> *Ibid.*, p. 176

<sup>360</sup> *Ibid.*, p. 178

<sup>361</sup> Hasan, 2021

<sup>362</sup> Gordon & Perugini, 2015, p. 88

<sup>363</sup> Butler, 2015, p. 229

<sup>364</sup> Gordon & Perugini, 2015, p. 89

This transforms the very presence of civilians into something suspect because potentially used by Hamas.<sup>365</sup> This also implies that any civilian activity becomes dangerous for the Palestinians. In fact, the military-related and the civilian converge and overlap -which can be the case in urban warfare in general. So can everything become a legitimate target when the combat happens in a densely populated area? Does the military function override everything civilian-related? According, to Gordon and Perugini, this is part of a process of “re-signification of urban architecture” in the context of conflicts.<sup>366</sup> And in this process, human shields play a crucial role:

*The notion of human shielding erases any distinction between private and public life, thereby transforming private life into bare dispensable life.*<sup>367</sup>

However, this reconceptualization of civilian spaces is not new to the IDFs. And it is not only used for remote bombing but also for ground operations, such as in the West Bank. This new kind of strategy reconceptualizes civilian infrastructures for military purposes. The architect Weizman gives an account of some of these strategies. He explains that the IDFs established institutes and think tanks to “reconceptualize strategic, tactical and organizational responses to the brutal policing work in the Occupied Territories known as ‘dirty’ or ‘low intensity’ wars.”<sup>368</sup> These new strategies are thought in the context of occupation and reproduce structures of power. In fact, the civilian homes are not spared but become part of the fabric, the material used to fight, as Israeli soldiers go through it.<sup>369</sup> Brigadier General Aviv Kochavi calls it ‘inverse geometry’, that is the “reorganization of the urban syntax by means of a series of micro-tactical actions.”<sup>370</sup> The IDFs avoid “streets, roads (...) that define the logic of movement through the city, as well as the external doors, internal stairwells and windows that constitute the order of buildings.”<sup>371</sup> Instead they punch “holes through party walls, ceilings and floors” and move “across them through 100-metre-long pathways of domestic interior.”<sup>372</sup> Thus, Weizman describes the operation on the city of Nablus in West Bank in 2002 by the following:

*Although several thousand Israeli soldiers and hundreds of Palestinian guerrilla fighters were maneuvering simultaneously in the town, they were saturated within its fabric to a degree that would have been largely invisible from an aerial perspective at any given moment.*<sup>373</sup>

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<sup>365</sup> *Ibid.*, p. 90

<sup>366</sup> Gordon & Perugini, 2016 (‘The Politics of Human Shielding’), p. 178

<sup>367</sup> Gordon & Perugini, 2015, p. 85

<sup>368</sup> Eyal Weizman, *Hollow Land – Israel’s Architecture of Occupation* (London: Verso 2007), p. 187

<sup>369</sup> *Ibid.*, p.185

<sup>370</sup> *Ibid.*, p.185

<sup>371</sup> *Ibid.*, p.185

<sup>372</sup> *Ibid.*, p.185

<sup>373</sup> *Ibid.*, p.185-186

In fact, the Israeli soldiers colonize the whole city; there is no home the army cannot access. These military tactics are adequately referred to as ‘Swarming’ or ‘Infestation.’<sup>374</sup> Weizman describes this as ‘walking through walls,’ a tactic that requires that all the city space turns into military domain.<sup>375</sup>

*Moving through domestic interiors, this manoeuvre turned inside to outside and private domains to thoroughfares. It was not the given order of space that governed patterns of movement, but movement itself that produced space around it. This three-dimensional movement through walls, ceilings and floors through the bulk of the city reinterpreted, short-circuited and recomposed both architectural and urban syntax. The tactics of ‘walking through walls’ involves a conception of the city as not just a site, but as the very medium of warfare – a flexible, almost liquid matter that is forever contingent and in flux.<sup>376</sup>*

