



**HUMAN SHIELDS: STANDARD OF PROTECTION
UNDER INTERNATIONAL HUMAN RIGHTS LAW AND
INTERNATIONAL HUMANITARIAN LAW**

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ABSTRACT

This thesis examines the existing legal framework governing the use of human shields, an increasingly deadly tactic prevailing in modern conflicts. International human rights law and international humanitarian law do not address the problem of human shields directly. In the absence of an express and clear treaty-based prohibition of this practice it is important to establish the realistic threshold of positive and negative obligations resting upon warring parties, which defines the standard of protection accorded to individuals used as shield. The purpose of this paper is to construe such a universal standard of protection based on the human rights norms, but which is also reflective of the realities of modern warfare.

One of the conclusions of this thesis is that addition of customary principles of humanitarian law to the established human rights framework renders a modified framework designed to consider the human shields dilemma, which is effective and in line with the rule of law and realities of the decision-making in emergency situations. The cogent and reasonable interpretation is required towards the laws governing the use of persons as human shields and the employment of lethal force against targets shielded by civilian population. Due to the factual complexity of shielding cases such framework should comprise of the separate but not isolated review of obligations of impeded party and shielding party. This paper urges the condemnation of any variation of the practice of human shielding and calls for the new international law to be developed in order to resolve the problems associated with the technique.

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Peace will not come out of a clash of arms but out of justice lived and done by unarmed nations in the face of odds.

Mahatma Gandhi

INTRODUCTION

25th of January 2003 is the day when one of the most highly controversial human right campaigns called “Truth Justice Peace Human Shield Action to Iraq” has started. On this day 30 human shield volunteers and 3 double-decker buses left London for Iraq, picking up others participants on their way.¹ It is claimed that 80 human shields risking their lives stayed in the Baghdad area during the bombing campaign. The volunteer strategy of the action demonstrates one of the central Gordian Knots faced by international community. The use of human shields in modern armed conflicts became one of the central problems faced by democratic states.² The use of this practice has radically escalated due to the shift of modern battlefield from the front to urban environments in conjunction with deployment of lethal modern weaponry system.

Human shielding has significantly increased civilian casualties in modern conflict, taking place across “the legal spectrum” of the conflict.³ In international armed conflict, Iraq used the technique of human shields in its confrontation with Iran (1980-1988)⁴ and Operation

¹“Anti-war human shields attempt to prevent attack” (22 Jan. 2003) available at <<http://www.guardian.co.uk/uk/2003/jan/23/iraq.world>>

²Michael N. Schmitt, “Human Shields in International Humanitarian Law” 47 CLMJTL 292, 301-22 (2009); Emanuel Gross, “Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?” 16 EMORY ILR 445 (2002).

³Schmitt, supra n. 2 at 302; See also Daniel P. Schoenekase, “Targeting Decisions Regarding Human Shields” Military Rev. (Sept.-Oct. 2004) at 26-27.

⁴The Secretary-General, Report: Mission to Inspect Civilian Areas in Iran and Iraq which May have been Subject to Military Attack, U.N. Doc. S/15834 (June 20, 1983).

Desert Storm (1990-1991) ⁵and Operation Iraqi Freedom (2003).⁶ Israel Defense Forces exploited Palestinian civilians as human shields in the Battle of Jenin of 2002, as well as in the Operation Cast Lead of 2008-2009.⁷ Resistance groups in occupied territories similarly engaged human shields, as in the 2002 Israeli operation “Defensive Wall.”⁸ The use of human shields has become usual practice in non-international armed conflicts, e. g. in Somalia,⁹ Sierra Leone,¹⁰ Chechnya¹¹ etc. The most recent examples of the use of human shields is the attempt of Gaddafi supporters to protect Gaddafi's compound and airports in the Libyan No Fly Zone¹² and use of children as human shields during firearms attacks by both Syrian government and rebel forces.¹³ Terrorists have also adopted this tactic, for instance, Hezbollah invoked this technique during “Operation Change Direction,”¹⁴ and Al-Qaeda used shields to prevent air strikes in Afghanistan.¹⁵

The term “human shields” is commonly defined as “an intentional co-location of military

⁵UNGA Res 46/134 (17 Dec. 1991)U.N. Doc. A/RES/46/134; UNCHR, Report on the Situation of Human Rights in Iraq, 48th Sess., Res. 1992/71, § 2(d); UNCHR, Report on the situation of human rights in Iraq, prepared by Mr. Max van der Stoep, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1991/74, UN Doc. E/CN.4/1992/31 (1992).

⁶“Human Shields in Iraq Put Obligations on U.S.” (21 Feb. 2003) available at <<http://www.hrw.org>>.

⁷See e.g. Human Rights Watch, “Israel, the Occupied West Bank and Gaza Strip, and Palestinian Authority Territories. Jenin: IDF Military Operations” Vol. 14, No. 3 (E), Chapter VII. (May 2002); Amnesty International, “Israel/Gaza: Operation ‘Cast Lead’: 22 Days of Death and Destruction” (17 Jan. 2009) at 48-50.

⁸The Secretary-General, Report Prepared Pursuant to General Assembly Resolution ES-10/10, U.N. Doc. A/ES-10/186 (July 30, 2002); *Barake v. Minister of Defense* [2002] HCJ 3114/02 (IsrSC 56(3)) at 11.

⁹U.N. Sec. Council, Report Pursuant to Paragraph 5 of the Security Council Resolution 837 (1993) on the Investigation into the 5 June 1993 Attack on United Nations Forces in Somalia Conducted on Behalf of the Secretary- General, Annex at 8-9, U.N. Doc. S/26351 (1993); HRW, «So Much to Fear» (2008) at 28-29, 64-66. HRW, “Harsh War, Harsh Peace Abuses by al-Shabaab, the Transitional Federal Government, and AMISOM in Somalia” (April 2010) at 39-40.

¹⁰UN SC, First Progress Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, U.N. Doc. S/1998/750 (1998) at 33, 36.

¹¹Duncan B. Hollis, “Accountability in Chechnya: Addressing Internal Matters with Legal and Political International Norms” 36 B.C. L. Rev. 793 (1995).

¹²Richard Hartley-Parkinson, “For the sins of his father: Gaddafi's son 'killed in kamikaze pilot attack on barracks” Daily Mail (22 Mar. 2011) available at <www.dailymail.co.uk>. See also Physicians for Human Rights, “Witness to War Crimes: Evidence from Misrata, Libya” (Aug. 2011) at 19; Amnesty International, “Libya: Attacks against Misrata residents point to war crimes” (5 May 2011) at 21.

¹³«Syrian forces killing and sexually abusing children, says UN» (12 June 2012) available at <<http://www.guardian.co.uk>>.

¹⁴Reuven Erlich, “Hezbollah's Use of Lebanese Civilians as Human Shields” Center for Special Studies (Nov. 2006); Human Rights Watch, Why They Died: Civilian Casualties in Lebanon during the 2006 War” 52-60 (2007) at 52-60.

¹⁵Gross, *supra* n.2 at 518-519.

objectives and civilians or persons *hors de combat* with the specific intent of trying to prevent the targeting of those military objectives.”¹⁶ Deliberate placement of civilians beside the military targets to prevent an adversary from attacking those targets is usually used with an expectation of reluctance to attack, since such attack results in high level of civilian casualties. Though, the element of intent in the definition is not necessarily justified, since the non-reaction to the civilian population located in the proximity of military objective may “immunize” military from potential attack. Therefore, for the purposes of this thesis the term “human shields” is used in the meaning of collocation of a legitimate target and civilian population that results in the immunity of such target and impedes the attacking party from the use of force.

International human rights law (hereinafter IHRL) does not entail either rule prohibiting attacks against persons used as human shields, nor does it forbid the use of this practice as such. The existing IHRL interpretation of the right of the person to not be arbitrarily deprived of life and not to be subjected to ill-treatment hardly provide an adequate analytical framework within which to consider the legal aspects of the human shields problem. In parallel, the concept of human shields originates from norms of international humanitarian law (hereinafter IHL) applicable in international armed conflicts. However, there is no treaty-based provision which mirrors these norms in the context of internal conflict. The system of customary rules of international humanitarian law encompassed in provisions of Geneva Conventions and Additional Protocols provides the basic guidelines for the parties trapped with the human shield dilemma.

The existent literature concerning the question of shielding addresses this problem exclusively from humanitarian law aspect. Scholars commonly make stress on the problems facilitated by the use of human shields in the context of modern warfare, namely necessity to

¹⁶Jean-Marie Henckaerts, Louise Doswald-Beck, “Customary International Humanitarian Law” Vol. 1: Rules. CUP [2005] [hereinafter ‘CLS’] 676 at 337.

delay or prevent military strikes against civilians, reconsideration of attacks, media attention to the attacks involving use of human shields and subsequent condemnation of these attacks.¹⁷ Nilz Mezler and Michael Schmitt developed an intensive discussion on the definition of the concept of direct participation in hostilities, which addresses the question of qualification of human shields. Amnon Rubinstein and Yaniv Roznai made an emphasis on the need to adjust the proportionality rules to the problems emerging in modern conflicts, including the shielding. Stephanie Boshie de Belle argues in favor of customary ban of human shields under humanitarian law. However, the increasing use of the technique in internal conflicts, situations not reaching the level of intensity of armed conflict, e. g. sporadic fighting and terrorist attacks, makes direct application of humanitarian law provisions impossible.

Human rights law and humanitarian law are not identical, but the developing complementarity theory suggests that the two bodies complement each other while remaining ultimately distinct. In the light of the evident trend in convergence between the protections of fundamental rights offered by human rights law and humanitarian law, it becomes possible to cover the lack of treaty-based ban on shielding by modifying the tests under human rights norms in accordance with the realities of emergency situations reflected in provisions of humanitarian law.

The aim of this thesis is to construe the universal standard of protection which must be accorded to persons used as shields, which would be realistic and reflective of the dynamic nature of modern warfare. To achieve this purpose this paper concentrates on both long-established and developing rules of international law. Due to the complexity of factual mode of shielding, it is necessary to spare between the obligation of the party, which faces the need

¹⁷Gross, *supra* n. 2 at 7-10; Douglas H. Fischer, "Human Shields, Homicides, And House Fires: How A Domestic Law Analogy Can Guide International Law Regarding Human Shield Tactics In Armed Conflict" 57 AM. U. L. REV. 479 (2007) at 7-8; Nada Al-Duaij "The volunteer human shields in international humanitarian law" Oregon Review of International Law, Vol. 12, No. 1 (2010) 117-139 at 122-124.

to conduct an attack against the legitimate objective shielded by innocent people (attacker) and party, which is likely to benefit from the civilians presence (shielding party).

In the light of these considerations, the structure of the paper is constructed to reflect this split among two confronting parties. Part I of the thesis reviews the situation from the standpoint of an attacker. Chapter I introduces the theoretical framework of the right to life protection under human rights treaties and analogous provisions of humanitarian law. Chapter II accommodates the theoretical underpinnings to the practical aspects of shielding and sets the standard of positive and negative obligation of the attacking party. Part II takes the opposite spin and discusses the position of shielding party. Chapter III presents the general legal framework of the prohibition on torture and other forms of ill-treatment, while Chapter IV applies theoretical concepts to the situations of the human shields involvement and suggests the set of precautionary measures required to prevent the possible risk to civilians.

This thesis primarily focuses on the aspects of the test that allows to establish the breach of the prohibition on human shielding, leaving aside the questions of responsibility of international actors for the norm infringement. This issue deserves to be covered in separate and independent research. Therefore, any reference to the problem of responsibility of state/non-state actors with regard to human shields is merely instrumental to underline their effect of the central thesis topic.

The research methodology concentrates on reviewing relevant theoretical literature concerning prohibition of arbitrary deprivation of life and prohibition against torture and other forms of ill-treatment under provisions of human rights and humanitarian law, as well as on NGO reports, scholarly articles, reliable electronic resources and various jurisprudences.

PART I. TARGETING HUMAN SHIELDS OR THEIR USERS

CHAPTER 1. THE GENERAL THEORETICAL FRAMEWORK

1.1. The Perspective of International Human Rights Law

International human rights law (hereinafter “IHRL”) does not entail the express prohibition on the attacks on human shields, although this tactic constitutes a violation of prohibition of arbitrary deprivation of the right to life, which also encompasses unlawful killing of civilians in the conduct of hostilities. The Human Rights Committee in General Comment No.6 indicated that this right implies also the obligation of States to take measures to protect life and prevent its violations. This positive obligation becomes relevant on the horizontal level in those cases when a State does not act directly via its agents, but merely authorizes killings performed by private actors.¹⁸ Regional human rights bodies, e.g. African Commission on Human and Peoples’ Rights¹⁹ and European Court of Human Rights,²⁰ share the same approach. In the absence of a treaty-based prohibition, it is necessary to define the scope of positive and negative obligations resting upon the attacker with a proper attention to the realities of shielding. This chapter will focus on the attacker's position in cases when the adversary is using human shields to defend itself. Through the analysis of the relevant norms protecting the right to life in IHRL and international humanitarian law (hereinafter “IHL”) this paper aims to construe the universal standard of attacker's obligations, which corresponds to the dynamic nature of modern warfare and is applicable in all types of conflicts, including transnational and asymmetrical conflicts.

¹⁸Roland Otto, «Targeted Killings and International Law With Special Regard to Human Rights and International Humanitarian Law» Berlin ; New York : Springer [2012] at 47.

¹⁹*Civil Liberties Organisation v. Chad*, ACHPR, Communication No. 74/92, Decision, 18th Session, Praia (1995) at 22 discussed in Jean-Marie Henckaerts, Louise Doswald-Beck, “Customary International Humanitarian Law”, Vol. 2: Practice. CUP [2005] 4449 at 2098.

²⁰*Demiray v. Turkey*, ECHR, 27308/95 (21 Nov 2000) at 67.

1.1.1. The Right to Life

The right to life is universally considered to be “inherent” in human nature²¹ and is regarded as a part of *jus cogens*.²² The right to life is laid down in a range of universal and regional instruments of human rights law and has become part of general international law.²³ The content of the right under the different conventions is almost identical.

Article 6 of the International Covenant on Civil and Political Rights (hereinafter “ICCPR”), Article 4 of the American Convention on Human Rights (hereinafter “ACHR”), and Article 4 of the African Charter on Human and People’s Rights (hereinafter “ACHPR”) formulate the right to life in terms of protection from “arbitrary” deprivation of life. Provisions of treaties demonstrate that protection of individuals against deprivation of life is not absolute. The lawfulness of extra-judicial killings performed by State agents wholly depends on the meaning of the term “arbitrary.”²⁴ With regard to fundamental nature of this right, HRC accorded the term “arbitrary” with a narrow interpretation.²⁵ The term “arbitrarily” is commonly interpreted as “unlawful”, “illegal” or “without due process of law.”²⁶ The Human Rights Committee clarified in its first General Comment on the right to life that “the law must strictly control and limit the circumstances in which a person may be deprived of his life by

²¹UNCHR, General comment No.6: Article 6 (Right to Life) (30 Apr. 1982) at 1, 5; Manfred Nowak, “UN Covenant on Civil and Political Rights, CCPR Commentary” 2nd rev. ed., Kehl am Rhein: Engel [2005]1277 at 105.

²²Ibid, Nowak at 104.

²³UNCHR, General comment No.29: Article 4: Derogations during a State of Emergency, Un Doc. CCPR/C/21/Rev.1/Add.11 (31 Aug.2001) at 11; UNCHR, General comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (4 Nov. 1994) at 10; W. Paul Gormley, “The Right to Life and the Rule of Non-Derogability: Peremptory Norms of *Jus Cogens*” in B. G. Ramcharan (ed.) «The Right to Life in International Law» Dordrecht: Martinus Nijhoff Publishers [1985] 1-314 at 138.

²⁴Nils Melzer, “Targeted Killing in International Law” OUP [2008] 468 at 92.

²⁵General comment 6, supra n. 21 at 128.

²⁶See Paul Sieghart, «The International Law of Human Rights,» [Oxford 1983] at 8.0.3; Nowak, supra n. 21 at 110.

such authorities” of a State.²⁷ The definition of the arbitrariness of action is contingent on the context, specific circumstances of an individual case and their legality and predictability, making it problematic to comprehend the term *in abstracto*.²⁸

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”) protects individual from “intentional” deprivation of life. Although, the Convention does not qualify the prohibition by the adjective “arbitrary,” it exhaustively specifies the situations in which deprivation of life is justified.²⁹ According to Article 2 ECHR, the death of a person may only be the unavoidable result of force employed in order to pursue another aim. The other question of crucial importance is whether the prohibition could be derogated from in exceptional circumstances recognized by international law.

Hence, with the exception of the ECHR, international human rights conventions make no explicit provision for the taking of human life in combat or for acceptable levels of collateral damage. Therefore, there is a need to form a coherent standard concerning impermissibility of attacks upon civilians use to shield adversary or military ammunition.

1.1.2. Derogation from the Right to Life

It is generally accepted that States are entitled to derogate from certain human rights obligations in the time of public emergency as such as armed conflict, public danger, or other situation threatening State’s security.³⁰ If the actions of State’s agents are not compatible with basic protection of the right to life under relevant human rights convention, it is necessary to review whether conventional protection can be derogated from under conditions recognized in conventional or general international law.

²⁷UNCHR, General comment No.29, supra n. 24 at 3; See also UNCHR, *Maria Fanny Suárez de Guerrero v. Colombia* (“Camargo Case”), Communication No. 45/1979, UN Doc. CCPR/C/15/D/45/1979 (31 Mar. 1982) at 13.1.

²⁸Nowak, supra n. 21 at 111.

²⁹Ibid at 102.

³⁰International Covenant on Civil and Political Rights, 999 UNTS 171 [hereinafter ICCPR], Article 4(1); American Convention on Human Rights, “Pact of San Jose”, Costa Rica (22 Nov.1969) [hereinafter AmCHR], Article 27 (1);European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 [hereinafter ECHR], Article 15(1).

In the light of norms on the protection from “arbitrary” deprivation of life, both ICCPR and ACHR clearly exclude any derogation or suspension regardless of the circumstances, while African Charter does not contain a general derogation clause (instead it incorporates the acceptable limitations of individual rights in respective articles).³¹ However, in the light of the interpretation by African Commission,³² the absence of exception clauses within Article 4 ACHR leads to express exclusion of derogation from protection against arbitrary deprivation of life similar to ICCPR, ACHR. For all types of conduct and situations falling within the scope of applicability of ICCPR, ACHR, ACHPR, the conventional prohibition of “arbitrary” deprivation of life is indeed absolute. Though, the International Court of Justice in its advisory opinion in the *Nuclear Weapons* case stipulated that in the circumstances of warfare the relevant test of “arbitrariness” of state action must be “determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”³³

The ECHR takes a different approach in that it prohibits any derogation from Article 2 “except in respect of deaths resulting from lawful acts of war,” given that it is “[i]n time of war or other public emergency threatening the life of the nation.” Abresch notes in this respect that “the drafters of the ECHR presumably envisioned that states involved in armed conflicts would derogate to humanitarian law with respect to the right to life, effectively incorporating humanitarian law as a *lex specialis* regulating the conduct of hostilities.”³⁴ At the same time it is essential that Russia, Turkey, and the United Kingdom have never derogated from their obligations under Article 2 ECHR “in respect of deaths resulting from

³¹Melzer, *supra* n.24 at 120.

³²B.G. Ramcharan, “The Concept and Dimensions of the Right to Life” in “The Right to Life in International Law” (Ramcharan Edn., MNP, Dordrecht, 1985) at 15; Tom Ruys, “License to Kill? State-sponsored Assassination under International Law,” Working Paper 76, Leuven: Institute for International Law (May 2005) 10 available at <www.law.kuleuven.be/iir/nl/wp/WP/WP76e.pdf>

³³*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 225 (July 8) at 926.

³⁴William Abresch, “A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya” 16 Eur. J. Int’l. L. 741- 754 (2005) at 745.

lawful acts of war,” but preferred to justify their actions undertaken in non-international armed conflicts within the terms of Article 2(2)(a) ECHR, which authorizes resort to the force when “absolutely necessary [...] in defense of any person from unlawful violence.”³⁵ Hence, the right to life as protected by ECHR may indeed be derogated from in situations of armed conflict. Nevertheless, even in situations of armed conflict, derogation is possible only with regard to deaths resulting from the conduct of hostilities, whereas law enforcement measures remain subject to Articles 2 ECHR. Derogation from human rights treaty on ground of war does not in itself imply that IHRL protections may be displaced by equivalent provisions of IHL.

1.1.3. The Extraterritorial Jurisdiction of Human Rights treaties

The principal human rights treaties were originally thought to apply within the State’s party’s territory and contain articles limiting their applicability to cases arising within the jurisdiction of the State.³⁶ Under general principles of international law jurisdiction is primarily territorial.³⁷

From early 1990s, Human Rights institutions have been consistent in holding that a State’s responsibility for respecting and ensuring rights protected by any human rights treaties to which they are parties extends outside national boundaries to all territory under their effective control, regardless of whether the law of international armed conflict is also applicable.³⁸

Therefore, the scope of application of human rights is regarded as an issue of effective

³⁵Ibid.

³⁶Siobhan Wills, “Protecting Civilians. The Obligations of Peacekeepers” OUP [2009] 296 at 120.

³⁷R Jennings, A Watts “Oppenheim’s International Law” vol. I, 9th ed., Bath Press (1992) at 208-244; V. Lowe, “Jurisdiction” in MD Evans(ed) “International Law” OUP [2003] at 329, 330,335.

³⁸Report of 46th Human rights Committee, UN GAOR, 46th session, supp No 40 [652] UN Doc. A/46/40 addressing situation in Kuwait following its invasion (1991); Walter Kalin, Report on the situation of human rights in Kuwait under Iraqi occupation, UN Doc E/CN. 4/1992/ 26; Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission Resolution 1993/2 A E/CN.4/2004/6 (8 Sept. 2003).

control rather than the question of the state's territory.³⁹

This attitude was confirmed by the ICJ in the *Wall Advisory Opinion* (2004) and in the case *DRC v. Uganda* (2005).⁴⁰ In the *Bankovic case*, the ECHR found that NATO's airborne bombing of Belgrade did not amount to effective control and established the rule on division of ground operations (where effective control is exercised) and air power (where operation does not amount to effective control).⁴¹ In this case the Court put the emphasis on the effective control of territory or the consent by the territorial state, stated that the assessment with the effective control over a person can also be sufficient as a basis for the application of the Convention.⁴² In the *Al-Skeini case* the Court has strengthened this premise by stating that an extraterritorial act could be considered to fall within a state's jurisdiction in "exceptional circumstances," e.g. when a state exercised public powers on the territory of another state.⁴³ Thus, the extraterritorial application is tended to be linked to a state-agency of the actor rather than mere territoriality.

This assessment is also accepted by the Inter-American System and is in line with the African System. The Inter-American Commission has gone further than the European Court and generally accepted that effective control over a person was sufficient to regard a person as being subject to the jurisdiction of a State.⁴⁴ The African Commission has explicitly stated that jurisdiction is not congruent with territory under the ACHPR and a wide interpretation of the Charter is demanded by the fact that it does not contain any limiting clause as to jurisdiction.⁴⁵ The Charter does not regulate the applicability of extraterritorial effect of

³⁹Wills, supra n. 35 at 122; See Otto, supra n. 18 at 369-399.

⁴⁰Melzer, supra n.24 at 167.

⁴¹*Banković v. Belgium*, ECHR, 52207/99 Decision on admissibility (12 Dec. 2001) at 47; Supra n. 6, Wills, supra n. 35 at 130.

⁴²Ibid at 71; *Öcalan v. Turkey* (GC), ECHR, 46221/99 (12 May 2005) at 91.

⁴³*Al-Skeini and others v. the United Kingdom*, ECHR, 55721/07 (7 July 2011).

⁴⁴See e.g. IAmCHR, *Armando Alejandro ("Brothers to the Rescue")*, Annual Report (1999), OAS/Ser.L/V/II.104 Doc. 10 (29 Sep.1999) at 25.

⁴⁵See e.g. ACHPR, *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia*, Communication 71/92, in 10th Activity Report (1996- 1997), Annex V, pp. 60-63, at 22; Otto, supra n. 18 at 400.

active state behavior since drafters intended to give the Court the widest possible jurisdiction. Though the State may not be responsible for the compliance with the positive guarantees of human rights on the territory of another state in the same manner as acting on its own territory, but the scope of negative obligation remains the same since the State is responsible for infringements of rights by active deeds of state agents irrespectively of the territory. When wording of human rights treaties links the jurisdiction to “exercise of effective control” over a territory, the State in possession of such control bears the full scope of positive and negative obligation of the rights protected. However, the “ad hoc control over a person” extends the State jurisdiction in respect of the negative obligations of the IHRL demanding to refrain from active infringement of these rights.

1.2. The Perspective of International Humanitarian Law

The resolution of cases involving the conduct of hostilities based exclusively on IHRL does not appear to lead to different results than resolution of the same cases based on IHL.⁴⁶ However, the direct application of IHRL in the context of armed conflict does not import the principles of law enforcement into the conduct of hostilities; rather factual occurrence of hostilities requires an interpretation of IHRL in accordance with the applicable standards of IHL.⁴⁷

In the international armed conflict the protection of individuals against deprivations of life is encompassed in Article 46 Hague Regulations, Article 4 and Article 32 of the Fourth Geneva Convention, Art 75 of Additional Protocol I. In non-international conflicts customary Article 3 common to the Geneva Conventions provides general and comprehensive protection of individual life. Article 4(2) of Additional Protocol II prohibits murder of persons “taking no direct part in hostilities.” Both in international and non-international armed conflict, the basic protection of individuals against deprivations of life outside the

⁴⁶Abresch, *supra* n. 34 at 741.

⁴⁷UNGA Res 2444 (XXIII) (19 Dec. 1968); Melzer, *supra* n. 24 at 393.

conduct of hostilities can be derived from various provisions of IHL and international criminal law, some of which have also become part of general international law. Irrespectively of the type of the conflict in question, the lawfulness of direct strike against targeted person is governed by customary requirements of distinction, proportionality and precaution.⁴⁸

1.2.1. The principle of Distinction

The lawfulness of the direct attack resulting in intentional deprivation of life depends primarily on whether the targeted person constitutes a legitimate military objective.⁴⁹ In its turn, the determination of whether the targeted individual constitutes a legitimate military objective is reliant on the fundamental principle of distinction.⁵⁰ As a general rule, the principle of distinction demands that the parties to the conflict are obliged to distinguish between persons engaged in combat and civilian population,⁵¹ and permits direct attacks solely against the armed forces of the parties to the conflict⁵² provided that civilian population is secure and protected against the effects of hostilities.⁵³ Civilian population (and individual civilians) shall enjoy the general protection arising from military operations⁵⁴ and should not be the objects of attacks or threats of violence.⁵⁵ From these postulates of general

⁴⁸Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum, Study on targeted killings, A/HRC/14/24/Add.6 (28 May 2010) [hereinafter 'Report on targeted killings'] at 30; CLS, supra n. 16, Rules 1, 12, 14; 15; Melzer, supra n. 24 at 395-411.

⁴⁹Melzer, supra n. 24 at 300.

⁵⁰Ibid.

⁵¹See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (June 8, 1977) 1125 U.N.T.S. 3 [hereinafter Protocol I] Art. 44 (3).

⁵²See Yves Sandoz et al (eds) "Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949" [ICRC Martinus Nijhoff, Geneva 1987] 2207 [hereinafter 'Commentary to Additional Protocols'] at 2017 (on the inclusion of combatants).

⁵³See Protocol I, supra n. 50, Art. 48. Article 52, paragraph 2 of Protocol I defines military objectives as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." Protocol I, supra n. 50, Art. 52 (2).

⁵⁴Protocol I, supra n. 50, Art. 51(1).

⁵⁵Protocol I, supra n. 50, Art. 51(2).

protection it follows that “[i]ndiscriminate attacks are prohibited.”⁵⁶ Violations of the principle of distinction amount to grave breaches of the Additional Protocols to the Geneva Conventions, and Protocol I Relating to the Protection of Victims of International Armed Conflicts⁵⁷ and are also considered war crimes.⁵⁸

The cardinal importance of this principle was confirmed in the *Nuclear Weapons Opinion* of the International Court of Justice, here the Court held that a number of basic principles of international humanitarian law, including the principle of distinction, are “intransgressible principles of international customary law”, and are so cardinal for the respect of individual that they can be derived directly from a general principle of law, namely “elementary considerations of humanity.”⁵⁹ Thus, the principle of distinction was recognized essential for protecting various categories of persons, including civilians,⁶⁰ medical, religious and civil defense personnel,⁶¹ and persons *hors de combat*,⁶² those who are unable to further participate in the fighting due to injury.

The principle of distinction is more convenient to international armed conflicts fought between states, since it is expected that the state’s military forces fight each other and civilian

⁵⁶Protocol I, supra n. 50, Art. 51(4).

⁵⁷Protocol I, supra n. 50, Art. 85(3).

⁵⁸See Statute of the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on The Establishment of the International Criminal Court, Rome, July 1988, UN Doc. A/CONF 183/9n [hereinafter ‘Rome Statute’] Art. 8 (2)(b)(i)-(ii), (2)(b)(vi), (2)(e)(i)-(ii), (2)(e)(iv); See also Amnon Rubinstein and Yaniv Roznai, “Human shields in modern armed conflicts: the need for proportionate proportionality” 22 STNLPR 93 (2011) at 99.

⁵⁹*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 225 (July 8) at 78. Here the Court held that “cardinal principles” of IHL include the principle of “distinction between combatants and non-combatants”, the prohibition “to cause unnecessary suffering to combatants” and Martens clause; See also on the customary nature of principle of distinction in both international and non-international armed conflicts: CLS, supra n. 16, Rule 1; with regard to international armed conflicts: Yoram Dinstein, “The Conduct of Hostilities under the Law of International Armed Conflict” CUP [2004] 296 at 82.

⁶⁰Protocol I, supra n. 50, Art. 51; CLS, supra n. 16, Rule 1.

⁶¹See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 [hereinafter GC I] Art. 24; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 [hereinafter GC II] Art. 36; CLS, supra n. 16, Rules 25 (medical) and 27 (religious); Protocol I, supra n. 50, Art. 12 (1); Rome Statute, supra n. 57, Art. 8(2)(b)(xxiv), which lists as a war crime in international armed conflict “intentionally directing attacks against [...] personnel using distinctive emblems of the Geneva Conventions in conformity with international law”. Both medical and religious personnel are entitled to use distinctive emblems.

⁶²Protocol I, supra n. 50, Art. 41(1), (2); CLS, supra n. 16, Rule 47.

population is not engaged in the conduct of hostilities.⁶³ The basic rule of distinction in conventional international humanitarian law governing international armed conflict is codified as follows:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.⁶⁴

The principle of distinction is based on the premise that a person may either be a combatant or a civilian. Roughly speaking, in international armed conflicts combatants are legitimate military targets for the time of duration of hostilities, while civilians may never be legitimately attacked. Combatants are immune from prosecution for acts that were conducted in accordance with international humanitarian law, while civilians can be prosecuted for any act of participation.

The rules of non-international armed conflict, whether traditional internal conflict or extraterritorial conflict against non-state actors, are different in that they do not contain a clear definition of combatants.⁶⁵ The term “combatant” used in rules governing non-international armed conflict is used in its generic meaning, namely it describes persons who do not enjoy civilian protection against attack, but at the same time the term does not imply a right to combatant privilege or POW status.⁶⁶ In these types of conflict one of the parties is not represented by uniformed soldiers of state military as distinctly and visibly identifiable group, what causes serious difficulties in the distinction between those who are and those who are not entitled to protection from the direct attack. Moreover, this trend in contemporary armed conflicts is increased by a shift of military operations from distinct battlefields into population centers, resulting into intermingling of armed actors with

⁶³Noam Lubell, “Extraterritorial Use of Force against Non-State Actors” OUP [2010] 288 at 136.

⁶⁴Protocol I, supra note 50, Art. 48.

⁶⁵Lubell, supra n. 62 at 136; see also Marco Sassoli & Laura M Olson, “The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non- International Armed Conflicts” 90 IRRC 599, 611 (2008); Marco Sassoli, “Transnational Armed Groups and International Humanitarian Law” HPCR Paper Series, Winter (2006).

⁶⁶CLS, supra n. 16, Rule 1; Melzer, supra n. 24 at 311.

civilians, increased involvement of civilians in the activities connected with the conduct of hostilities and outsourcing of traditional military functions to civilian employees.⁶⁷ As a result, civilians face the increasing risk to fall victim of unnecessary, erroneous or arbitrary targeting, while armed forces are in a peril of attack held by persons who may not be identified as adversary.

In the context of non-international conflicts rules based on this principle of distinction remain applicable and paramount, but often become object of controversial interpretations and debates.⁶⁸ Thus, it becomes essential to define clear and reliable criteria specifically for the distinction between “peaceful” civilians, who must remain strictly protected at all times, and civilians engaged in fight who lose their protection against the direct attack. Conventional international humanitarian law governing non-international conflict contains few rules governing the conduct of hostilities; the most important principles applicable in situations of international armed conflict were recognized to attain customary nature in non-international armed conflict.⁶⁹ The customary rule of distinction⁷⁰ applicable in situations of non-international armed conflict also obliges the warring parties at all times “to distinguish between military and civilian objectives at all times and direct attacks only against military

⁶⁷Melzer, *supra* n. 24 at 328.

⁶⁸See e.g. Jann K. Kleffner, “From ‘Belligerents’ to ‘fighters’ and Civilians Directly Participating in Hostilities – on the Principle of Distinction in “Non-International Armed Conflicts One Hundred Years after Second Hague Peace Conference” NILR 315 (2007); Rosa E. Brooks, “War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror” 153 UPLR 675 (2004) 730; Michael N. Schmitt “Deconstructing direct Participation in Hostilities: The Constitutive Elements” 42 NYUJILP 697(2010); Nils Melzer “Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretative Guidance on the Notion of Direct Participation in Hostilities” 42 NYUJILP 831.

⁶⁹Melzer, *supra* n. 24 at 311.

⁷⁰CLS, *supra* n. 16, Rule 1; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1125 (8 June 1977) UNTS 3 [hereinafter ‘Protocol II’], Art. 13. 24(1); UNGA Res 2444 (XXIII) (19 Dec. 1968) at 1; UNGA Res 2675 (XXV) (9 Dec. 1970) Art. 2, 11; *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T ICTY Decision (3 March 2000) at 180; ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague (14 June 2000) [hereinafter ‘Final Report on NATO Bombing Campaign in Yugoslavia’] at 29; *Supra* n.16, See *Prosecutor v. Tadic*, Case No. IT-94-1, ICTY Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 Oct. 1995) at 110-11, 127.

objectives.”⁷¹ According to Article 51(3) of Protocol I, which is also regarded a rule of customary law,⁷² civilians enjoy the protection afforded to them and may not be directly attacked “unless and for such time as they take a direct part in hostilities.” Similarly, provisions of the Article 8(2)(b)(i) of the Rome Statute, identifying the international direction of an attack against civilians as a war crime, relate specifically to those civilians “not taking the direct part in hostilities.” Hence, those civilians taking an active part in hostilities stop to enjoy the benefit of their protection given that they are engaged in military functions.⁷³ Similarly, when one of the parties to a conflict makes use of protected objects for its military purposes, those objects become legitimate military objectives.⁷⁴ In contrast to combatants, civilians regain protection against direct attack as soon as their individual conduct no longer amounts to direct participation in hostilities.⁷⁵

Even though the concept of “direct participation in hostilities” has a considerable effect on the threshold of protection of the involved civilians, neither conventional international humanitarian law nor state practice offers the express definition or clear interpretation of this

⁷¹CLS, supra n. 16, Rule 1; *Prosecutor v. Ljube Boskovski and Johan Tarculovski*, Case No. IT-04-82-T ICTY Decision (Trial Chamber II) (10 July 2008) at 353; see also *Prosecutor v. Stanilav Galic*, Case No. IT-98-29-A ICTY Judgement (30 Nov.2006) [*Prosecutor v. Stanilav Galic*] at 190, Nils Melzer, “Targeted Killing in International Law” OUP [2008] 468 at 311.

⁷²CLS, supra n. 16, Rule 6; Protocol I, supra n. 50, Art. 51(3); Protocol II, supra n.69, Art. 13 (3); *Prosecutor v. Stanilav Galic*, supra n.70 at 48; *The Prosecutor v. Dario Kordic, Mario Cerkez*, Case No. IT-95-14/2-A ICTY Decision (17 Dec. 2004) at 51; *The Public Committee Against Torture et al. v The Government of Israel et. al.*, HCJ 769/02 Israeli Supreme Court, Judgment (13 Dec. 2006) [hereinafter ‘*PCATI v Israel*’] at 30.

⁷³Protocol I, supra note 50, Art. 51(3); Rome Statute, supra n. 57, Art. 8 (2)(b)(i); see Dinstein, supra n. 58 at 27-29.

⁷⁴Commentary on the Additional Protocols, supra n. 51 at 620-621.

⁷⁵Melzer, supra n. 24 at 329; Nils Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law” [ICRC 2009] [hereinafter ‘Guidance on Direct Participation’] at 70.

notion.⁷⁶ In *Tadic* the ICTY emphasized the necessity to “define exactly the line dividing those attacking an active part in hostilities and those who are not so involved” provided that such distinction would be made with regard to “the relevant facts of each victim” and “each individual’s circumstances” at the relevant time.⁷⁷ Nils Melzer persuasively argues that ICTY approach may seem acceptable for tribunals provided that the careful investigation will take place, but it can hardly give guidance to military commanders and soldiers confronted with hostile civilians.⁷⁸ The attempts to clarify the operational standards made on the national level have the common tendency to address the concept through the concrete examples, what again amounts to creation of rather vague non-exhaustive list of actions leaving room for the disputable interpretations.⁷⁹ Without a doubt, military commanders and soldiers, obliged to apply the principle of distinction the concrete military operations, are inescapably allowed to act within some margin of interpretation. However, the protection of the civilian population may be ensured only if there is adequate and clear guidance defining the conduct that will amount to the loss of civilian protection and will subject individuals to permissible direct attacks. Moreover, the definition of direct participation should protect civilian population should not benefit an enemy that may deliberately hide among civilian population while putting civilians at risk, or that may force them to engage in hostilities. There are three major controversies over the notion of “direct participation in hostilities”, namely 1) the type of

⁷⁶CLS, supra n. 16, Rule 6; Jean-François Quéguiner, “Direct Participation in Hostilities under International Humanitarian Law” *IHLResearch Initiative Working Paper*, Program on Humanitarian Policy and Conflict Research at Harvard University, (Nov., 2003 at 2; Robert W. Gehring, “Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I,” 19 RDMDG 9 (1980) p. 17; Michael N. Schmitt, “Direct Participation in Hostilities and 21st Century Armed Conflict” in “Crisis Management and Humanitarian Protection” [Berlin: Berliner WissenschaftsVerlag, Horst Fischer et al. eds, 2004] at 50; See Kenneth Watkin, “Humans in the Cross-Hairs: Targeting, Assassination and ExtraLegal Killing in Contemporary Armed Conflict,” in Wippman and Evangelista, eds., “New Wars, New Laws” at 140; unanimous pinion as to the need for a clarification of the notion of direct participation in hostilities was expressed in ICRC/Asser, Report Meeting Direct Participation in Hostilities (2003) at 10.