According to Weizman, this strategy folds “the ‘Palestinian state’ within Israeli security conceptions and subject it to constant transgressions seeking to un-wall its Wall.”<sup>377</sup> Like for human shields, these strategies imply that the Israeli can access and target any point or element of the Palestinian territories. This completely ignores the potential presence of Palestinian civilians and the harm these methods could do to them -let alone their homes. In fact, it gives the impression that the Israeli Army appropriates Guerilla-like methods. It is also worth noting that if the Israeli go through homes to fight, they potentially transform these homes into targets. This strategy focuses on the military advantage of not being seen and the protection it gives soldiers, while omitting to consider the protection of civilians and civilian homes. And maybe this is ‘inverse geometry’: when the everything military takes over and reconceptualizes civilian areas at the expense of those civilians. The civilian space is emptied of its essence and meaning, while the military ‘infests’ and cuts through it.

## Weapons

Interestingly, despite these guerilla-like strategies, Israel is rarely accused of breaching the principle of discrimination as opposed to Hamas. According to Gordon and Perugini, it is linked to the weapon gap between Israel and Palestine, which can be reinscribed in “the long-standing gap that existed in international law between colonizer and colonized.”<sup>378</sup> Because Israel has weapons that allow “pinpoint surgical strikes,” it is assumed that the Military systematically minimizes the harm to civilians.<sup>379</sup> But the precision of those

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<sup>374</sup> *Ibid.*, p. 186

<sup>375</sup> *Ibid.*, p. 186

<sup>376</sup> *Ibid.*, p. 186

<sup>377</sup> *Ibid.*, p. 218

<sup>378</sup> Gordon & Perugini, 2015, p. 100

<sup>379</sup> *Ibid.*, p. 96

weapons “is not judged by its effect, only by the inherent components of the weapon deployed.”<sup>380</sup> In Gordon and Perugini’s words, it means the following:

*Israel’s use of advanced technological weapons that can be guided and directed with relatively high level of precision protected it from violating international law, irrespective of the actual number of civilian fatalities.*<sup>381</sup>

This can be seen as problematic and unfair. This means that parties that do not possess high-tech weapons can automatically be accused of indiscriminate attacks. Furthermore, looking at the effects may be even more critical when the army can launch surgical strikes. An army using such performant weapons and still causing many casualties would have even more reasons to be investigated. Those civilian deaths could very well be intentional. And it is particularly interesting to see that despite having such technological means, Israel continues to carry out indiscriminate attacks. The so-called humanitarian intent -of not killing civilians- is associated with the weapon rather than the sparing of civilians.

#### **d. Instrumentalization of International Humanitarian Law**

##### Anticipated Legal Defense

It appears that IHL has become influential enough in the armies’ decision-making process. Legal departments of armies have taken up importance, and military decisions are “impacted by legal considerations at every level.”<sup>382</sup> Specifically, it became a necessity to find a way so that the law is compatible with the military objective. Butler highlights, *inter alia*, that “the debate on what constitutes the appropriate ‘proportion’ of civilian deaths in warfare is actively debated by war strategists.”<sup>383</sup> Specifically, she mentions that it is confirmed that “the Israeli army calculates how many civilian deaths it can cause without being held accountable for a war crime.”<sup>384</sup> This shows again the key role of proportionality in this instrumentalization process. These calculations do not appear to be done for the sake of proportionality itself, let alone for the protection of civilians. On the contrary, the principle of proportionality is stretched to its maximum before the line of war crimes is crossed. And this can be done in multiple ways, among which accusations of human shielding appear as a convenient justification to raise the number of acceptable casualties. But it is important to note that these calculations happen before striking (as they should in the first place, as per the proportionality principle). And indeed, Israeli militaries are provided with advice before striking.<sup>385</sup> In this context, human shields represent a type

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<sup>380</sup> *Ibid.*, p. 96

<sup>381</sup> *Ibid.*, p. 96

<sup>382</sup> *Ibid.*, p. 75

<sup>383</sup> Butler, 2015, p. 226

<sup>384</sup> *Ibid.*, p. 226

<sup>385</sup> Gordon & Perugini, 2015, p. 96

of ‘preemptive legal defense’ to avoid responsibility for indiscriminate strikes.<sup>386</sup> This also means that indiscriminate strikes are decided in advance, with the knowledge of potential casualties. And indeed, B’Tselem notes that:

*The commanding military officers were given legal advice prior to and during the campaign, underscoring the IDF’s claim that its “forces operate in accordance with international law, including all restrictions it imposes.” Hence, the practice of providing the military with legal advice in and of itself serves to protect it from violations.*<sup>387</sup>

Unlike the case of Sri Lanka, where the legal defense came at a later stage, the IDFs anticipated their defense. This involves the com operation on human shields as much as the legal advice to field operators. This shows how IHL shapes operations on the ground and is exploited and stretched to its limits at the expense of civilians. And here, it is essential to note that human shields have a dual function: the crimes of Hamas become both an accusation and a defense for Israel.<sup>388</sup> Once again, this favors the dominant and State-party:

*The immorality of the colonized corroborates the morality of the colonizer and its adherence to IHL.*<sup>389</sup>

And indeed, human shields also permit the Israeli to discredit and demonize the enemy, while protecting themselves. This double function can only make it very attractive for armies that desire to turn the narrative in their favor. Furthermore, it makes it possible to hide the casualties behind supposed humanitarian reasons to end this barbaric use of human shields. Gordon and Perugini mention Kennedy, who argues that IHL helps transform violence into “something you can sustain and proudly stand behind.”<sup>390</sup> According to Butler, the question is not “who will commit the war crime first, but whose war crime will be recognised as such and prosecuted, and at what—or whose—political expense.”<sup>391</sup> For her:

*Those who would attack civilians would rather not be seen within the media or the international legal community as having committed a war crime.*<sup>392</sup>

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<sup>386</sup> Neve Gordon, Nicola Perugini, ‘Human Shields as Preemptive Legal Defense for Killing Civilians’, CounterPunch (31 August 2016), available at <https://www.counterpunch.org/2016/08/31/human-shields-as-preemptive-legal-defense-for-killing-civilians/>

<sup>387</sup> Gordon & Perugini, 2015, p. 96

<sup>388</sup> *Ibid.*, p. 91

<sup>389</sup> *Ibid.*, p. 91

<sup>390</sup> *Ibid.*, p. 72. Referring to: David Kennedy, *Of War and Law* (Princeton NJ: Princeton University Press 2009), p. 139.

<sup>391</sup> Butler, 2015, p. 224

<sup>392</sup> *Ibid.*, p. 225



The actions following this anticipated legal defense is also what frames civilians as human shields, whether they were indeed used as such. In fact, you become a human shield when you are designated as such, because you undergo the consequences of this classification. According to Butler:

*The involuntary character of that very designation effectively produces them as a human shield, even when they have neither been positioned nor positioned themselves in that way. They are thus involuntarily positioned as human shields by the discourse that legitimates their targeted destruction.*<sup>393</sup>

However, one can wonder to which extent it can work from a legal point of view. As we have seen, the argument that human shields lose their protection and/or can be killed in higher proportions than other civilians has many flaws. It contradicts and omits other IHL principles. And despite using the human shield argument, Israel has recently been accused of war crimes by HRW, and the UN condemned its indiscriminate attacks, among other things<sup>394</sup>. Furthermore, The ICC is currently leading an investigation into the State of Palestine<sup>395</sup>. This involves allegations of the use of human shields by Hamas. This will hopefully help clarify the situation.

### Collateral Damage

But the instrumentalization of IHL does not stop to human shields. Gordon and Perugini underline that Israel uses the category of civilian to harm Palestinians. And indeed, to be considered shields in the first place, the inhabitants need to be classified as civilians:

*The inhabitants of Gaza have to be considered vulnerable beings presupposed as civilians—a legal category that was denied to other colonized populations in the past. Their constitution as vulnerable civilians exploited by Hamas—the uncivilized enemy that does not recognize the value of civilian life—as tools of military protection allows the Israeli military to classify them as human shields, while this classification enables the military to kill them and transform the buildings they occupy into rubble in accordance with international law.*<sup>396</sup>

This means that laws that were supposed to protect civilians are used at the expense of colonized civilian populations. And the human shields' classification has become one of the tools to exercise this violence -a tool so useful that testimonies from Palestinians are