⁷⁷*Prosecutor v. Dusko Tadic*, IT-94-1-T, ICTY, Judgement, Trial Chamber (7 May 1997) at 616.

⁷⁸Melzer, supra n. 24 at 333.

⁷⁹For instance, the Israeli Supreme Court decision on the policy of targeted killing attempted to provide the operation guidance for the notion of “direct participation in hostilities”. The Court held that the civilian “directly participated in hostilities” must be understood as the one “performing the function of combatant” and “the function determines the directness of the parties. *Public Committee Against Torture v. State of Israel*, HCJ 5100/94 (1999) at 11.3.

conduct which amounts to “direct participation” and turns a person into legitimate target; 2) the degree to which “membership” in an organized armed group may be regarded as a determining factor 3) the duration of the direct participation.⁸⁰ The present analyses shall focus on the first controversy as a basis for defining whether the engagement in human shields amounts into direct participation. Regardless of the nuances in various interpretations, there are mainly two approaches on the interpretation of the substantive scope of the notion of “direct participation in hostilities.”

The first, restrictive, approach limits the direct participation in hostilities to civilian conduct constituting immediate military threat, and requires the direct causal link between such conduct and the resulting harm to the adversary. Alston argues that the key for the definition of direct participation is to “include conduct close to that of a fighter, or conduct that directly supports combat” so that regardless of the enemy’s tactics, the vast majority of civilians is under the legal protection.⁸¹ The ICRC has provided its interpretation of the constitutive elements of the direct participation in hostilities grounded on the restrictive understanding. In 2009, the ICRC issued its Interpretive Guidance on direct participation in hostilities, which clarifies that “each single act” performed by the civilian must meet three cumulative requirements to constitute direct participation in hostilities:

1. 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, injury, or destruction on persons or objects protected against direct attack (threshold of harm).
2. 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).
3. 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).⁸²

⁸⁰Report on targeted killings, supra n. 47 at 59.

⁸¹Ibid, para 60.

⁸²Guidance on Direct Participation, supra n. 74 at 46. The ICRC Commentary previously entailed the similar provisions, which equate direct participation in hostilities with “acts of war” and establishes strict requirements with regard to causal proximity. See Commentary to Additional Protocols, supra n. 51 at 1944 (Art 51 Protocol I) and 1679 (Art 43 Protocol I) and 4787 (Art 13 Protocol II).

In general, the ICRC Guidance interprets the notion of “direct participation in hostilities” as “specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.”⁸³ In non-international armed conflict civilians, who participate directly in warfare and are members of an armed group with a “continuous combat function,” are regarded as legitimate military target at all times and in all places.⁸⁴ The category of “continuous combat function” encompasses participation of individuals in hostilities beyond spontaneous and sporadic, so that such individuals become members of an organized armed group, which deprives them of protection against direct attacks for as long as they remain members of such group.⁸⁵

The Guidance, however, holds an opinion that direct participation for civilians who are non-members of organized groups is restricted to each specific act: “the earliest point of direct participation would be the concrete preparatory measures for that specific act”, and “participation terminates when the activity ends”.⁸⁶ The Guidance distinguishes the direct participation from the conduct which supports the military efforts through preparation or construction of capacities (e.g. the production of weapons) as well as from the conduct which is protected under other human rights standards (e.g. political support, supply of provisions or refuge, propaganda and financial support), since neither of them would not as a sole reason amount to cessation of civilian protection.⁸⁷

Israeli Supreme Court also shares the opinion that “direct participation in hostilities” demands causing harm to the army and provides the interpretation of the direct causal relation between civilian conduct and the resulting harm. In particular, the Court states that the notion

⁸³Guidance on Direct Participation, supra n. 74 at 45; Melzer, supra n. 24 at 344.

⁸⁴Guidance on Direct Participation, supra n. 74 at 66-68; Report on targeted killings, supra n. 47 at 62.

⁸⁵Report on targeted killings, supra n. 47 at 72.

⁸⁶Guidance on Direct Participation, supra n. 74 at 66-68.

⁸⁷Commentary to Additional Protocols, supra n. 51 at 1945 (Art 51 Protocol I). ICRC/Asser, Report Expert Meeting Direct Participation in hostilities (2005), p. 21; Melzer, supra n. 24 at 335; Report on targeted killings, supra n. 47 at 61; Nils Melzer “Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities” 42 NYU J. Int’l L. and Politics, 829, 858 (2010).

must not be limited “merely to the person committing the physical attack,” since those decide upon the act and plan also directly contribute into the act’s commission.⁸⁸ The IACiHR in its Report on Columbia (1999) expressly confirms the approach adopted by ICRC, providing the further clarification on the requirement of immediate military threat of harm to the adversary posed by civilians who prepare for, participate in, and return from combat.⁸⁹ Thus, the notion of direct participation is restricted to carrying out the actual combat operations, what includes deployment to and return from specific military engagements, while excluding the support activities, which do not directly cause harm to the adversary.

The second, liberal, approach to the concept of “direct participation in hostilities” extend it to include non- military activities that are of significant value for the general war effort without requiring a direct connection to the hostilities. Thus, some authors argue that civilians who work within a military objective, substitute a member of military in his/her position or service in the civilian position that is “of a greater value to the nation’s war effort than that person’s service in the military” must be covered by the category of civilians “directly participating in hostilities.”⁹⁰

For instance, Rogers cites “use of civilians in war support activities” as one of the issues that would be considered by the tribunal to judge the correctness of proportionality assessments.⁹¹

Dinstein suggests that industrial plant workers “enjoy no immunity while at work. If the industrial plants are important enough, [...] civilian casualties--even in large numbers--would usually come under the rubric of an acceptable collateral damage.”⁹² Furthermore, Dinstein concludes that civilians are deprived of a protection from the attack not only when they enter military objectives (e.g. by working on military base or in ammunitions factory), but also the

⁸⁸*PCATI v Israel*, supra n. 71 at 37.

⁸⁹IACiHR, Third Report on the Situation of Human Rights in Columbia (26 Feb. 1999) at 54.

⁹⁰Parks, W. Hays “executive Order 12333 and Asasination” Memorandum of Law, (2 Nov. 1989) Reproduction of Direct Army, office of the Judge Advocate General Army, Washigton D.C. at 6.

⁹¹Rogers, A.P.V. “Law on the Battlefield” [Melland Schill studies in Interntional law, Manchester: University Press, 2d ed. 2004] at 129.

⁹²Dinstein, supra n. 58 at 124.

protection is reduced when individuals simply reside near or overpass a military object.⁹³ Some commentators have referred to the category of civilians who accompany the force as “quasi-combatants,”⁹⁴ however proposal for this status was purposely rejected during the drafting of the Additional Protocol I.⁹⁵ Such extensive interpretation contradicts to the prevailing opinion in the doctrine,⁹⁶ to the State practice,⁹⁷ and to the articulate distinction between “direct participation in hostilities” and “activity linked to the military effort”⁹⁸ enshrined in conventional law.⁹⁹

The liberal approach is based on the presumption of the loss of civilian protection in case of doubt, going beyond the permissible standards of conventional and customary international humanitarian law. Schmitt argues that “[g]rey areas should be interpreted liberally, i.e., in favour of finding direct participation” by creating for civilians an incentive to “remain as distant from the conflict as possible”.¹⁰⁰ The same author suggests that “[o]nce the line between combatants and non-combatants begins to blur, self-preservation dictates a presumption in favor of combatant status in questionable cases.”¹⁰¹ Thus, the liberal approach leaves excessively broad margin of appreciation to governmental forces as to what conduct should entail loss of civilian protection.

The approach is commonly criticized for insufficient address the sporadic or temporary involvement of unorganized civilians in hostilities which derives due to the focus on

⁹³Ibid at 129.

⁹⁴See M. Sasolli and A.A. Bouvier, “How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in IHL?” 163 ICRC (1999); Michael E. Guillory, “Civilianizing the Force: Is the United States Crossing the Rubicon?” Air Force Law Review 51 (2001) at 115-16.

⁹⁵Commentary to Additional Protocols, supra n. 51 at 51.

⁹⁶See Kenneth Watkin, “Humans in the Cross-Hairs: Targeting, Assassination and ExtraLegal Killing in Contemporary Armed Conflict,” in Wippman and Evangelista, eds., “New Wars, New Laws” at 157; Commentary to Additional Protocols, supra n. 51 at 1945; ICRC/Asser, “Report Expert meeting Direct Participation in Hostilities” (2005) at 21.

⁹⁷See CLS, supra n. 16, Rule 6 with the relevant state practice referring to several military manuals.

⁹⁸Protocol I, supra n.50, Art. 60 (3).

⁹⁹Melzer, supra n. 24 at 339.

¹⁰⁰Michael N. Schmitt, “Direct Participation in Hostilities and 21st Century Armed Conflict” in “Crisis Management and Humanitarian Protection” Berlin: Berliner WissenschaftsVerlag, Horst Fischer et al. eds, [2004] at 509.

¹⁰¹Ibid at 633

governmental armed forces and highly organized groups.¹⁰² Moreover, it fails to suggest sufficient safeguards to prevent arbitrariness and abuse of the principle of distinction apart from the presumption of good faith of the military commanders engaged into the operation.

Therefore, the principle of distinction requires defining whether the person in question is a peaceful civilian or civilian engaged in and actively supporting hostile action, who may be qualified as directly participating in hostilities. In the latter case such person would constitute a legitimate military target and may be attack for as long as he/she participates in the harmful act which poses an immediate threat to the adversary. In respect of the human shields involvement it is necessary to define whether shielding can fit the definition of direct participation in hostilities and under what conditions. These questions are addressed in Subchapter 2.1.

1.2.2. The principle of Proportionality

There is no absolute prohibition against civilian casualties in international humanitarian law.¹⁰³ However the desired balance between considerations of humanity and military necessity is reflected by the principle of proportionality.¹⁰⁴ The basic rule of proportionality is part of customary international humanitarian law applicable both in international and non-international armed conflict.¹⁰⁵ The principle of proportionality under paradigm of hostilities provides that “[a]n attack is [...] prohibited if it may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹⁰⁶

¹⁰²Melzer, supra n. 24 at 341.

¹⁰³Judith Gardham, “Necessity and Proportionality in Jus Ad Bellum and Jus in Bello,” in “International Law, the International Court of Justice and Nuclear Weapons” [1999] at 275, 283-84; Dinstein, supra n. 58 at 119.

¹⁰⁴Amnon Rubinstein and Yaniv Roznai, “Human shields in modern armed conflicts: the need for proportionate proportionality” 22 STNLPR 93 (2011) at 100.

¹⁰⁵*Prosecutor v Kupreskic et. al*, Case No. IT-95-16-T-14 ICTY decision (14 Jan. 2000) [hereinafter ‘*Prosecutor v Kupreskic*’] at 524; CLS, supra n. 16, Rule 14 and Vol. 2 at 297. See also C. Greenwood, “Customary Law status of the 1977 Geneva Protocols” in A.M.Delissen and G.J.Tanja eds. “Humanitarian Law of Armed Conflict: Challenges Ahead” (Essays in Honour of Frits Kalshoven) [1991] at 93, 109.

¹⁰⁶Protocol I, supra n. 50, Art. 51(5)(b). See also CLS, supra n. 16, Rule 14.

Under this principle the State is required to evaluate whether the incidental harm is likely to be caused by the force used in operation is justified in view of the expected military advantage.¹⁰⁷ The proportionality requirement does not forbid carrying out combat activities which may harm civilians, but it entails that harm to the civilians must be proportionate to the security benefit gained from the military act.¹⁰⁸ While determining the degree of the military value in relation to strikes directed at individuals, such factors as their rank, operational function, momentary tactical position should be considered.¹⁰⁹ Thus, “high value” targets justify greater collateral damage than low value targets. Moreover, the principle of proportionality imposes limitations on time, geographical span, and choice of targets and means of attack.¹¹⁰

Although, the wording of the principle replicates the part of codification of the prohibition of “indiscriminate attacks” in international armed conflict,¹¹¹ they must be distinguished since proportionality provides a further restriction by prohibition of attacks against indisputable military objectives due to anticipated disproportionate injury and damage to civilians or civilian objects.¹¹² Additional Protocol I does not use the phrase “disproportionate”, preferring the term “excessive.” The obligation to refrain from attacks expected to cause “clearly excessive” damage to civilians (in relation to the expected concrete and direct military advantage) is reiterated in Article 57 (2) (a) (ii) of the Protocol I. Article 8 (2) (b) (iv) of the Rome Statute of the ICC brands such an attack as a war crime. “Excessive” means that the disproportion is clearly discernible: the adverb “clearly” is explicitly added in the Rome

¹⁰⁷Protocol I, supra n. 50, Arts. 51(5)(b) and 57; CLS, supra n. 16, Rule 14; Rome Statute, supra n. 57, Art. 8(2)(b)(iv); UNSC Res. 1092 (23 Dec. 1996) at 2; *Prosecutor v Kupreskic*, supra n. 104 at 524; Final Report on NATO Bombing Campaign in Yugoslavia Final Report on NATO Bombing Campaign in Yugoslavia, supra n. 69, supra n. 69 at 28, 50-51; Report on targeted killings, supra n. 47 at 43; Melzer, supra n. 24 at 357.

¹⁰⁸*PCATI v Israel*, supra n. 71 at 13.

¹⁰⁹Melzer, supra n. 24 at 404.

¹¹⁰Rubinstein and Roznai, supra n. 103 at 100-101; see also Christopher Greenwood “Self-Defence and the Conduct of International Armed Conflict” in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* 273 at 275-81 (Yoram Dinstein ed., 1989).

¹¹¹Protocol I, supra n. 50, Art 51 (5) (b).

¹¹²E. Rauch, “Conduct of Combat and Risks Run by the Civilian Population” 21 RDMDG 66 (1982) at 67; Dinstein, supra n. 58 at 120; Rogers, supra n. 90 at 23.

Statute.¹¹³ Although, the principle of proportionality is well-recognized and indisputable, the formulation of the principle in the Protocol I has been widely criticized by some commentators.¹¹⁴ For instance, the expression “may be expected to” by indication of a mere possibility was looked upon as an exceptionally difficult standard to be complied with.¹¹⁵

The key issue with regard to the requirement of proportionality in the conduct of hostilities is the interpretation of the term “excessive”. The standard poses practical difficulties since it is relative and not absolute.¹¹⁶ There is no objective possibility of “quantifying the factors of the equation,”¹¹⁷ and the process “necessarily contains a large subjective element.”¹¹⁸ Thus, Judge Higgins in her dissenting opinion to the Nuclear Weapons Opinion says that “the question of numbers of suffering [...] falls to be considered as part of “balancing” or “equation” between the necessities of war and the requirements of humanity.”¹¹⁹ The whole assessment of what is “excessive” in the circumstances entails a mental process of pondering dissimilar considerations inevitably resulting into subjective evaluation,¹²⁰ what is commonly viewed with a skeptical eye by certain scholars.¹²¹ However, there’s no theoretically coherent and practically convincing alternative. The authors commonly come to the conclusion that there must be a duly limit the collateral civilian casualties, but in effect the application of this

¹¹³Rome Statute, supra n. 57, Art. 8 (2)(b) (iv); ICRC, Paper submitted to the Working Group on Elements of Crimes of the preparatory Commission for the International Criminal Court, quoted in CLS, supra n. 16, Vol. 2 at 331 (para 191); Dinstein, supra n. 58 at 119; Melzer, supra n. 24 at 361.

¹¹⁴See W.H. Parks, “Air War and the Law of War” 32 AFLR 1, 174 (1990) at 171-4.

¹¹⁵See A.D. McClintock, “The Law of War: Coalition Attacks on Iraqi Chemical and Biological Weapon Storage and Production Facilities” 7 EILR 633, 658 (1993).

¹¹⁶Schmitt, supra n. 2 at 333; Melzer, supra n. 24 at 360.

¹¹⁷Waldemar A. Solf, “Article 51” in Michael Bothe, Karl J. Partsch, & Waldemar A. Solf, “New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949” The Hague u.a.: Nijhoff [1982] 746 at 310.

¹¹⁸H. Bix, “Means and Methods of Combat”, International Dimensions of Humanitarian Law 135, 148 (UNESCO, 1988). See also Robert Kogod Goldman, “International Humanitarian Law: Americas Watch's Experience in Monitoring International Armed Conflicts” 9 AMUJILP 49 (1993) at 81.

¹¹⁹*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 66 (July 8) (Higgins, J., dissenting) at 20.

¹²⁰See W.J. Frenrick, “The Rule of Proportionality and Protocol I in Coventional Warfare” 98 Mil. LR 91 (1982) at 102.

¹²¹A. Cassese, “The Prohibition of Indiscriminate Means of Warfare” in “Declarations on Principles: A Quest for Universal Peace” (R. Akkerman et al. Eds, 1977) at 171, 184 ; A. Cassese, “Means of Warfare: The Traditional and the New Law” in “The New Humanitarian Law of Armed Conflict” (A. Cassese ed., 1979) at 161, 175-6.

rule will be clear only in cases of clear disproportion, or vice-versa, and arguable in wide range in between.¹²²

Indisputably, the attacker must act in a good faith¹²³ and not “simply turn a blind eye on the facts of the situation; on the contrary, he is obliged to evaluate all available information.”¹²⁴

The ICRC Commentary also suggests that: “[e]ven if this system is based to some extent on a subjective evaluation, the interpretation must above all be a question of common sense and good faith for military commanders. In every attack they must carefully weigh up the humanitarian and military interests at stake.”¹²⁵ Thus, the proportionality principle appears to be closely interrelated with the requirements of distinction, military necessity and precaution and compliance of military actor with this principle is contingent on the other restraints imposed by international humanitarian law on the conduct of hostilities.¹²⁶

Additionally, military action must be proportionate both on the tactical and on strategic level.¹²⁷ Thus, the next question in respect of proportionality assessment is whether the proportionality of the operation must be evaluated for each individual strike or the cumulative effect of all attacks causing incidental damage within an operation has to be considered in the same proportionality assessment.¹²⁸ Dinstein argues that proportionality has to be calculated

¹²²Final Report on NATO Bombing Campaign in Yugoslavia, supra n. 69 at 48; *PCATI v Israel*, supra n. 71 at 46; Lubell, supra n. 62 at 157.

¹²³Although, good faith and subjectivity are not mutually exclusive, it is argued “[t]he standard to be applied must operate in a good faith and not in accordance with subjectivity”. L.C. Green, “Aerial Considerations in the Law of Armed Conflict” 5 AASL 89, 104 (1980).

¹²⁴F. Kalshoven, “Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity” 86 PASIL 39, 44 (1992).

¹²⁵Commentary to Additional Protocols, supra n. 51 at 2208; see also Robert Kogod Goldman, International Humanitarian Law: Americas Watch's Experience in Monitoring International Armed Conflicts, 9 AMUJILP 49 (1993) at 81, 82; Judith Gardham, “Necessity and Proportionality in Jus Ad Bellum and Jus in Bello,” in “International Law, the International Court of Justice and Nuclear Weapons” 275, 283-84 Laurence Boisson de Chazournes & Philippe Sands eds. [1999] at 99, 105; Dinstein, supra n. 58 at 122; CLS, supra n. 16, Rule 14 with references to State practice.

¹²⁶Commentary to Additional Protocols, supra n. 51 at 1979.

¹²⁷Melzer, supra n. 24 at 362.

¹²⁸*Procecutur v Kupreskic*, supra n. 104 at 526; Melzer, supra n. 24 at 363.

in relation to a given attack rather than on an ongoing cumulative footing,¹²⁹ however “[i]f an extensive air campaign is undertaken, it would be mistaken to focus on the outcome of an isolated sortie.”¹³⁰ Under the Article 8 (2)(b)(iv) of the Rome Statute, evaluation of whether the planned attack or strike is excessive must be based on the “overall” estimated military advantage.¹³¹ By insertion the word “overall” the Statute “somewhat broadens the scope of military advantages which may be taken into account”¹³²; it addresses not the isolated attack, but takes the wider operational perspective. Thus, it was suggested that it is permissible to balance between the cumulative collateral damage caused by whole military campaign on the one hand, and the advantage expected from winning that campaign on the other.¹³³ Nevertheless, this opinion is confronted by the number of scholars, who argue that the proportionality rule as it is codified in the First Additional Protocol demands that each attack be assessed individually.¹³⁴ Alston in respect of target killings operations specifically emphasizes that “compliance with the IHL proportionality principle is assessed for each attack individually, and not for an overall military operation.”¹³⁵

In the context of the involvement of the civilian population in the hostilities, including the use of human shields, the latter approach is the only acceptable since assessment of proportionality with regard to “overall” military advantage would endorse the arbitrary deprivation of civilian life justified by the cumulative result of the successive military operation. Therefore, such view on the proportionality assessment contravenes with the

¹²⁹Dinstein, *supra* n. 58 at 123 See also Judith Gardham, “Proportionality and Force in International Law” 87 *AJIL* 391, 407 (1993).

¹³⁰See W.J. Frenrick, “The Rule of Proportionality and Protocol I in Conventional Warfare” 98 *Mil. LR* 91, 102 (1982) at 107, 111-12.

¹³¹See Ruth G. Wedgwood, “Proportionality, Cyberwar, and the Law of War,” 76 *ILS* 219, 225 (2002) at 222.

¹³²Michael Bothe, ‘War Crimes’, in Antonio Cassese, Paula Gaeta and John RWD Jones (eds.), “The Rome Statute of the International Criminal Court: A Commentary” (2002) at 399.

¹³³Judith Gardham, “Necessity and Proportionality and the Use of Force by States,” CUP [2004] 259 at 101; Dinstein, *supra* n. 58 at 123; See also Harold Hongju Koh, “The Lawfulness of the U.S. Operation Against Osama bin Laden,” *Opinio Juris*, (19 May 2011) available at <<http://opiniojuris.org/>>.

¹³⁴F.J. Hampson, “Means and Methods of Warfare in the Conflict in the Gulf” in P. Rowe, ed., “The Gulf War 1990-91 in International and English Law” London: Routledge (1993) 98 at 89.

¹³⁵Report on targeted killings, *supra* n. 47 at 93.

humanity considerations and would inevitably amount in the clear breach of human rights by the party of conflict. Hence, in a case of a legitimate attack on a military objective, the principle of proportionality requires the military commander to estimate the particular attack's collateral damage and to consider whether the anticipated military advantage justifies the commission of such an attack.

1.2.3. The Requirement of Precaution

The principles of proportionality and distinction are both reliant for their effective implementation upon the principle of protection in attack.¹³⁶ The principle has been recognized as a rule of customary law applicable in both international and non-international armed conflict¹³⁷ and has been codified in Article 57 of the Protocol I. The customary principle of precaution in attack aims to prevent erroneous targeting and to avoid incidental harm to civilians.¹³⁸ In *Galic*, the ICTY referred to precaution principle in following statement: “[o]ne of the fundamental principles of international humanitarian law is that civilians and civilian objects shall be spared as much as possible from the effects of hostilities.”¹³⁹ In *Kupreskic* the Tribunal held that “[i]n case of attacks on military objectives causing damage to civilians, international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so civilians are not needlessly injured through carelessness.”¹⁴⁰ Thus, the principle requires that the operation must be planned and organized with appropriate accuracy and based on excellent intelligence¹⁴¹ and may not be conducted based on mere suspicion.¹⁴²

¹³⁶Melzer, supra n. 24 at 363.

¹³⁷CLS, supra n. 16, Rules 15-2; *Prosecutor v Kupreskic*, supra n. 104 at 524; Melzer, supra n. 24 at 364.

¹³⁸Protocol I, supra n. 50, Art. 57(4); Protocol II, supra n. 69, Art. 13(1); CLS, supra n. 16, Rules 15-21; UNGA Res 2444 (XXIII) (19 Dec.1968) at 1(c); UNGA Res 2675 (XXV) (9 Dec. 1970) at 3; *Abella v Argentina* (IACiHR, Report No. 55/97 of 18 November 1997, Case No. 11.137) at 177; Final Report on NATO Bombing Campaign in Yugoslavia, supra n. 69 at 29; Report on targeted killings, supra n. 47 at 30.

¹³⁹*Prosecutor v. Stanilav Galic*, supra n. 70 at 190.

¹⁴⁰*Prosecutor v Kupreskic*, supra n. 104 at 524.

¹⁴¹*Ibd*, para 58; see also Melzer, supra n. 24 at 407.

¹⁴²*PCATI v Israel*, supra n. 71 at 40.

The principle consists of a basic rule and several distinct obligations designed for those deciding upon attack, and for those responsible for its actual conduct.¹⁴³ The basic rule stipulates that:

In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.¹⁴⁴

The interpretation of term “everything feasible” is generally accepted and codified in conventional law, defining the notion as precautions that are “practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”¹⁴⁵ The factors which affect the “feasibility” of precautionary measures may include availability of intelligence on the target and its surrounding, the level of control exercised over the combat area, the choice and sophistication of weapons, the exigency of attack, the security risks which precautionary measures may entail for the attacking party or civilians.¹⁴⁶ However, the flexibility of the standard of precaution may not justify violations of IHL.¹⁴⁷ The principle demands that to military operations must be planned and decided upon diligently so as to keep collateral damage at the absolute minimum.¹⁴⁸ Therefore, the basic rule is complemented by several distinctive obligations for the persons responsible for planning and deciding upon attack, and for those responsible for the actual conduct.

¹⁴³Melzer, supra n. 24 at 364

¹⁴⁴CLS, supra n. 16, Rule 15. corresponds to Art. 57 (1) Protocol I.

¹⁴⁵Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II). Geneva (Oct. 10, 1980) Art. 1(5), Art. 3(4); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996) Art. 3 (10); CLS, supra n. 16, Rule 15 with relevant state practice; Rule 16; Commentary to Additional Protocols, supra n. 51 at 2198, with reservations regarding military considerations. The USA and its NATO allies adopted this position during the Diplomatic Conference working on the Additional Protocol I. See Bothe, Partsch, & Solf, supra n. 116 at 362. “The obligation to do everything feasible is high but not absolute.” Final Report on NATO Bombing Campaign in Yugoslavia, supra n. 69 at 29; See also Report on targeted killings, supra n. 47 at 30.

¹⁴⁶Melzer, supra n. 24 at 365

¹⁴⁷Ibid at 366.

¹⁴⁸Commentary to Additional Protocols, supra n. 51 at 2198; Jean-Quéguiner, “Precautions Under the Law Governing the Conduct of Hostilities” 88 IRRC 793, 815-17 (2006) at 794.

Pursuant to Article 57(2) (a) of Protocol I, those who plan or decide upon an attack are obliged to undertake the following stages of precautionary measures to ensure that civilians and civilian objects are spared:¹⁴⁹

1. Doing everything feasible to verify that the objectives to be attacked are legitimate military objectives.¹⁵⁰

2. Selecting of means and methods of attack with a view to avoiding or diminish the incidental injury to civilians and civilian objects.¹⁵¹

3. Refraining from decision on launching an attack expected to cause collateral damage excessive in relation to the concrete and direct military advantage anticipated provided that the proper assessment must be conducted beforehand.¹⁵²

The obligation to distinguish between the civilian population and civilian objects is reliant upon the fundamental rule of distinction discussed above. As Queguiner correctly mentions that requirement to do “everything feasible to verify the nature of the objective” is designed to ensure that operation is aimed strictly at military objectives and preserves the immunity of civilian population and objects, being a “vital ramification of the principle of distinction.”¹⁵³ However, such obligation devolves on relatively high levels of military subordination impeding the possibility to overview decisions of junior officers.¹⁵⁴ Conversely, senior commanders are obliged to rely on military intelligence and information collected by lower ranks and surveillance.¹⁵⁵ That creates the practical difficulties in decision-making process in cases of urgent attacks, as well as the questionable reliability of the intelligence collected. Therefore, in case if there was a time lapse between stage of decision-making and the actual attack, there is an obligation to update the information concerning the target and the change of circumstances.¹⁵⁶ Even though, regardless of the wide opportunities the modern

¹⁴⁹Dinstein, supra n. 58 at 125, Melzer, supra n. 24 at 364.

¹⁵⁰CLS, supra n. 16, Rule 16; Protocol I, supra n.50, Art. 57 (2) (a)(i).

¹⁵¹CLS, supra n. 16, Rule 17; Protocol I, supra n.50, Art. 57 (2) (a) (ii).

¹⁵²CLS, supra n. 16, Rule18; Protocol I, supra n.50, Art. 57 (2)(a)(ii).

¹⁵³Quéguiner, supra n. 147 at 797.

¹⁵⁴Dinstein, supra n. 58 at 125; See also Stefan Oeter, “Methods and Means of Combat” in Dieter Fleck “Handbook of International Humanitarian Law” 2 ed. OUP [2008] 770, 1434 at 181-2.

¹⁵⁵B.L.Brown, “The Proportionality principle in the Humanitarian Law of Warfare: Recent efforts at Codification” 10 CILJ 134 (1976-7) at 145-46.

¹⁵⁶Jorge J. Urbina, “Derecho internacional humanitario” La Coruna (2000) at 241 in Quéguiner, supra n. 147 at 797.

technologies provide, the accessible information may be erroneous, imprecise or incorrectly interpreted. Therefore, Dinstein notes that “no absolute certainty can be guaranteed in the process of ascertaining the military character of an objective selected for attack” emphasizing the obligation of due diligence and good faith.¹⁵⁷

The requirement of precaution orders the selection of those methods weapons and ordnance, as well as appropriate targets from a list of military objectives that will likely diminish the collateral injury to civilian population, assuming the equivalent military benefit.¹⁵⁸ This obligation is not limited to the duty to promote the accuracy of bombing raids in densely populated areas,¹⁵⁹ but should be interpreted to include the wide range obligations and restrictions on the attacking party. This provision is intended to impose restrictions on the location and timing of attack, suggesting that the attack must be carried out at the time when it is expected to be least populated with personnel.¹⁶⁰ Thus, if the attack aims at a small military objective surrounded by densely populated civilian areas, the only legitimate *modus operandi* may be to resort to a surgical raid with precision- guided munitions.¹⁶¹

The obligation to take precautionary measure requires caution in choosing the angle of the attack,¹⁶² as well as choice of the most precise weapon available (e.g. precision guided munitions). However, the availability of precision-guided munitions does not preclude the attacking party to employ alternative precautionary options. Moreover, if the attacker

¹⁵⁷Dinstein, supra n. 58 at 126.

¹⁵⁸Quéguiner, supra n. 147 at 817; Dinstein, supra n. 58 125-28; See Oeter, supra n. 153 at 183.

¹⁵⁹Schmitt, supra n. 2 at Quéguiner, supra n. 147 at 797; Bothe, Partsch, & Solf, supra n. 116 at 364, 2.6; Hilaire McCoubrey, “Kosovo, NATO and International Law”, 14(5) International Relations 29 (1999) at 40.

¹⁶⁰Dinstein in this refers to the bombardment of Belgrade Television and Radio Station during the Kosovo air campaign occurred around 2.a.m.. Dinstein, supra n. 58 at 127; Quéguiner brings similar example of bombing raids attacking factories located in the territories occupied by Germany conducted on weekends or at night. Quéguiner, supra n. 147 at 800; Commentary to Additional Protocols, supra n. 51 at 2200; But see A. Schwabach, “NATO’s War in Kosovo and the Final Report to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia” 9 TJICL 167 (2001) 181.

¹⁶¹Dinstein, supra n. 58 at 127

¹⁶²Quéguiner, supra n. 147 at 801; Human Rights Watch, “Off Target: The Conduct of the War and Civilian Casualties in Iraq”, New York (2003) at 17; Australian Defence Force Manual on the Law of Armed Conflict, ADFP 37 (1994) at 552. See also Michael W. Lewis, “The law of aerial bombardment in the 1991 Gulf War” AJIL Vol. 97 (2003) at 501.

employs precision-guided munitions in situation where more options are accessible, the attack would be scrutinized by any impartial observer more vigorously.¹⁶³ Legal doctrine supports the idea that the party to the conflict enjoys full discretion in questions of weaponry selection, which depends on its military interests as well as the conditions of the operation.¹⁶⁴ The rule interpreted as to include either a duty to use precision-guided munitions in urban settings (or in every case they are accessible in possession) will impose an inadmissible discriminatory bias affecting party equipped with expensive ordnance in asymmetrical warfare.¹⁶⁵ Despite the states are obliged under IHL to use the most precise weapons in state's arsenal if their use is practically possible, there is no legal obligation to acquire such weapon even if they have enough financial resources.¹⁶⁶

The obligation addressed to those responsible for conduct of the attack requires them to do everything feasible to cancel or suspend the attack if it may be expected to cause excessive collateral damage or if it becomes clear that the objective is not military.¹⁶⁷ In conformity with the proportionality requirement, when it becomes apparent that civilian casualties will be more significant than anticipated military advantage, the operation must be suspended or canceled. This obligation similarly correlates with the principle of distinction, requiring to cancel or suspend the operation against individuals not only when a person was erroneously regarded combatant, but also if civilian ceases to directly participate in hostilities, e.g. in case

¹⁶³Dinstein, *supra* n. 58 at 127.

¹⁶⁴Dinstein, *supra* n. 58 at 126; Quéguiner, *supra* n. 147 at at 801. But see W. Belt, "Missiles over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas" 47 NLR 115(2000) 174; Nathan A. Canestaro, "Legal and Policy Constraints on the Conduct of Aerial Precision Warfare" VJTL Vol. 37 (2004) at 465. "[I]t seems illogical to presume that the handful of states with precision weapons – such as the United States, Britain and, to a lesser degree, Russia – should be held to a higher standard of law." D.L. Infeld, "Precision –Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But Is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?" 26 GWJILE 109 (1992-3) at 110-111.

¹⁶⁵See J.F. Murphy, "Some Legal (and Few Ethical) Dimensions of the Collateral Damage Resulting from NATO's Bombing Campaign" 31 IYHR 51 (2001) at 63.

¹⁶⁶Michael N. Schmitt, "The Impact of High and Low-Tech Warfare on the Principle of Distinction", Briefing Paper, Program on Humanitarian Policy and Conflict Research at Harvard University (Nov. 2003) at 10.

¹⁶⁷CLS, *supra* n. 16, Rule 19, Protocol I, *supra* n. 50, Art. 57 (2)(b).

of surrender.¹⁶⁸

The principle of precaution in attack contains two additional obligations. The first applies in cases where a choice is possible between several military objectives of a similar military advantage, and requires “to select that objective which may be expected to involve the least danger to civilian lives and to civilian objects when attacked.”¹⁶⁹ The implementation of this provision indisputably calls for the exercise of subjective judgment, as to whether several potential targets actually offer a comparable military advantage.¹⁷⁰ The second obligation requires that effective advance warning must be given of attacks affecting the civilians, “unless circumstances do not permit.”¹⁷¹ Thus, Quéguiner correctly concludes that “the duty to warn remains the rule unless the belligerent can invoke special circumstances that would justify its non-compliance.”¹⁷² Warnings are intended “to allow, as far as possible, civilians to leave a locality before it is attacked,”¹⁷³ and must not be misleading or deceptive.¹⁷⁴ Dinstein criticizes this requirement since it is hard to determine what kind of advanced notice would amount to an effective warning and how direct and specific the warning should be.¹⁷⁵ Moreover, several authors underline that surprise is a weighty element in all types of warfare,¹⁷⁶ which precludes warnings in non-assault situations or instigated warnings which

¹⁶⁸Quéguiner, *supra* n. 147 at 364.

¹⁶⁹CLS, *supra* n. 16, Rule 21; Protocol I, *supra* n. 50, Art. 57 (3).

¹⁷⁰See Waldemar A. Solf, “Article 51” in Bothe, Partsch, & Solf, *supra* n. 116 at 357, 368.

¹⁷¹CLS, *supra* n. 16, Rule 20; Protocol I, *supra* n. 50, Art. 57 (2)(c); Article 26 of the Regulations annexed to Hague Convention (IV) requires the commander of an attacking force to do all in his power to warn the authorities before commencing a bombardment, except in the cases of assault; Article 6 of Hague Convention (IX) states that if the military situation permits- the commander of the attacking naval force must do his utmost to warn the coastal authorities before commencing a bombardment.

¹⁷²The report to the prosecutor on the NATO bombing campaign during notes that “[t]he obligation to do everything feasible is high but not absolute.” Final Report on NATO Bombing Campaign in Yugoslavia, *supra* n. 69 at 29. See also Quéguiner, *supra* n. 147 at 807.

¹⁷³A. Cassese, “The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law” 3 UCLAPBLJ 55 (1984) 84.

¹⁷⁴Claude Pilloud, Jean Pictet, “Article 57” in Commentary to Additional Protocols, *supra* n. 51 at 684.

¹⁷⁵Dinstein, *supra* n. 58 at 128.

¹⁷⁶Dinstein, *supra* n. 58 at 128; Melzer, *supra* n. 24 at 365; Quéguiner, *supra* n. 147 at 802; Michael N. Schmitt, “Human Shields in International Humanitarian Law” 47 CLMJTL 292 (2009) 292-336 at 305.

are too imprecise to alert the civilians to the impending threat.¹⁷⁷ Therefore this obligation is not absolute and applies where the circumstances allow the party to deliver adequate and effective warning.