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<sup>393</sup> *Ibid.*, p. 230

<sup>394</sup> Gordon & Perugini, 2018

<sup>395</sup> International Criminal Court (ICC) Website, State of Palestine - Situation in the State of Palestine, ICC-01/18 – Investigation, available at <https://www.icc-cpi.int/palestine>

<sup>396</sup> Gordon & Perugini, 2016 ('The Politics of Human Shielding'), p. 184

obtained under torture to prove they were used as shields. And such testimonies then end up shielding Israel from war crime accusations.<sup>397</sup>

But those civilian deaths seen as collateral damage can be designated with many names and justified in many ways. Human shields are just one among them, notwithstanding being very efficient. And indeed, as I mentioned in the previous section, Israel can just frame Palestinians as terrorists. For instance, to evade war crime accusations, Israel has argued that voting for Hamas makes the Palestinians complicit. Butler explains the following:

*Voting is conceived, then, as signing up for the armed forces. The act of voting is on a continuum with an act of war, and so voting for that party becomes a way of becoming a combatant; one loses one's civilian status simply by voting.*<sup>398</sup>

Voting would now consist of direct participation in the hostilities. It seems that any excuse is good to strip civilians of their protection. Butler also mentions that Israel has used the very convenient excuse that Hamas sends children under the bombs in order to display Israel's inhumanity and create an international outcry.<sup>399</sup> This kind of argument could be used to disqualify any accusations and frame them as a setup.

#### **e. Critic of the Laws of War**

This reinforces the idea that human shields are just one convenient classification among others to frame attacks and casualties as legal. According to Gordon and Perugini, this underscores two claims:

*In and of itself international law is neither inherently just nor unjust and its value is determined by its use; and that liberal regimes use international law to frame their violence as ethical.*<sup>400</sup>

For them, IHL helps "rationalize the violence deployed by the dominant,"<sup>401</sup> which generally is the State Party. We can observe it both in the case of Sri Lanka: the army against the rebels, and in the case of the Gaza wars: colonizer/occupier against colonized.

The case of human shields is particularly striking. This is because the lack of definition of the category renders IHL particularly pliable when they are involved. According to Bargu,

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<sup>397</sup> Gordon & Perugini, 2015, p. 75

<sup>398</sup> Butler, 2015, p. 240

<sup>399</sup> *Ibid.*, pp. 239-240

<sup>400</sup> Gordon & Perugini, 2015, p. 91

<sup>401</sup> *Ibid.*, p. 98

this exposes the “fragility and instability of the constitutive categories of international humanitarian law.”<sup>402</sup> Actors in the field, among which are potential human shields, do not always fall into the combatant/civilian binary offered by the law. Berman thus argues that “the contingency and contestability of these legal concepts have led in our time to their subjection to strategic instrumentalization.”<sup>403</sup> He adds that one should then confront “the vulnerability of the legal construction of war to instrumentalization.”<sup>404</sup> In the case at hand, the link between both is very apparent.

The fact that the legal category of human shields is solely codified as a prohibition may also “strongly favor the attacker vis-a`-vis the defending state, especially when the balance of forces is already asymmetric.”<sup>405</sup> This is the attractive dual function of the shields: a category that jeopardizes the status of civilians on the one hand, rendering their death legal, and that discredits the adversary on the other hand. Since the enemy is supposedly committing a war crime, its image is automatically tarnished. And thus, attacking this enemy to end its unlawful and cruel actions, incidentally killing the shields, becomes commendable. At this point, military and humanitarian logic become interchangeable.

But the dangers of the instrumentalization of the classification of human shields are also reinforced by the “militarization of [IHL] (...) internal logic through the introduction of clauses of exception and necessity that can be interpreted expansively.”<sup>406</sup> The principle of proportionality is subjective and not properly restricted in the first place. But with the precarious status of human shields, it can be stretched even further. Proportionality can then be extended to the point where all the civilians in the area are constituted as shields, and thus killable. Thus, the analysis of the two case studies showed that the association of those two legal concepts are used to justify the massive killings of civilians.