From the aforementioned it follows that in order to fulfill the requirements of distinction and proportionality, attacker planning and conducting the operation is obliged to take all feasible precautions to spare civilian population and minimize incidental injury to civilian objectives. The attacking party at the stage of decision- making must verify that targeted persons are military objectives, choose means and methods which would lessen the collateral damage and refrain from launching the operation if it is likely to cause excessive casualties to civilian population. Once the operation was instigated, the attacker conducting the attack must cancel or suspend the operation if it is expected to cause the excessive collateral damage or if the targeted object does not constitute a legitimate aim. In the situations of the use of human shields the obligation to give an advance the effective advance warnings obtains the special significance, as it will be discussed in Subchapter 2.3.

1.3. Relationship Between IHL and IHRL

Both IHL and IHRL are aimed at preventing unnecessary or disproportionate deaths. Although General Assembly has adopted a number of resolutions that view IHL as a category of IHRL,¹⁷⁸ these two bodies of law do not operate similarly being designed for use in a very diverse circumstances.¹⁷⁹ The primary purpose of IHRL is to protect individuals from abuses perpetrated against them by their own government, and is considered in terms of rights of individuals exercisable against them¹⁸⁰. The rights of individuals give rise to obligations on the State to defend those rights through institutionalized means. In contrast, the primary

¹⁷⁷See Waldemar A. Solf, "Article 51" in Bothe, Partsch, & Solf, *supra* n. 116 at 357, 367; Rogers, *supra* n. 90 at 61.

¹⁷⁸UNGA Res 2444 (XXIII) (19 Dec. 1968); UNGA Res 2675 (XXV) (9 Dec.1970); UNGA Res 2677 (XXV) (9 Dec. 1970); UNGA Res 2853 (XXVI) (29 Dec. 1971); Giad Draper "The Relationship Between Human Rights Regime and the Law of Armed Conflict" 1 *IYHR* 191 (1971) at 206.

¹⁷⁹Siobhan Wills, "Protecting Civilians. The Obligations of Peacekeepers" OUP [2009] 296 at 111.

¹⁸⁰*Ibid* at 112.

purpose of IHL is to minimize the infliction of suffering and harm in the course of waging war. It is conceived in terms of the obligations required of parties to an armed conflict (both, individual and State parties).¹⁸¹ Although, obligations under IHL may give rise to rights, they are not presented in terms of rights since IHL primarily concerns rules and principles that parties of conflict must apply in conducting their operation.¹⁸²

There are two opposing scholarly views on the problem of applicability of human rights in the context of armed conflict. Melzer states that it is justified to have recourse to *lex generalis* of IHRL only where the *lex specialis* of IHL does not provide any rule at all, and where no sufficient guidance can be obtained by reference to the general principles underlying IHL¹⁸³. Following the same line of argumentation, Brooks provides the critique of human rights application in US war on terror¹⁸⁴. The other authors, who endeavor to strengthen the role of IHRL as regulatory framework for the conduct of hostilities approach, question the validity of the *lex specialis* rule of interrelation between IHL and IHRL. For instance, Doswald-Beck¹⁸⁵ and Abresch¹⁸⁶ argue that the concurrent applicability of IHRL and IHL to hostilities in armed conflict does not mean that the right to life must, in all situations, be interpreted in accordance with the provisions of IHL. Since IHL is not always clear, a simple reference to IHL provisions will not be sufficient, so that the right to life must not be necessarily interpreted solely in accordance with the provisions of IHL.¹⁸⁷

Gowland-Debbas in study on the interplay of IHRL and IHL describes the two parallel mutually enriching tendencies: the “humanization” of the IHL and interpretation of right to

¹⁸¹Ibid at 111.

¹⁸²Noam Lubell, “Challenges in applying human rights law to armed conflict” IRRC Vol.87 No. 860 (Dec. 2005) 737- 754 at 749-750.

¹⁸³Melzer, supra n. 24 at 383.

¹⁸⁴Rosa Ehrenreich Brooks “War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror” University of Pennsylvania Law Review , Vol. 153, No. 2 (Dec. 2004) 675-761 at 747.

¹⁸⁵See Louise Doswald-Beck, “The Right to Life in armed Conflict: Does International Humanitarian Law Provide All the Answers?” 88 IRRC 881 (2006).

¹⁸⁶Abresch, supra n. 34 at 741- 754.

¹⁸⁷Ibid.

life in the context of armed conflict and “militarization” of human rights law applicable to emergency situations falling short of armed conflict definition. This trend is evident in the range of recent ECHR cases,¹⁸⁸ where the Court relies on the categories and principles borrowed from the IHL to amend the unrealistically high standard of IHRL protection in emergency situations when parties did not recognize the state of armed conflict and did not claim the derogation from the norm. For instance, such approach allows to set the prohibition of indiscriminate attacks during the hostage-taking crisis in a peace time, even though the prohibition as such is based on humanitarian principle of distinction. In the light of this tendency the legality of attacks against human shields (whether in the context of armed conflict or other emergency situation) must be assessed under the generally applicable standard of IHRL, but the test of “arbitrariness” of the deprivation of life should be construed with a reference to relevant IHL principles.

¹⁸⁸*Finogenov and others v Russia* , ECHR18299/03 – 27311/0 (20 Dec. 2011); *Isayeva v Russia*, ECHR 57950/00 (24 Feb.2005); *Abuyeva et al. v Russia*, ECHR 27065/05 (2 Dec. 2010); *Georgia v. Russia No. 2*, ECHR. 38263/08 (13 Dec. 2011).

Chapter 2. APPLICATION TO HUMAN SHIELDS

Since IHRL does not expressly outlaw the attacks on human shields, the legality of such attack should be assessed under generally applicable prohibition on arbitrary deprivation of life. Due to the peculiarities of the tactic of shielding, demanding attacker to spare between the actor who uses shield and victim used as shield, as well as the typical context of practice – asymmetrical conflicts and terrorist attacks – the test of the arbitrariness of attacker's actions is contingent upon the customary IHL principles. In identical circumstances, the test construed under “military” principles of IHL coincides with respective requirements under human rights law.¹⁸⁹ Therefore, the legality of the attack on the legitimate target shielded by civilian population depends on the attacker's compliance with customary requirements of distinction, proportionality and precaution.¹⁹⁰ This chapter would focus on the analysis of each of these principles in the situations of shielding in order to verify the scope of positive and negative obligations resting upon the attacker.

2.1. The Principle of Distinction

The tactics of the use of human shields creates a significant obstacle in application of the principle of distinction since it exploits the principle of civilian immunity by inducing warring parties into attacks of unclear legality. The attacker's compliance with the principle of distinction would depend on characterization of human shields and whether the certain categories of civilians shielding a defender may be viewed as directly participating in hostilities.

Denstein explains that there are three major ways in which shielding of military objectives by civilians can be effected: 1) civilians choose voluntarily to serve as human shields, with a view to deterring an enemy attack against combatants or military objectives; 2) combatants

¹⁸⁹Melzer, *supra* n. 24 at 398.

¹⁹⁰Report on targeted killings, *supra* n. 47 at 30; CLS, *supra* n. 16, Rules 1, 12, 14; 15; Melzer, *supra* n. 24 at 395-411.

compel civilians to move out and join them in military operations; 3) the third way is considered to be a variation of the second, where instead of civilians being constrained to join the combatants, the combatants (or military objectives) join the civilians.¹⁹¹

Thus, the differential treatment during the battle should be accorded on the basis of the nature of the shielding, i.e. whether it is voluntary or not. Thus, the principle of distinction would require not only distinguishing between the combatants and civilians, but between the different types of civilian population engaged in hostilities as human shields. There are various approaches to how the categories should be formed and what standards of protection must be respectively accorded to them. Rubinstein and Roznai address this question by division of Human Shields in two categories, namely “(i) voluntary (those who shield military targets of their own free will), and (ii) unknowing (civilians who have neither volunteered nor been coerced into serving as human shields, but are located near a legitimate military target) or involuntary (civilians or hostages who are coerced into shielding a military target).”¹⁹² In their assessment voluntary human shields are considered to be directly participating in military activities and consequently are excluded from the proportionality assessment.

In contrast, human shields which are involuntary or unknowing preserve their civilian protection. Schmitt similarly distinguishes “compelled” and “voluntary” shielding by referencing to the international humanitarian law provision that civilian population who directly participate in hostilities are deprived of protection from attack “for such time as they so participate.”¹⁹³ He discusses two approaches to the problem. First, he persists that shielding does not itself amount to direct participation because it does not meet the requisite

¹⁹¹Dinstein, *supra* n. 58 at 130.

¹⁹²Rubinstein and Roznai, *supra* n. 103 at 109.

¹⁹³Schmitt, *supra* n. 2 at 317.

qualitative threshold.¹⁹⁴ An alternative approach argues that voluntary human shields qualify as direct participants, which he views as corresponding to the modern warfare.¹⁹⁵ Although, he concludes that “in cases of doubt as to whether shielding is voluntary the shields should be treated as acting involuntarily.”¹⁹⁶ Alternatively, Schoenekase suggests division of human shields into three categories: “proximity” human shields, “involuntary” human shields/hostages and “voluntary” human shields.¹⁹⁷ All authors agree that the division between voluntary and involuntary human shields may be hardly drawn in reality, and the estimation must be rooted on “reliable intelligence sources.”¹⁹⁸ The most common approach is the generalizing categorization of human shields into voluntary and involuntary (unwilling) that will be used in the subsequent analyses.

Based on the aforementioned classification, the next question is whether the voluntary human shields satisfy the criteria for “direct participation in hostilities” and whether it would exclude them from the prohibition on human shielding. The scholar’s opinion on this matter is split into two major branches.

The traditional approach based on the treaty norms suggests that voluntary shielding does not meet the threshold necessary to qualify it as “direct participation in hostilities”¹⁹⁹ since it lacks the direct causal link among activity involved in and damage to the adversary “at the time and the place where activities take place”.²⁰⁰ Human shields do not actively engage in the conduct of hostile action, thus they do not defend a military objective in the sense of

¹⁹⁴Quéguiner, supra n. 147 at 816.

¹⁹⁵Schmitt, supra n. 2 at 318.

¹⁹⁶ Ibid.

¹⁹⁷Schoenekase, supra n. 3 at 26.

¹⁹⁸*Adalah and ors v General Officer Commanding Central Command, Israeli Defence Force and ors, Original Petition, HCJ 3799/02*; Matthew W. Ezzo and Amos N. Guiora, “A Critical Decision Point on the Battlefield: Friend, Foe or Innocent Bystander” in Cecilia M. Bailliet ed. “Security: A Multidisciplinary Normative Approach” 91 (2009) at 101-17.

¹⁹⁹Quéguiner, supra n. 147 at 815-17; See also ICRC Summary Report, Fourth Expert Meeting: Direct Participation in Hostilities Under International Humanitarian Law 46-48 (2006); ICRC Summary Report, Second Expert Meeting: Direct Participation in Hostilities Under International Humanitarian Law 6-7 (2004), available at <[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct_participation_in_hostilities_2004_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2004_eng.pdf)>

²⁰⁰Commentary to Additional Protocols, supra n. 51 at 516.

constituting an immediate menace to the attacker. Rubinstein and Roznai correctly note that “[e]ven if they do contribute to a party's warfare capacity by protecting military targets, this contribution is only indirect”.²⁰¹ Thus, human shields are viewed rather as construct of the moral impediment for the attacker or legal barrier. Neither of these characteristics is sufficient to satisfy the criterion for direct participation. Therefore, they do not fall under the ambit of the article A 51.3, therefore voluntary shields will benefit from protections under a 51.7.

The alternative approach, which correctly corresponds with the military logics, suggests that voluntary shields satisfy the standards for direct participation in hostilities and may qualify as military targets, since shielding is an effective defensive tactic. In *Boskoski and Tarculovski* Tribunal held that target may be attacked if “the object is being used to make an effective contribution to military action.”²⁰² Voluntary human shields fit the definition of military target as persons who “by their nature, location, purpose or use make an effective contribution to military action”²⁰³ and, consequently their neutralization would offer a definite military advantage. Since civilians willingly shielding a military objective take affirmative steps in order to aggravate harm to the objects or people that make such input, they contribute to the military action in a direct causal way.²⁰⁴

Schmitt argues that “[f]rom a practical point of view, a civilian who takes up arms may be

²⁰¹Rubinstein and Roznai, supra n. 103 at 111. See Human Rights Watch, “International Humanitarian Law Issues in a Potential War in Iraq” (20 Feb. 2003), available at <<http://www.hrw.org>>; Stephanie Bouchié de Belle, “Chained to Cannons or Wearing Targets on Their T-Shirts: Human Shields in International Humanitarian Law” 90 IRRC 883, 889 (2008) at 894-95.

²⁰²*Prosecutor v. Boskovski and Tarculovski*, supra n. 70 at 356 ; See also *Prosecutor v. Stanilav Galic*, supra n.70 at 51.

²⁰³Protocol I, supra note 50, Art. 52.2; CLS, supra n. 16, Rule 8; Michael N. Schmitt, Charles H.B. Garraway & Yoram Dinstein, “The Manual on the Law of Non-International Armed Conflict with Commentary” International Institute of Humanitarian Law (2006), reprinted in 36 Israel Yearbook on Human Rights (2006) (Special Supplement) at 1.1.4; U.K. Ministry of Defence, “The Manual of the Law of Armed Conflict” OUP (2004) at 5.4.1; Canada, The Office of the Judge Advocate General, “The Law of Armed Conflict at the Operational and Tactical Level” Publ: B-GG-005-027/AF-021 (Mar. 21, 2001), Art. 406(2). See also Yoram Dinstein, “Legitimate Military Objectives Under the Current Jus In Bello,” in Andru E. Wall ed., “Legal and Ethical Lessons of NATO's Kosovo Campaign” (2002) 139; B. Horace nad Jr. Robertson, “The Principle of Military Objectiv in he Law of Armed Conflict” in Michael N. Schmitt ed. “The Law of Military Operations” (1998) 197.

²⁰⁴Richard Parrish, “The International Legal Status of Voluntary Human Shields” Paper Presented at International Studies Association Annual Meeting 8 (Mar. 17, 2004), available at <http://www.allacademic.com/meta/p_mla_apa_research_citation/0/7/4/0/5/pages74057/p74057-1.php>.

less effective in deterring the attack than one who shields.”²⁰⁵ Therefore, even if the attacker possesses enough military resources to attack the shielded target, he may not launch the attack against the target if it is likely to result in the excessive civilian casualties, as a matter of law. Such an attack in majority of case would constitute a war crime. Hence a sufficient number of civilians engaged as shields will completely immunize the target. Thus, in asymmetrical warfare the weaker party, which is less militarily advantaged, obtains sufficient strategic prevalence by the systematical use of such tactics.

The ICRC supports this approach, however suggests a more flexible model of its application, since it connects the status of voluntary human shield with the impact of their presence. When human shields used in the ground operations create the “physical obstacle to military operations of a party to the conflict,” they are likely to cause the threshold of harm necessary for a prerequisite as direct participation in hostilities.²⁰⁶ However, the civilian protection would not cease if human shields do not affect the ability of the attacker to “identify and destroy the shielded military objective.”²⁰⁷ Hence, the status of “direct participant” would depend on whether they create a physical or “legal” obstacle, since only physical impediment of attack would satisfy the requirement of direct causal relation between the actions and the harm suffered.²⁰⁸ This view does not seem to be necessarily correct. There is no need to distinguish between physical or legal obstruction since in every case of human shields both elements will be present. Similarly, there is no need to draw the distinction between ground and air operations.

Nevertheless, the ICRC view on the problem of voluntary shields implicitly addresses the question of the intent of civilians to shield the target. Such intent itself is not sufficient to

²⁰⁵Schmitt, *supra* n. 2 at 318.

²⁰⁶Guidance on Direct Participation, *supra* n. 74 at 56

²⁰⁷*Ibid* at 57.

²⁰⁸The similar division between the shields who “truly obstruct an attack”, by their physical presence, and those “who only present moral or legal restraints.” was suggested in Ian Henderson, “The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack Under Additional Protocol I” Leiden:Martinus Nijhoff Publishers [2009] 266 at 218.

deprive the individual of the civilian protections. Unless voluntary human shields do not actually (bodily) preserve military objectives, they lose protection from the direct attack.²⁰⁹

Although Israeli Supreme Court identified objective causation of harm as a main criterion for the determining the “direct participation in hostilities,”²¹⁰ its conclusions concerning voluntary human shields are based exclusively on subjective intent. The Court stated that in contrast to civilians forced by terrorists to defend the military objects, civilians who support the terrorist organization by voluntary shielding “should be seen as persons directly participating in hostilities,” but did not discuss the circumstances in which human shielding could be evaluated as causation of the direct harm to the adversary.²¹¹

Schmitt argues that the loss of civilian protection would occur due to the fact that voluntary shields “are deliberately attempting to preserve a valid military objective for the use by enemy,” but at the same time makes an exception for children who act as voluntary shields since they lack the mental capacity to form the intent necessary to categorize them as direct participants.²¹² But loss of protection under international humanitarian law is a measure of military necessity and not the sanction for individual culpability.²¹³ Thus, defining the act as “direct participation” would depend not on a subjective intent, but on objective likelihood that it will cause harm to the adversary. For instance, civilians who protect offensive weapon systems that fire at the adversary should be qualified as directly participating in warfare. Such approach would solve the doubt to the problem of indifference towards the situations of civilians’ presence in the vicinity of military targets.²¹⁴ If the objective criteria of the harm

²⁰⁹Melzer, *supra* n. 24 at 346.

²¹⁰*PCATI v Israel*, *supra* n. 71 at 33, 37.

²¹¹*PCATI v Israel*, *supra* n. 71 at 36; see also Dinstein, *supra* n. 58 at 130; Michael N. Schmitt, “Direct Participation in Hostilities and 21st Century Armed Conflict” in “Crisis Management and Humanitarian Protection” Berlin: Berliner WissenschaftsVerlag, Horst Fischer et al. Eds. [2004] at 152.

²¹²Schmitt, *supra* n.2 at 317.

²¹³See Roy S. Schöndorf, “Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?” 37 NYUJILP 1(2004) at 6; Roy S. Schöndorf, “The Targeted Killings Judgement : A Preliminary Assessment” 5 JICJ (2007) at 301.

²¹⁴The problematic question was raised in Quéguiner, *supra* n. 147 at 815-816.

causation would apply, then the mere passivity of human shield would equate the status of unknowing shield retaining the civilian protection. In the cases where of adequate warning prior to an attack is possible, only those civilians who persist in shielding the target should be qualified as direct participants.

Without a doubt, it is impossible to construct the definition of direct participation in such a way that it would not reward the defending side who use human shields, but the rule should be interpreted to include not only offensive acts, but also defensive ones if they contribute to the party's military capacity. Disarmed civilians who willingly locate themselves in the vicinity of a military objective which poses an imminent and real danger to the adversary with the intent to prevent it from being attacked are thereby intentionally engaging in defensive act. Thus, they are directly causing harm to the attacker and should qualify as direct participants in hostilities. However, in case civilians do not have an intent to cause harm to the adversary but are staying in the locality of the military targets, e.g. if the combat zone in the large-scale operation spread to the densely populated civilian areas, they may not satisfy the standard of direct participation. In the cases of doubt the attacker should regard civilians obstructing the attack against legitimate military target by their physical presence as involuntary human shields.