Overall, this questions the role of IHL in protecting civilians. Especially when legal categories in which civilians fall are not defined and when the conditions in which those civilians can be killed legally are not clearly restricted. According to Jochnick and Normand, because the Law of Armed Conflicts endorses military necessity “without substantive limitations”, it only asks “that belligerents act in accord with military self-interest.”<sup>407</sup> And since military necessity is codified in the law, in return it becomes “a powerful rhetorical tool to protect their [the belligerents] controversial conduct from humanitarian challenges.”<sup>408</sup> Berman adds that “rather than opposing violence, the legal construction of war serves to channel violence.”<sup>409</sup> And it is indeed interesting to see that

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<sup>402</sup> Bargu, 2013, p. 292

<sup>403</sup> Nathaniel Berman, ‘Privileging Combat ? Contemporary Conflict and the Legal Construction of War’ (2004) 43(1) *Columbia Journal of Transnational Law* 1-71, p. 9

<sup>404</sup> *Ibid.*, p. 8

<sup>405</sup> Bargu, 2013, p. 283

<sup>406</sup> *Ibid.*, p. 292

<sup>407</sup> Chris Jochnick, Roger Normand, ‘The Legitimation of Violence: A Critical History of the Laws of War’ (1994) 35(1) *Harvard International Law Journal* 49-96, p. 58

<sup>408</sup> *Ibid.*, p. 58

<sup>409</sup> Berman, 2004, p.5

rather than denounce the Conventions to be able to kill civilians, states use them as a ‘rhetorical tool’ to frame their conduct as legal. It appears they try to maintain this image of fighting ‘just wars,’ rather than simply putting International Law aside. And since this instrumentalization is so well-integrated into military practice, this ‘rhetorical tool’ appear to indeed be efficient.

This thesis however points out that despite those valid criticisms of the construction of IHL, some dispositions can be applied to protect civilians framed as shields. To be sure, the codification of human shields is insufficient, but the law provides enough to give human shields the status of civilians. And as such, obligations to protect civilians from intentional and indiscriminate attacks apply. In good faith, all these principles should have been applied in the case studies. Then, the outcome would probably have been very different. This would however not change the fact that a certain extent of collateral damage remains legal as per the principle of proportionality. And the acceptable extent of casualties remains subjective. The Law of War should thus be demystified; one should recognize that with the refusal from states to “provide concrete limitations on military action,” the world is not “safe from the ravages of battle.”<sup>410</sup>

#### **f. Conclusion**

Similarly to Sri Lanka, Israel appears to have shown factual and legal expediency in its accusations of human shielding. This opportunism is made possible by the absence of a framework delimiting human shields and properly addressing proportionality calculations. As for Sri Lanka, Israel indulges in a process of dehumanization of its enemy and alleged human shields, presented as terrorists on the one hand, or voiceless passive victims on the other. However, as opposed to Sri Lanka, this analysis has shown that Israel has built an anticipated legal defense strategy based on human shields and proportionality. This time, the instrumentalization precedes the attacks, while for Sri Lanka, the justification process mainly came after the war. This reinforces the claim that IHL and its ambiguities also shape actions in the field, thus allowing the use of violence against civilians.

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<sup>410</sup> Jochnick & Normand, 1994, p. 77

## Conclusion

This thesis has argued and demonstrated that the classification of human shields is instrumentalized to justify civilian casualties. To analyze this process, the paper first examined the law. This examination revealed many shortcomings that can be exploited and clarified which obligations apply to the attacker facing shields.

First, human shielding is prohibited, to be sure, but the concept is not defined. The absence of scale and scope restrictions has made it possible to extend the classification of human shields to human shields ‘by coincidence.’ Nonetheless, this thesis argued that human shields as a legal category require an intent to shield, which is absent from the most commonly used concept of ‘proximate shield.’

Furthermore, the absence of a clear disposition establishing the status of those used as shields has allowed some scholars and military manuals to exclude human shields from the protected category of civilian. Specifically, voluntary shields are sometimes treated as directly participating in hostilities. The paper countered that claim and maintained that human shields have the status of civilians: nothing in the law suggests otherwise, and it empties ‘direct participation in hostilities’ of its logic. But most importantly, the proportion of legal instrumentalization at the expense of human shields makes it even more important to consider them as civilians. It offers them protection, admittedly imperfect, from attacks.