2.2. The Principle of Proportionality

The principle of proportionality bans attacks where the number of civilian people likely to die or get injured as a result of an attack becomes "excessive" compared to its expected "military advantage."²¹⁵ A particular problem arises when the defender attempts to shield himself from the attack being surrounded by civilians. The current prohibition of attacks against civilian population creates an incentive for the use of civilians as shields since a party can effectively

²¹⁵Prototcol I, supra n. 50, Arts. 51(5)(b), 57(2)(b); CLS at 46; Michael N. Schmitt et al., "The Manual on the Law of NonInternational Armed Conflict (With Commentary)" 36 IYBLHR (special supp. 2006); U.K. Ministry of Defence, The Manual of the Law of Armed Conflict, OUP (2004) [hereinafter U.K. Manual]. at 86; see also Dinstein, supra n. 58 at 119– 25; Michael N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict" 22 YJIL. 1 (1997) at 55–56.

immunize a military objective from an attack by placing civilians at risk so that the attack would amount to excessive collateral damage.²¹⁶ Therefore, the present application of the proportionality principle increases danger to civilians through the shift of the responsibility from the shielding to the attacking party.²¹⁷ In the context of human shields the key question is whether the intention of the civilian population to shield the warring party would affect the application of proportionality principle.

In the case of necessity to conduct the military operation against the legitimate target protected by human shield the application of the proportionality test will be reliant upon the compliance of attacker with the principle of distinction complemented by the principle of precaution in attack. The attacking party's assessment of the incidental collateral damage will depend on its ability to distinguish between voluntary and involuntary shields, which should be accorded differential treatment under this principle.

When a defender knowingly and intentionally takes advantage of the protection accorded to civilian population in a form of counter targeting without consent or awareness of the civilians in question, civilians in midst of the target must not suffer from the defender's unlawful actions. Involuntary shield as civilians should be accorded the full benefits of the humanitarian law protections based on "the foundational premise that relevant provisions operate in favor of individual civilians, not the parties to the conflict."²¹⁸ Thus, proportionality assessment must be conducted with incorporation of involuntary shields to the general damage estimation. United States doctrine applicable to the military services appears to adopt this position, stipulating that the civilians do not lose their protection, while joint force responsibility is determined by the proportionality principle whenever defender uses human shields in order to protect military objective from the attack or forces civilians to

²¹⁶Rubinstein and Roznai, supra n. 103 at 120; Al-Duaij, supra n. 17 at 123.

²¹⁷ Rubinstein and Roznai, supra n. 103 at 121.

²¹⁸ See Schmitt, supra n. 2 at 320.

obstruct the movement of an enemy.²¹⁹ Israeli Supreme Court in judgment on Israeli target killing policy found it disproportionate to bomb the building in order to attack a single person,²²⁰ alluding to the Shehadeh case, when a bomb was dropped on a building in a densely populated area of Gaza City killing Hamas military leader Salah Shehadeh, his wife, at least 12 other uninvolved persons and injuring more than 100 persons.²²¹ Thus, in the cases of the use of involuntary human shields, the lawful targets shielded may be attacked if anticipated casualties are not disproportionate to the concrete and direct military advantage.

When assessing the calculation of collateral damage the proportionality principle must be realistically applied with the proper adjustment to the frequency of use of the involuntary or unknowing human shields.²²² According to Rubinstein and Roznai such adjustment would depend on the application of the other precautions and military necessity.²²³ However, in this respect it must be emphasized that the necessity would not merely require that the concrete military advantage would be obtained as the result of the operation, but it would shift to the “absolute” necessity standard which requires that the objective poses a clear and imminent danger to the attacking party. This type of objectives differs substantially from the general category of military objects and may include gun emplacements, rocket launchers, and sniper hideouts if they are “actively firing at the impeded party's territory, especially [...] if directed at the other side's soldiers and civilians.”²²⁴ Proportionality rule in this respect then would require that the use of force against belligerent shielded by civilians would not exceed the

²¹⁹Joint Chiefs of Staff, Joint Targeting, (Joint Publication 3-60) (Apr. 13, 2007) at E-2-E-3 available at <http://www.aclu.org/files/dronefoia/dod/drone_dod_jp3_60.pdf>. “[S]tandards of conduct should apply equally to the attacker and defender. In other words, that the responsibility to minimize collateral injury to the civilian population not directly involved in the war effort remains one shared by the attacker and the defender [...]. At the same time, however, targeteers and judge advocates should consider the necessity of hitting the particular target, the expected results versus expected collateral damage, and ways to minimize civilian casualties, if possible.”US Air Force, “Air Force Operations and the Law: A Guide for Air and Space Forces” (Washington, DC, Judge Advocate General's Department 2002) at 293.

²²⁰*PCATI v Israel*, supra n. 71 at 46;

²²¹ CNN, *Israeli General Apologies for Civilian Deaths*, 23 July [available at <http://www.cnn.com>].

²²²Rubinstein and Roznai, supra n. 103 at 100-101.

²²³*Ibid* at 123.

²²⁴Rubinstein and Roznai, supra n. 103 at 123.

minimum which is necessary to achieve a legitimate purpose and cease the fire in order to protect own forces and civilian population.²²⁵ Therefore, the proportionality in cases of clear and present danger would require the attacker to achieve its legitimate objective throughout minimum resort to force by adequate means at its disposal.²²⁶

In case where civilian population is willingly defending military objectives in order to damage the adversary, the proportionality assessment would merit the different treatment. Voluntary human shields are considered to be comprised of the direct participants in hostilities who are legitimate military targets for the duration of their engagement in hostile action. Therefore, if the attacking party delivered the adequate warning prior to the attack, and there is no doubt that the civilians are willingly defending the military target in order to cause harm to the attacker, such voluntary shield will constitute a legitimate military target. Consequently, civilians willingly defending the target will be excluded from the proportionality assessment.

Schmitt argues that for the same reason “voluntary human shields obviously do not merit [...] consideration of alternative plans of attack that might minimize harm to the civilian population.”²²⁷ Although, defining the intent is only essential to find a violation of the prohibition on the use of civilian population as human shields and evaluation of the “excessiveness” of the collateral damage. It would not release the attacking party from the obligation to take precautions against deploying military objectives in densely populated areas, neither would it affect party’s obligation to comply the test of military necessity,²²⁸

²²⁵Eyal Benvenisti, “Human Dignity in Combat: The Duty to Spare Enemy Civilians”, 39 ILR. 81 (2006) at 93, 108.

²²⁶*Ouedraogo v Burkina Faso*, IACiHPR, decision of 1 May 2001, Communication No. 204/97, 29th Ordinary Session, (April/May 2001) at 4.

²²⁷Schmitt, supra n. 2 at 325

²²⁸Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague (October 18,1907) [hereinafter 'Hague Convention 1907'], Art. 23(g); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 75 UNTS 287 (August 12, 1949) [hereiafter 'GC IV'], Art. 53; Report on targeted killings, supra n. 47 at 16; Melzer, supra n. 24 at 397.

which requires evaluating whether an operation will achieve a concrete military advantage without increasing risk to the operating forces or civilians. Humanitarian law experts commonly express the view that such approach would endorse the possibility of directly targeting voluntary shields.²²⁹ However, the accurate intelligence information about the targeted objective and its surrounding, subsequent delivery of adequate warning would lessen the possibility of causing injury to the “innocent” civilians. Moreover, if the precautionary measures undertaken prior to commission of attack do not resolve the doubt about the nature of involvement of the civilian population into the operation, presumption must remain in favor of civilians. Moreover, as Schmitt correctly noticed, frequent direct attacks against voluntary human shields would violate the “economy of force” principle of war, according to which it is irrational to place own forces at risk or waste weapons if the actual objective is not the human shield itself, but the object that the shields seek to protect.

There are mainly three alternative approaches to proportionality assessment with respect to human shields, but none of them solves the initial problem of the evaluation of “excessive” civilian damage. The first approach, which enjoys the strong support, does not distinguish between voluntary shields and “incidentally present civilians” and treats voluntary shields as civilians accorded with full humanitarian law protections.²³⁰ Therefore, any anticipated harm to voluntary shields would also be considered in proportionality analysis, what fully corresponds to the current provisions international humanitarian law on protection of civilian population. Human Rights Watch addressing the situation with peace activist human shields in Iraq (2002- 2003) made the conclusion that “civilians acting as human shields, whether voluntary or not, contribute indirectly to the war capability of a state”, nevertheless since their actions do not pose a direct risk to attacking forces that may not be regarded as directly participating in hostilities what precludes the possibility of the direct attack if it appear to

²²⁹Schmitt, *supra* n. 2 at 325.

²³⁰Schmitt, *supra* n. 2 at 326.

result in excessive civilian harm.²³¹ However, this approach implicitly suggests that as a matter of law proportionality principle allows the party using voluntary shields to preserve a target from attack completely. In the context of the shielding party's obligations, this position constitutes a major predicament, since it becomes merely an issue of assembling sufficient number of human shields in the proximity of targeted object to render the expected harm "excessive".²³² Thus, this approach simply preserves the status quo.

An opposite extreme approach suggests that both, involuntary and voluntary shields, do not merit neither proportionality assessment nor the requirement the precautions analyses since attacker's operations must not be affected by the violation of the prohibition of the use of shields by adverse side. Thus, this approach supports the view that party violating humanitarian law must not benefit from its unlawful actions,²³³ but it clearly contravenes with the logic of humanitarian law that "expressly enhances protection of vulnerable groups, such as detainees, women, children and persons in occupied territory."²³⁴ It is impermissible that the civilians would be deprived of the accorded protection merely because one of the parties acted in breach of own obligations.

The third approach does not draw the clear distinction between voluntary and involuntary shields but suggests rather vague rule for the proportionality assessment. It implies that proportionality rule will still apply to both types of shields, but the appraisal of whether it has been violated would depend on the specific circumstances and defender's violation of the prohibition of the use human shields.²³⁵ Dinstein referring to the Parks' work states in this respect that in situation of human shields "the principle of proportionality remains prevalent"

²³¹Human Rights Watch, "Briefing Paper: International Humanitarian Law Issues in a Potential War in Iraq" (20 Feb. 2003).

²³²Schmitt, *supra* n. 2 at 327.

²³³"By compensating for the military advantage a party using human shields gains through its violation of the law, the approach recalibrates the military necessity-humanitarian considerations balance." Myres S. McDougal & W. Michael Reisman, "The Prescribing Function in the World Constitutive Process: How International Law is Made" *YJWOS* 249 (1980) at 273.

²³⁴ Schmitt *supra* n. 2 at 321. See Protocol I, *supra*, n. 50, Arts. 75-78; see generally GC IV, *supra* n. 222.

²³⁵Lubell, *supra* n. 62 at 159.

but “the actual test of excessive injury to civilians must be relaxed.”²³⁶ Thus, the estimation of the excessiveness of civilian casualties in the case of human shields involvement must take into account the fact that fatalities among civilian population will be higher than usual. ICRC’s Model Manual also endorses analogous approach:

[t]he attacking commander is required to do his best to protect [civilians who are used as shield] but he is entitled to take the defending commander's actions into account when considering the rule of proportionality.²³⁷

Similarly the United Kingdom's Manual of the Law of Armed Conflict provides that the proportionality rule must be considered in the case of involvement of human shields, but “if the defenders put civilians or civilian objects at risk by placing military objectives in their midst [...], this is a factor to be taken into account in favour of the attackers in considering the legality of attacks.”²³⁸ Although, this approach measures proportionality of the strikes on a case-to-case basis, it can hardly suggest any objective standards to the practical proportionality rule application leaving the broad discretion for military commanders in making the judgment on commission of the particular attack. Moreover, this approach does not suggest coherent set of factors that should be paid attention to, suggesting instead that the assessment could involve “adjusting upwards the acceptable number of casualties to reflect the circumstances or taking into account the defender’s actions at a later stage if the matter comes before a tribunal or investigation.”²³⁹ Hence, such interpretation may doubtfully contribute to clarifying the proportionality rule (which is itself quite indefinite in its current form) with respect to the circumstances of the use of human shields.

Therefore, the proportionality under the paradigm of hostilities requires the different treatment of voluntary human shields, who should be excluded from the assessment if the fall

²³⁶Dinstein, *supra* n. 58 at 131; See also W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1, 163-68 (1990).at 81-82: “While an attacker facing a target shielded from attack by civilians is not relieved from his duty to exercise reasonable precautions to minimize the loss of civilian life, neither is he obligated to assume any additional responsibility as a result of the illegal acts of the defender.”

²³⁷ICRC, “Fight It Right: Model Manual on the Law of Armed Conflict for Armed Forces” 58 (1999).

²³⁸See UK Manual, *supra* n. 212 at 2.7.2.

²³⁹Lubell, *supra* n. 62 at 159; Dinstein, *supra* n. 58 att 130-131; UK Manual, *supra* n. 212 at 26; Louis Doswald-Beck “The Civilian in the Crossfire” 24 JPR 251 (1987) at 257.

into the category of “directly participating in hostilities,” while involuntary or unknowing shields should be included in evaluation of the “excessive” collateral damage. In the cases of doubt and uncertain proportionality an attacker would not be entitled to launch the strike. Additionally, the adjustment of proportionality principle would be permissible in the situation of systematic use of involuntary human shields if there is a clear and imminent danger for civilian population or military forces provided that requirement of precautions was adhered to.

2.3. The Principle of Precaution

The requirement of precaution complements both, the principle of proportionality and distinction, therefore compliance of military forces with IHL obligations will be contingent upon their ability to implement available precautionary measures if the circumstances allow doing so. Accordingly, armed forces are obliged to avoid tactics and weapons that may directly civilian population shielding legitimate military targets.²⁴⁰ In the context of the use of human shields the major problem is compliance with the obligation to verify whether the objectives to be attacked are legitimate military objectives. The principle of precaution is aimed to assure that civilians benefit from the full legal protection; therefore attacker has the duty to determine whether the shielding persons involved in the operation are acting voluntary. Therefore, the question is what precautionary measures might help the attacker’s forces facing human shield to distinguish between voluntary shields comprised of civilians directly participating in hostilities or involuntary shields.

The obligation to verify whether the actors are willingly engaged in the operation is critical, however meets a lot of obstacles in the practical application. While in certain cases the willingness to shield becomes apparent from mere answer to a public call, in the cases when the defending party established control over the civilians engaged in the operation their intent

²⁴⁰ Al-Duaj, *supra* n. 17 at 124.

to participate in military action merits close examination.²⁴¹ In support of this premise Schmitt refers to the situation when Palestinian militants often employ child shields since Israeli Defense Force (IDF) soldiers are prohibited from use of live ammunition against children.²⁴² In such circumstances it becomes difficult to verify whether a child is willingly present near a potential target.²⁴³ Therefore, it is necessary to employ all available means and methods comforting the circumstances of attack in order to spare civilian population.

The requirement of advance warning is commonly viewed helpful to assist attacking party in fulfilling the compliance with the principle of distinction. The obligation to give advance warning of attack is referred to in various military manuals and has been incorporated in all contemporary normative and academic codifications²⁴⁴ and its underlying principle is to permit civilian population to find shelter from a probable attack.²⁴⁵ Rubinstein views compliance with the requirement of delivery adequate warning as a necessary precondition for the proportionality assessment.²⁴⁶ Similarly, Bouchie de Belle emphasizes that the role of the principle and explains that “a warning before an attack on the objective will let the party using the human shields [...] know that the stratagem has not worked, and give it a chance to remove the human shields from the target.”²⁴⁷ Despite the requirement of efficient warning is not a perfect remedy in case of human shields involvement given that impeded party may not

²⁴¹Schmitt, *supra* n. 2 at 335.

²⁴²Justus R. Weiner, “Co-existence Without Conflict: The Implementation of Legal Structures for Israeli-Palestinian Cooperation Pursuant to the Interim Peace Agreements” 26 BJIL 591 (2000) at 679.

²⁴³Schmitt, *supra* n. 2 at 336-335.

²⁴⁴See.g. Hague Convention 1907, *supra* n. 222, Art. 26; Protocol I, *supra* n. 50, Art. 57 (c); New Delhi Draft Rules (1956), Article 8(c); Obligation under Art. 57 of Additional Protocol I was unanimously accepted during the drafting process; See also Rubinstein and Roznai, *supra* n. 103 at 113; Quéguiner, *supra* n. 147 at 806; Harry Post, “War Crimes in Air Warfare” in Natalino Ronzitti & Gabriella Venturini (eds. “Essential Air and Space Law: The Law of Air Warfare-Contemporary Issues” (2006) at 157, 164; CLS, *supra* n. 16, Vol. 2 at. 400–13. (a list of pertinent military manuals and other elements of state diplomatic and military practice).

²⁴⁵Rubinstein and Roznai, *supra* n. 103 at 113; see also Lassa Oppenheim, *International Law: Peace* (Ronald F. Roxburgh ed., 3d ed.) The Lawbook Exchange, Ltd. [2005] at 220.

²⁴⁶Rubinstein and Roznai, *supra* n. 103 at 113.

²⁴⁷Bouchié de Belle, *supra* n. 199 at 905.

assume civilians who ignore the warning constitute legitimate targets,²⁴⁸ it conforms the “basic notion of humanity.” It gives an adversary an opportunity to surrender.²⁴⁹ and facilitates the categorization of the human shields as voluntary or involuntary necessary in case of exploitation of human shields tactic.

Pursuant to Article 57 (2)(c) of Protocol I the attacker is required to deliver an “effective advance” warning, however the norm does not provide any specific standard on how specific and detailed the warning should be to comply with IHL.²⁵⁰ Therefore, this requirement is the object of different interpretations. For instance, Bouchie de Belle defines “effective advance” warning as notice given “sufficiently in advance to allow the evacuation of civilians, including human shields,” but not a premature sign so that “civilians believe that the danger is over when the attack has yet to occur.”²⁵¹ In this respect, ECHR specified in *Isaeva v Russia* that the warning party must ensure that civilians have a safe exit and have a shelter.²⁵² In *Finogenov v Russia* the ECHR held that the authorities conducting the operation during Moscow theater siege were obliged to take “all necessary precautions to minimize the effects of the gas on hostages, to evacuate them and provide them with necessary assistance.”²⁵³ Moreover, the assessment of compliance with this requirement was split into two stages, namely 1) analyzing planning of the operation and 2) examining of implementation of the evacuation plan. The Court considered that planning and conduct of the operation is subject to thorough scrutiny with regard to several factors, e.g. whether the operation was spontaneous, whether the party has control over the area and possesses the general emergency

²⁴⁸Rubinstein and Roznai, supra n. 103 at 114; Schmitt, supra n.2 at 316; Ian Henderson, “The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack Under Additional Protocol I” IDC Publishers, Martinus Nijhoff Publishers and VSP [2009] at 188; Bouchié de Belle, supra n. 199 at 905; Federico Sperotto, Counter-Insurgency, Human Rights, and the Law of Armed Conflict” 17 HR Brief 19 (2009) at 21.

²⁴⁹Guidance on Direct Participation, supra n. 74 at 82.

²⁵⁰Quéguiner, supra n. 147 at 807; Dinsteiner, at 128;

²⁵¹Bouchié de Belle, supra n. 199 at 905.

²⁵²*Isaeva v Russia*, ECHR 57950/00 (24 Feb.2005)189.

²⁵³*Finogenov v Russia*, ECHR 18299/03 and 27311/03 (20 Dec 2011) at 237.

plan; the predictability of hazard, i.e. whether the party acted on assumption that the hostages can be seriously injured.²⁵⁴ However, while the primary aim of the “effective advance warning” to release the targeted area from civilians is clear, the question of the nature and precision of the warning is the object of the scholar’s debate.

The ICRC Commentary states that the warning may have a “general character”²⁵⁵ and names three examples of warnings, namely leaflets, radio warnings, and low-altitude flights over populated areas.²⁵⁶ Even though the threshold of these requirements is rather low, the UN Fact-Finding Mission on the Gaza Conflict found that that measures employed by IDF troops²⁵⁷ in Operation Cast Lead were insufficient to satisfy it. Rubinstein relies on Goldstone Report while defining the requirements of adequate warning without questioning,²⁵⁸ which the report establishes as follows:

[effective warning] must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they should do to avoid harm and it must be a credible warning. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible warning means that civilians should be in no doubt that it is intended to be acted upon, as a false alarm or hoax may undermine future warnings, putting civilians at risk.²⁵⁹

He argues that the requirements were not correctly applied in the report since they established too high threshold of “effectiveness”²⁶⁰ which according to Schmitt’s opinion “have no basis in the law and which run counter to state practice and military common sense.”²⁶¹ Schmitt in

²⁵⁴Ibid at 243.

²⁵⁵Commentary to Additional Protocols, supra n. 51 at 687.

²⁵⁶Ibid at 686.

²⁵⁷Warnings included near 165,000 telephone calls, the dropping of 2,500,000 leaflets, radio broadcasts, and the tactic of “roof-knocking.” Human Rights Council, “Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict,” UN Doc. A/HRC/12/48 (2009) [hereinafter ‘Goldstone Report’] at 498–99 available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf> citing Israel Ministry of Foreign Affairs, IDF Issues Warnings to the Civilians of Gaza (Jan. 7, 2009) at 264, available at <http://www.mfa.gov.il/MFA/Government/Communiques/2009/IDF_warns_Gaza_population_7-Jan-2009.htm>

²⁵⁸Rubinstein and Roznai, supra n. 103 at 113.

²⁵⁹Goldstone Report, supra n. 250 at 528.

²⁶⁰Rubinstein and Roznai, supra n. 103 at 113. See also Sergio Catignani, “Variation on a Theme: Israel’s Operation Cast Lead and the Gaza Strip Missile Conundrum” 154 *Rusi J.* 66 (2011) at 71.

²⁶¹Michael N. Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance” 50 *VIL* 795 (2010) at 829 (criticizing the Goldstone Report’s early warning requirements).

his critique correctly notes that the Goldstone Report confuses the warning requirement with the principle of proportionality, which must be subjected to the separate assessment and issuance of warnings would be only one of the factors contributing to subsequent analysis of proportionality.²⁶² Therefore, in order to minimize harm to civilian population warnings must be issued even if the anticipated collateral damage assessed is not regarded excessive relative to the anticipated military advantage.²⁶³ Rubinstein agrees with Schmitt's conclusion and makes three important points on the nature of warning to be delivered in cases of human shields involvement: 1) the examination of warnings under international law is required to be prospective, based on the warnings' nature and content, in contrast to retrospective examination suggested the report analyzing whether civilians actually followed the warnings and found a shelter; 2) the total number of warnings should suggest an adequate transmission; 3) the warning should not be too specific since too specific to preclude civilian population acting as voluntary shields to gather around specific targets likely to be attacked.²⁶⁴

Regarding the last argument there is no agreement on whether the requirement of effective notice can be satisfied by providing the abstract warning since the level of precision in given notice will depend on the aim pursued, attacker's military interests, and strategic context.²⁶⁵ Nevertheless, Alston in his Report on the Targeted killings while underlining the obligation of State to issue the effective advance warning to the civilian population "through leaflets broadcast warnings, etc." argues that warning should be "as specific as possible."²⁶⁶ It must be noted, that despite Rubinstein draws the perfect conclusion in the context of the current legislative framework, the suggested formula of the distinction supports Alston's emphasis on

²⁶²Ibid at 828.

²⁶³Ibid.

²⁶⁴Rubinstein and Roznai, *supra* n. 103 at at 114. See also C.B. Shotwell, *Economy and Humanity in the Use of Force: A Look at the Aerial Rules of Engagement in the 1991 Gulf War*, 4 USAFCAJLS 15 (1993) at 44-45; Laurie R. Blank, "The Application of International Humanitarian Law in the Goldstone Report: A Critical Commentary" 12 YBIHL 347, 349 (2009) at 46-48.

²⁶⁵Quéguiner, *supra* n. 147 at 808.

²⁶⁶Report on targeted killings, *supra* n. 47 at 78.

the most accurate warning. The civilians possessing the precise information concerning forthcoming attack in their attempt to congregate around the military objective actively contribute to the defensive military action and should be treated as directly participating in hostilities. Therefore, the requirement to give the most accurate notice on the subsequent attack would contribute into attacker's effort to discern civilian population from direct participants and simultaneously discourage civilians to act as voluntary shields as they may be legitimately attacked.

HPCR Model Manual suggested different standards of advance warnings applicable in air or missile operations, attacks directed at aircraft in the air, case of loss of protection for civilian aircrafts and civil defense. Thus, regarding the specifics of air or missile combat operations which may result in death or injury to civilians Model Manual stipulates that effective advance warning "may be done [...] through dropping leaflets or broadcasting the warnings" requiring that "such warnings ought to be as specific as circumstances permit."²⁶⁷ However, the Commission of Inquiry on Lebanon noted in its report that a military force undertaking the obligation to warn civilian population to evacuate "should take into account how they expect the civilian population to carry out the instruction and not just drop paper messages from an aircraft."²⁶⁸ Therefore, it is implied that the warning itself must provide the sufficiently precise order for civilians and complemented by other precautionary measures,²⁶⁹ which may vary depending on the circumstances.

From the above mentioned it follows that in context of the use of human shields the principle of precaution obtains the utmost importance, since it constitutes a necessary precondition to

²⁶⁷Program on Humanitarian Policy and Conflict Research at Harvard University, "Manual on international law applicable to air and missile warfare," Bern, (15 May 2009). Cambridge, MA: Program on Humanitarian Policy and Conflict Research at Harvard University (2009) 56 at 37.

²⁶⁸Report of the Commission of Inquiry on Lebanon established pursuant to Human Rights Council Resolution S-2/1, A/HRC/3/2, 23(Nov., 2006) para. 156.

²⁶⁹The impeded party by delivery of warning is not relived from obligation to compliance with obligation to undertake other precautions. See Report on targeted killings, *supra* n. 47 at 79; Bouchié de Belle, *supra* n. 199 at 905.

comply with the principle of distinction. The obligation to verify the objective overlaps with the duty to distinguish between civilians willingly defending the military objectives and peaceful civilian population. Grounded on this premise, the supplementary obligation of the effective advance warning obtains bigger weight. Hence, the attacker should be obliged to deliver credible, clear and precise notice on the forthcoming attack sufficiently in advance to permit the evacuation of civilians. The advance warning must be complemented by set of other precautionary measures with a view to avoiding or diminish the incidental injury to civilians unless the circumstances do not permit. The tactics of the delivery of warning must not put at risk the civilian population and keep the proper balance between the safety of civilians engaged as shields and safety of military forces. Whenever the attack is expected to cause collateral damage which is excessive relatively to the expected concrete military advantage, the attacker is obliged to suspend or cancel the operation.

The legality of an attack against adversary using human shields depends State's compliance with the set of negative and positive obligations. The negative obligation encompasses the requirement to refrain from attack if such attack is likely to cause excessive collateral damage and is disproportionate. The possibility to assess the proportionality of attack rests upon attacker's abidance of positive obligations under principles of distinction and precaution. The principle of precaution demands that the party planning an attack against legitimate target is obliged to verify all the necessary information about the target, to make the advance warning for civilian population residing in the proximity of this target and to free the zone of potential attack from innocent persons if it is practically possible. If this obligation is fulfilled, it becomes possible to distinguish between the adversary and civilian population. The attack on civilian population used as human shield is prohibited unless civilians actively contribute into hostile action. Such active contribution amounts to direct participation in hostilities and excludes such actors from proportionality assessment. Thus, the compliance with the

principle of distinction enables the attacker to establish an adequate balance between the military advantage of the operation and potential collateral damage within the proportionality principle. Therefore, these three elements of test reflect whether the deprivation persons used as shields of life was arbitrary.

PART II. THE PROHIBITION OF THE USE OF HUMAN SHIELDS

Chapter 3. GENERAL LEGAL FRAMEWORK

3.1. The Perspective of International Human Rights Law

There is no provision of IHRL that expressly proscribes the use of human shields. Boushiede-Belle correctly notes that “it seems logical that such prohibition would fall within the scope of the core fundamental rights such as [...] the prohibition of torture and other cruel, inhuman or degrading treatment”.²⁷⁰ The Human Rights Committee in General Comment No. 20 stated that for a State to fulfill the duty to protect against acts of ill-treatment it is not sufficient to criminalize such acts, but the set of legislative, administrative, judicial and other preventive measures is required in any territory under State's jurisdiction.²⁷¹ The focus of this chapter is on the scope of negative and positive obligations resting upon the party, which are essential to fulfill the duty to abstain from the use of innocent people to defend itself from the upcoming attack. This chapter will address the existing IHRL theoretical approaches to the ban on human shielding as a form of well-established prohibition of ill-treatment. The analysis of the shielding party's obligations within IHRL framework will be complemented by analogous norms which have been developed within the IHL framework in order to formulate the standard applicable in both systems of law and corresponding to modern warfare realities.

3.1.1. The Prohibition of Torture and Other Forms of Ill-Treatment

The prohibition against torture and cruel, inhuman or degrading treatment or punishment has

²⁷⁰Bouchié de Belle, *supra* n. 199 at 887.

²⁷¹UNCHR, ICCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) U.N. Doc.HRI/GEN/1/Rev (10 March 1992) [hereinafter 'General Comment No. 20/'] at 8; *Prosecutor v. Furundzija*, IT-95-17/1, ICTY, Judgement, Trial Chamber (10 Dec.1998) at 153-157.

been elevated to a *jus cogens*²⁷² norm and *erga omnes*²⁷³ obligation. It is to be found in general human rights treaties,²⁷⁴ as well as in specific treaties.²⁷⁵

Article 7 of the ICCPR states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” With minor differences in wording ECHR, AImCHR, ACHR, Revised Arab Charter of Human Rights prohibit torture or other forms of ill-treatment in terms similar to those of Article 7 of the ICCPR. For instance, the text of Article 3 of the ECHR contrasts with the equivalent Article 7 of the ICCPR insofar as it omits any reference to “cruel” treatment or punishment, but this difference is commonly viewed as insignificant since the prohibition of “cruel” treatment or punishment has been subsumed under the existing terms of Article 3.²⁷⁶

The definitions of torture, cruel, inhuman or degrading treatment are necessarily general and relatively flexible. Human Rights Committee did not find it essential to establish sharp distinctions between the different types of treatment or to outline a list of prohibited acts since the distinctions depend on the nature, purpose and severity of the treatment applied.²⁷⁷

The prohibition of ill-treatment is meant to cover a wide range of situations; consideration must be given not to an abstract act, but to the particular circumstances of the case.²⁷⁸

Moreover, people subjected to ill-treatment most probably undergo not only an isolated act,

²⁷²First Report of the UN Special Rapporteur on Torture, U.N. Doc.E/CN.4/1986/15 (1986) at 3; *Prosecutor v. Furundzija*, supra n. 264 at 151-152.

²⁷³Brody, R. and Ratner, M., «The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain» The Hague, Kluwer Law International [2000] at 238; See also *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain); Second Phase, ICJ (5 Feb. 1970) at 3.

²⁷⁴See ICCPR, Art. 7; ECHR Art. 3; AmCHR, Article 5(2) ; African Charter on Human and Peoples’ Rights [1520 UNTS 217] [AiCHR]Art.5 ; Convention on the Rights of the Child [1577 UNTS 3], Art. 37(a); see also UDHR, Article 5.

²⁷⁵See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1465 UNTS 85] [hereinafter ‘CAT’], Art 1, Art 16; Inter-American Convention to Prevent and Punish Torture [OAS Treaty Series No. 67] [hereinafter ‘IACPPT’]; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [ETS 126].

²⁷⁶Edward Bates, Carla Buckley, David Harris and Michael O’Boyle, “Law of the European Convention on Human Rights” 2nd ed. OUP [2009] 902 [hereinafter O’Boyle] at 71.

²⁷⁷General Comment 20, supra n. 264 at 4.

²⁷⁸O’Boyle, supra n. 269 at 70-71; Cordula Droege “In truth the leitmotiv’: the prohibition of torture and other forms of ill-treatment in international humanitarian law” 89 ICRC 867 (Sept.2007) [hereinafter Droege] at 518.

but also a number of acts and conditions which, as a whole, result in ill-treatment.²⁷⁹ Therefore, the jurisprudence is called on to “simply reflect[...] the reality of ill-treatment.”²⁸⁰ In addition, the diverse notions of ill-treatment emerge with the lapse of time, so that acts which have never been previously interpreted to constitute ill-treatment may be recognized such now.²⁸¹ Therefore, international bodies make an attempt to follow the dynamic character of the human rights instruments demanding the high standards of protection for fundamental liberties. At the same time, so high threshold of protection inevitably demands firmness and clarity in assessing breaches of human rights. This paper addresses the question whether the use of human shields constitutes the infringement of victim's dignity sufficient to fall under prohibition of forms of ill-treatment other than torture.

3.1.2. The Absolute Prohibition

The prohibition of torture and other forms of ill-treatment in IHRL instruments is formulated as absolute prescription. The ban on all forms of ill-treatment is non-derogable and commonly expressed in unqualified terms.²⁸² Consequently, it must be respected even in situations of public emergency or an armed conflict. Human Rights Committee specifically notes that Article 7 of the ICCPR “allows of no limitation” and “no justification or extenuating circumstances may be invoked to excuse [its violation] for any reasons, including those based on an order from a superior officer or public authority.”²⁸³ In case of the ECHR, the IAmCHR, the Revised Arab Charter, a parallel with the ICCPR is maintained with regard

²⁷⁹O'Boyle, supra n. 269 at 71; Droege, supra n.271 at 518; Franz Viljoen and Chidi Odinkalu «The Prohibition of Torture and Ill-treatment in the African Human Rights System» OMCT Handbook Series no. 3, Geneva [2006] at 38. See e.g. *Dougoz v. Greece*, ECHR, 40907/98 (6 Mar. 2001) at 46; *Iovchev. v. Bulgaria*, ECHR, 41211/98 (2 Feb.2006) at 137; CAT, “Concluding observations, Israel” UN Doc. A/52/44 at 253–260 (9 May 1998) at 255–257.

²⁸⁰Droege, supra n.4 at 518.

²⁸¹See *Semouni v France*, ECHR 25803/94 (28 Jul.1999) at 101. The IACtHR follows the same approach in . See *Cantoral-Benavides v. Peru*, IAmCHR, Ser. C No. 69 (18 Aug. 2000)at 99.

²⁸²ICCPR, Article 4; CAT, Article 2(1); ECHR, Article 15; ACHR, Article 27; IACPPT , Art. 5.

²⁸³General Comment 20, supra n. 264 at 3.

to impossibility derogations from the ban even in time of public emergency.²⁸⁴ The African Charter has no provisions regarding derogations or suspension of guarantees and suggests no list of exemptions.

The absolute and non-derogable nature of the norm has led to the firm rejection of any attempt by State-parties to undermine or weaken the prohibition. For this reason the European Court recognized that the threat of terrorism²⁸⁵ or need to combat an organized crime²⁸⁶ cannot justify state conduct that is in breach the prohibition of torture or other forms of ill-treatment. The Inter-American Court followed the ECHR approach by stating that the ban applies even in the most difficult circumstances, including aggression of terrorist groups or large-scale organized crime.²⁸⁷ The African Commission confirmed the absolute character of the prohibition of torture and ill treatment in the Robben Island Guidelines²⁸⁸ and *Hurilaws v Nigeria*.²⁸⁹ Additionally, the absolute nature of this ban is reflected in regional and international instruments including CAT.²⁹⁰

Since the prohibition of torture and other forms of ill-treatment provides an absolute guarantee, there is no room for a margin of appreciation doctrine.²⁹¹ Nevertheless, the international and regional bodies are influenced by the absence of uniformity in state practice while deciding on whether state conduct is consistent with the prohibition of torture and other

²⁸⁴ECHR, Art. 15; ACHR, Art. 27; League of Arab States, Arab Charter on Human Rights (15 Sept. 1994), Art. 4(2).

²⁸⁵*Tomasi v France*, ECHR 12850/87 (27 Aug.1992) at 155; *Chahal v. United Kingdom*, ECHR 22414/93(1996) at 79.

²⁸⁶*Semouni v France*, ECHR 25803/94 (28 Jul.1999) at 403.

²⁸⁷*Cantoral-Benavides v Peru*, IAmCHR, Ser. C No. 69 (18 Aug. 2000) at 95.

²⁸⁸Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (RIG), African Commission on Human and Peoples' Rights, 32 nd Session (17-23 Oct. 2002) at 9.

²⁸⁹*Hurilaws v. Nigeria*, AfCHR, Comm. no. 225/98, 14th Activity Report, AHRLR 273 (2000) at 41.

²⁹⁰CAT, Art. 2(2); United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 3452 (XXX) (9 Dec. 1975) Art. 3.

²⁹¹ See Johan Callewaert, "Is There a Margin of Appreciation in the Application of Articles 2,3 and 4 of the Convention ?"19 HRLJ 6 (1998). .O'Boyle, supra n. 269 at 70.

forms of ill-treatment.²⁹² The European Court emphasized that “suffering or humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment.”²⁹³ Therefore, it is important that the absolute prohibition of ill-treatment should not be trivialized and interpreted to contain other than the most serious forms of ill-treatment.

3.1.3. Inhuman and Degrading Treatment

The notion of “inhuman and degrading treatment” was not expressly defined in the texts of international human rights treaties, but the concept was developed in jurisprudence of regional human rights bodies.

The ECHR case-law requires an act attain “a minimum level of severity” in order to qualify as cruel or inhuman treatment.²⁹⁴ It was recognized that particular treatment must “cause either actual bodily harm or intense physical or mental suffering.”²⁹⁵ Moreover, the suffering caused must “go beyond that inevitable element of suffering” that results from any form of legitimate treatment or punishment.²⁹⁶ The prohibition of degrading treatment is included in European Convention alongside the prohibition of torture and inhuman treatment.²⁹⁷ Treatment is degrading if it is “such as to arouse in the victims the feelings of fear, anguish and inferiority capable of humiliating and debasing them.”²⁹⁸ The alternative formula defines degrading treatment as the set of action which “humiliates or debases an individual showing a

²⁹² See *T. v. The United Kingdom*, ECHR, 24724/94 (16 Dec. 1999); *M.C. v. Bulgaria*, ECHR, 39272/98 (4 Dec. 2003); *Jalloh v Germany*, ECHR, 54810/00 (11 Jul. 2006). O’Boyle, *supra* n. 3 at 70.