If the status of human shields appears very precarious, once we consider them civilians, numerous obligations apply to the attacker facing them. The paper maintained that not only should the attacking party presume the shields to be civilians when in doubt and apply distinction, but they should take precautions in attack and refrain from reprisals.

The thesis then focused on one specific disposition of the principle of precautions in attack, the principle of proportionality. Some jurists have argued that even when human shields remain civilians, proportionality would apply differently. The paper confronted that claim, and argued that it has no legal basis. It also underlined that this principle is not clearly defined, opening the door to subjectivity and manipulation.

Having established the obligations of the attacker and uncovered various ambiguities in the law, the thesis then provided two case studies’ analysis. Confronting the findings of the first chapter to the practice revealed several patterns of instrumentalization.

First, the case study of Sri Lanka showed how the classification was used to encompass entire NFZs and hundreds of thousands of civilians. To sustain such a narrative, the Government manipulated the facts and built an alternate narrative. As argued, this shows how the lack of definition of human shields is now being exploited to include as many civilians as possible.

Moreover, the paper went through the subsequent legal opinions commissioned by the Government of Sri Lanka to avoid war crime accusations. The qualification of civilians as human shields was used as a base for the argumentation. But the second step of this reasoning coupled it with the principle of proportionality. This revealed how pliable the principle of proportionality is without any practical restrictions. Human shields then become the perfect factor to stretch it and allow a maximum of legal casualties. The logic behind the principle was even reversed: rather than presenting the numerous civilian deaths as a failure, the legal opinions introduced the number of survivors as a success, and humanitarian and military logics were intertwined.

Second, the paper looked at Israel's discourse on voluntary shields. This examination showed that the classification was used to justify the death of an activist, whose figure was subsequently associated with terrorism. This also revealed that the classification of human shields can be used to legally kill civilians who do not remain passive during conflicts and protest against their condition. This case was then used to demonstrate how the conduct of the attacking party breached the applicable principle as established in the legal clarifications part.

Lastly, this thesis appraised Israel's anticipated legal defense based on involuntary human shields. It revealed that this legal defense has become Israel's strategy during numerous wars, especially in Gaza, to avoid accusations of indiscriminate attacks. This practice blurs the line between the crime of human shielding and the separate breach of endangerment of civilians, especially in densely-populated areas. It was then argued that this legal reasoning involving human shields and proportionality calculations has clearly been integrated to the practice and influences the course of hostilities. This questions the role of IHL in protecting civilians, when the law can be instrumentalized to this extent.

By studying how the classification of human shields can affect legal violence against civilians, this thesis shows that there is an urgent need to reduce the gap between the narratives regarding human shields and the law. As mentioned, 99% of the human shields documented are proximate shields. This category of human shields lacks a key element of the crime: the intent, and are thus not covered by the law. The utilization of the legal category of human shields to avoid war crime accusations is thus mostly based on a category that does not exist in the first place. It is then pressing to establish limits to the concept of human shields, and clarify their status, which this paper maintains can only be a civilian one. Moreover, this thesis demonstrates that the prohibition of human shields has been used to shift the attention and the blame on the adversary, even though the responsibility of one party is not exclusive. It is then important to refocus the debates and the investigation to establish responsibility when the deaths of alleged human shields are involved.

Finally, there needs to be an overall reflection on the principle of proportionality and related collateral damage. The use of human shields to stretch this principle poses "a sharp

question to the liberal use of military necessity” in the application of IHL.<sup>411</sup> It also questions the construction of the law and reveals a need “for a rehumanization of current international humanitarian law, too often construed as the law of armed conflict.”<sup>412</sup>

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<sup>411</sup> Bargu, 2013, p. 286

<sup>412</sup> *Ibid.*, referring to : Anicée Van Engeland, *Civilian or Combatant? A Challenge for the Twenty-First Century* (Oxford: Oxford University Press 2011), p. xvi

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