²⁹³ *Kalashnikov v Russia*, ECHR, 47095/99 (15 Jul. 2002) at 95; *Ilascu and others v. Moldova and Russia*, ECHR, 48787/99 (8 Jul. 2004).

²⁹⁴ *Ireland v UK*, ECHR, 5310/71 (18 Jan. 1978) at 162; Droege, *supra* n. 271 at 521; O’Boyle, *supra* n. 269 at 75.

²⁹⁵ *Kudla v Poland*, 30210/96, ECHR (26 Oct. 2000) at 92.

²⁹⁶ O’Boyle, *supra* n. 269 at 90-91. The African Commission adopted the ECHR’s approach. See *Hurilaws v. Nigeria*, AfCHR, Comm. no. 225/98, 14th Activity Report, AHRLR 273 (2000) at 41.

²⁹⁷ E.g. the ECHR draws a distinction between “inhuman” and “degrading” while classifying the treatment or punishment. See *Yankov v. Bulgaria*, ECHR, 39084/97 (11 Dec. 2003); *Bilgin v. Turkey*, ECHR, 23819/94 (16 Nov. 2000).

²⁹⁸ *Kudla v Poland*, ECHR, 30210/96, (26 Oct. 2000) at 92; See John Vorhaus, “On Degradation. Part One: Article 3 of the European. Convention on Human Rights” 31 *Common.L.World.R.* 374 (2002).

lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.”²⁹⁹ In contrast with inhuman treatment, the emphasis is upon humiliation and debasement rather than physical or mental suffering, although clearly the two overlap.

Neither Article 5(2) of the American Convention nor Article 2 of the Inter- American Torture Convention defines cruel, inhuman and degrading treatment and punishment. In *Caesar*, the Inter- American Court cited the ICTY *Celibici* judgment, which defined cruel or inhuman treatment as “an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, that causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.”³⁰⁰ In cases of *Loayza Tamayo v. Peru* and *Caesar v. Trinidad and Tobago* the IAmCHR relied on the ECHR jurisprudence in order to define that the crucial criterion for distinguishing torture from other cruel, inhuman or degrading treatment or punishment is the intensity of the suffering..³⁰¹ Similar definition was developed by African Court of Human Rights, which states that inhuman or degrading treatment includes “actions which cause serious physical or psychological suffering (or) humiliate the individual or force him or her to act against his or her will or conscience.”³⁰²

Although all definitions rely on the abstract minimum level of the severity of suffering, neither of international bodies managed to formulate a method predictably defining minimum threshold of severity. The threshold of suffering is relative and is defined by the number of factors:

²⁹⁹*Pretty v. the The United Kingdom*, ECHR, 2346/02 (29 Apr. 2002) at 52; *Iwanczuk v. Poland*, ECHR, 25196/94 (15 Nov. 2001) at 59.

³⁰⁰*Caesar v. Trinidad and Tobago*, Series C, No. 13, IAmCHR, Judgment (11 Mar. 2005) at 68. Similarly to international human rights bodies ICTY stressed that defining whether concrete conduct results in cruel treatment is a question of fact and should be determined on a case by case basis. *Prosecutor v. Limaj and Others*, IT-03-66-T, ICTY, Judgement, Trial Chamber (30 Nov. 2005) at 232.

³⁰¹*Loayza Tamayo v. Peru*, Ser. C, No. 33, Judgment (17 Sep. 1997), IAmCHR at 57; See also *Caesar v. Trinidad and Tobago*, Series C, No. 13, IACtHR, Judgment (11 Mar. 2005) at 50.

³⁰²*International PEN, Constitutional Rights Project, Interights (on behalf of Ken Saro-Wiwa) v. Nigeria*, AfCHR, Comm. No. 137/94, 139/94, 154/96 and 161/97, 24th Ordinary Session (31 Oct. 1998) at 79.

it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and the method of its execution, its duration, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.³⁰³

The assessment of severity of treatment must be based both on “objective criteria and on criteria that pertain to the circumstances of the particular case.”³⁰⁴ The ECHR case-law stressed on individual experience by stating that for treatment to be qualified as degrading it is sufficient that an individual is humiliated in his/her own eyes.³⁰⁵ However, it is necessary to accommodate a dimension of degradation that is not victim-subjective.³⁰⁶ The definition of mistreatment shows whether it is objectively possible that any person in a situation comparable to the one in question would endure serious mental or physical suffering. In order to identify a state of humiliation and degradation, it is implicit to assess the felt experience, but at the same time, precedence should be given to the question of whether the applicant used “sound reasons” for feeling humiliated or degraded.³⁰⁷ Such approach allows to respond the widespread challenge implying that individuals experience situations in different ways and that it is therefore impossible to label a particular situation as degrading.

In contrast with torture, inhuman or degrading treatment need not be intended to cause suffering and the suffering is not required to be purposefully inflicted to qualify as inhuman.³⁰⁸ In this respect the ECHR emphasized that the crucial distinction between torture and inhuman treatment lies in the degree of suffering caused: clearly less intensive suffering

³⁰³*Ireland v UK*, ECHR, 5310/71 (18 Jan. 1978) at 162; See also *Vuolanne v. Finland*, HRC, CCPR/C/35/D/265/1987, (2 May 1989) at 9.2.; *Kalashnikov v Russia*, ECHR, 47095/99 (15 Jul. 2002) at 93. The IAmCHR found that determination of whether the violation of the physical and psychological integrity of person falls within the category of humiliation or cruel, inhuman or degrading treatment must be separately assessed and proven in each specific situation. *Loayza Tamayo v. Peru*, Series C, No. 33, IAmCHR, Judgment (17 Sep.1997) at 57.

³⁰⁴Droege, *supra* n.271 at 527.

³⁰⁵*Tyrer v. United Kingdom*, ECHR, 5856/72 (25 Apr. 1978) at 32; *Smith and Grady v. the United Kingdom*, ECHR, 33985/96 and 33986/96 (27 Sep. 1999); *D.G v. Ireland*, ECHR, 39474/98 (16 May 2002) at 94, 95.

³⁰⁶Elaine Webster, «Degradation: A Human Rights Law Perspective » in Kaufmann, P.; Kuch, H.; Neuhaeuser, C.; Webster, E. (eds.) «Humiliation, Degradation, Dehumanization: Human Dignity Violated» (Springer , 1st Ed., 2010) 279 at 75.

³⁰⁷Avishai Margalit, «The Decent Society» HUP [1996] 304 at 9.

³⁰⁸*Ireland v UK*, ECHR, 5310/71 (18 Jan. 1978) at 167; *Egmez v. Cyprus*, ECHR, 30873/96 (21 Dec.2000); *T. v. The United Kingdom*, ECHR, 24724/94 (16 Dec. 1999) at 71.

is required than in the case of torture.³⁰⁹ Droege states that lines between degrading treatment, cruel or inhuman treatment are blurred, what results in extreme difficulties distinguish between the thresholds of suffering in practice.³¹⁰ Although, the notions vary with regard to criminal law obligations,³¹¹ this dissimilarity does not influence the substantial proscription preserved in the norm.

In *Ribitsch v Austria* the ECHR stated that “any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity” and constitutes a breach of an absolute prohibition of ill-treatment.³¹² The ECHR on numerous occasions criticized a lack of respect for a person’s physical and mental health, as well as treatment of a person as an object.³¹³ The loss of dignity caused by such debasing attitude generates sufficient suffering or humiliation to engage Article 3 as inhuman and degrading treatment.³¹⁴ In *Selçuk and Asker v Turkey*³¹⁵ the Court found the violation of the prohibition on inhuman treatment when the security forces destroyed the applicant's home and property in a contemptuous manner in their presence, without regard to their safety or welfare and depriving them of their livelihood and shelter, causing them great distress. In case of the human shields involvement, the threshold of harm inflicted upon individual is undoubtedly higher since not only the property of civilian population is endangered, but a person him/herself is subjected to the risk of being killed.

3.2. The Perspective of International Humanitarian Law

Under the regime of IHL, torture, or cruel, inhuman or degrading treatment or punishment

³⁰⁹Even the threat of torture, provided that it is «suffieciently real and immediate,» may generate enough mental suffering to be inhuman treatment. *Campbell and Cosans v. The United Kingdom*, ECHR, 7511/76, 7743/76 (25 Feb. 1982) at 26.

³¹⁰Droege, supra n.271 at 519.

³¹¹ Ibid.

³¹²*Ribitsch v Austria*, ECHR, 18896/91 (4 Dec.1995) at 38.

³¹³See e.g. *Peers v. Greece*, ECHR, 28524/95(19 Apr. 2001); *Valasinas v. Lithuania*, 44558/98, ECHR (24 Jul. 2001); *Tyrer v. United Kingdom*, ECHR, 5856/72 (25 Apr. 1978).

³¹⁴O’Boyle, supra n. 269 at 76.

³¹⁵*Selçuk and Asker v. Turkey*, ECHR, 23184/94, 23185/94 (24 Apr. 1998).

during any armed conflict is likewise prohibited regardless of any state of alleged necessity.³¹⁶ The obligation of a warring party to treat persons in its power humanely “stands at the core of [IHL].”³¹⁷ Pictet notes that the principle of human treatment “is in truth the leitmotiv of the four Geneva Conventions” and the breach of this norm may not be justified by arguments based on military necessity or national security.³¹⁸ The absolute prohibition of torture and other forms of ill-treatment is reflected in the set of norms applicable in international armed conflicts, as well as in non-international armed conflict.

3.2.1. Prohibition of Ill-treatment in International Armed Conflict

The Geneva Conventions are mainly concerned with the traditional subject matter of the laws of armed conflict, namely protection of persons in the hands of the warring party. All four Geneva Conventions outlaw the infliction of the torture and other forms of ill-treatment on protected persons.³¹⁹ The number of acts are specifically defined as “grave breaches” of each of the Conventions, namely Articles 50, 51, 130 and 147 of the four Geneva Conventions proscribing torture, inhuman treatment and “willful causing great suffering or serious injury to body or health.” With regard to grave breaches provisions of Article 130 of Third Geneva Convention and Article 147 of the fourth Geneva Convention the ICRC Commentary explained that inhuman and degrading treatment constitutes “a wider concept than just attack on physical integrity or health,” which is “intimately linked with the general rule that every person must be treated with respect for human dignity.”³²⁰ In addition to these rules there are

³¹⁶*Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America) Merits, ICJ, 1986 I.C.J. 14 (27 June 1986) at 218.

³¹⁷Droege, supra n.271 at 516. See, e.g. Hague Convention 1907, supra n. 222, Art. 4; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 Aug. 1949 [hereinafter GC III], Art. 13; GC IV, supra n. 222, Art. 4, 27.

³¹⁸Jean Pictet (ed.), “The Geneva Conventions of 12 August 1949: Commentary, Vol. IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War” [ICRC, Geneva, 1958] [hereinafter ‘Commentary on GC IV’] at 204.

³¹⁹GC I, supra n. 60, Art. 12; GC II, supra n. 60, Art. 12; GC III, supra n. 309, Art. 17; GC IV, supra n. 222, Art. 32.

³²⁰Commentary on GC IV, supra n. 310 at 625.

two provisions of Geneva Conventions which are directly relevant to the instances of using protected persons to shield military objectives. Article 23(1) of Third Geneva convention prohibits to detain POWs in areas where they may be exposed to the fire of the combat zone or use their presence to immunize concrete locations from military operations. Similarly Article 28 of the Fourth Geneva Convention proscribes the use of the presence of a protected person to render certain areas immune from military operations.

Additional Protocol I extends the protections of the Geneva Conventions to victims of international armed conflict that were not covered by Geneva Conventions (e. g. refugees now benefit from protection of Article 73 of the Protocol I). The ICRC expressed its concern that in time of armed conflict a minimum of protection should be granted to any person who can't claim a particular status (e.g. prisoner of war, civilian internee, wounded, sick or shipwrecked).³²¹ Therefore, persons who are “in the power of a party to the conflict” or are “affected by armed conflict or occupation” are entitled to fundamental guarantees of article 75 of Protocol I, which reflects provisions of general international law.³²² The ICRC Commentary stipulates that provisions of Article 75 (2) of the Protocol I were inspired by the text of common Article 3 as well as by wording of Article 4 (2) of the Protocol II which applies to non-international conflicts. In fact, the Committee III followed the text of that Article 4 of the Protocol II which had already been adopted.³²³

3.2.2. Prohibition of Ill-Treatment in Non-International Armed Conflict

Article 3 common to the Geneva Conventions applies to armed conflicts of non-international character. The persons protected by the Article 3,³²⁴ i. e. anyone in the hands of/under control

³²¹ICRC Commentary on Article 75, Protocol I at 3001 available at < <http://www.icrc.org/ihl>.>

³²²See Nigel S. Rodley, «The prohibition of Torture: Absolute Means Absolute» 34 Denv JIL&P 145, 151(2006); See also *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) at 2797-8; CLS, supra n. 16, Rules 315-319.

³²³ICRC Commentary on Article 75, Protocol I at 3037 available at < <http://www.icrc.org/ihl>.>

³²⁴“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause”. GC III, supra n. 309, Art.3.

of a party to the conflict must “in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.” For this purpose a number of acts against protected persons “are and shall remain prohibited at any time and in any place,” including “violence to life and person, in particular [...] cruel treatment and torture [...] outrages upon personal dignity, in particular humiliating and degrading treatment.”³²⁵ Hence, Common Article 3 prohibits the following forms of ill-treatment: torture, cruel and inhuman treatment, and outrages upon personal dignity. The ICRC Commentary stresses that “no possible loophole is left; there can be no excuse, no attenuating circumstances.”³²⁶ Therefore, common Article 3 embodies the minimum rule of IHL, which must be applied as wide as possible.³²⁷ The parties to the conflict are encouraged to set the higher threshold of protection.

The language of the Article 4 of Additional Protocol II, which was recognized as a customary rule,³²⁸ reiterates the essence of common Article 3 in relation to the ban on inhuman and degrading treatment. The only difference is the notion of “violence to life and person” enshrined in common Article 3 was expanded to “violence to the life, health and physical or mental well-being of persons” in Article 4 of Protocol II. The ICRC Commentary suggests that this expansion allowed to considerably strengthen of the scope of the prohibition since such formulation is “further-reaching in protection than the sole mention of violence to life and person, as contained in Article 3.”³²⁹ Nevertheless both Articles contain non-exhaustive list of prohibited acts aiming to cover all possible situations.

The ICRC Study on Customary IHL lists the fundamental guarantees, which may not be

³²⁵GC IV, supra n. 222, Art.3.

³²⁶Commentary on GC IV, supra n. 310 at 9.

³²⁷Ibid at 36;Droege supra n.271 at 516.ICRC stressess that «[c]are [was] taken to state, in [common] article 3, that the applicable provisions represent a compulsory minimum.» ICRC Commentary on Article 3, Geneva Convention III, available at < <http://www.icrc.org/ihl>.>

³²⁸CLS, supra n. 16, Rule 90; See e.g. UNSC Res 674 (29 Oct. 1990); UNSC Res 1072 (30 Aug. 1996); UNGA Res. 2547 (XXIV) (15 Dec. 1969), UNGA Res 3318 (XXIX) (14 Dec. 1974), UNGA Res 53/164 (25 Feb. 1999).

³²⁹ICRC Commentary on Article 4, Ptotocol II at 4531. available at < <http://www.icrc.org/ihl>.>.

ceased in both international and non-international armed conflicts. Rule 87 requires that civilians and persons *hors de combat* must be treated humanely. The study does not spell out the meaning of an overarching concept of “humane treatment,” but relies on human rights instruments and jurisprudence of international military tribunals which link this notion to respect for the “dignity” of a person or the prohibition of “ill-treatment.” Rule 90 expressly forbids torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment. Alongside with above-mentioned fundamental guarantees ICRC study includes the prohibition on the use of human shields embodied in the Rule 97. Although it admits, that IHL applicable in non-international conflict does not entail the express prohibition, the ban is based on the customary principles of distinction and precaution, as well as similar norm prohibiting hostage-taking proscribed by Article 4(2)(c) of the Protocol II.

Similarly, the San Remo Manual on the Law of Non-International Armed Conflict prescribes “[t]he use of civilians (as well as captured enemy personnel) to shield a military objective or operation” and “to use them to obstruct an adversary’s operations” is forbidden.³³⁰ Although, military manuals typically include such a ban,³³¹ they must be carefully employed in categorizing customary rules since “it is often unclear whether a manual provision reflects customary law or only a requirement of a convention to which the State is a Party.”³³² A

³³⁰M.N. Schmitt, C.H.B. Garraway & Y. Dinstein, «The Manual on the Law of Non-International Armed Conflict with Commentary (International Institute of Humanitarian Law, 2006)» 36 Israel Y.B. Hum. Rts. (2006) (Special Supp.) at 2.3.8.

³³¹E.g. two recently promulgated paradigmatic manuals: “[d]eliberate use of civilians to shield military objectives from enemy attack is prohibited” US Navy/US Marine Corps/US Coast Guard, The Commander’s Handbook on the Law of Naval Operations (NWP 1-14M/MCWP 5-12.1/COMDTPUB P5600.7A) (2007) at 8.3.2.; its British counterpart replicates the Article 51(7) of Additional Protocol I and extends the norm into non-international armed conflict. U.K. Ministry of Defence, The Manual of the Law of Armed Conflict (2004) at 5.22, 15.24

³³²Schmitt, *supra* n. 2 at 31.

variety of other sources also identify the norm as the one accorded customary status.³³³

3.3. Relationship Between IHL and IHRL

While there are a number of differences between IHRL and IHL, the notions of ill-treatment are interpreted in a similar way in both bodies of law.³³⁴ Under IHRL, the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment is formulated in absolute terms and must be respected in all situations, including an armed conflict. Similarly common Article 3 of the Geneva Conventions contains the list of rights which are to be protected in all circumstances, including those covered by non-derogable human rights. The common Article 3 rules were supplemented and reinforced by new provisions inspired by the Geneva Conventions and the ICCPR.³³⁵ Hence, the notions of ill-treatment in this norm are drawn on IHRL treaties, soft law instruments and jurisprudence.

Therefore, obligation of States to respect non-derogable rights in all circumstances turns IHRL in an inevitable part of rules on armed conflicts.³³⁶ The draft of the “Turku Declaration” called for the “legal gray zones” (the overlapping areas of the law of peace and the law of war) to be filled by the cumulative application of IHRL and IHL so that minimum humanitarian standards are guaranteed.³³⁷ Indeed, in order to protect human dignity the IHL prohibition against inhuman and degrading treatment echoes the human rights ban on

³³³Rome statute, supra n. 57, Art. 8(2)(b)(xxiii); SC Res 687, UN Doc. S/RES/687 (3 Apr. 1991); UN CHR, Res. 1992/71, UN Doc. E/CN.4/RES/1992/71 (5 Mar. 1992); UNCHR, Res. 1995/89, UN Doc. E/CN.4/RES/1995/89 (8 Mar. 1995). Shielding constitutes an offence before the Guantanamo Military Commissions. Military Commissions Act of 2006, Pub. L. No. 109-366, 10 U.S.C. 950V(9) & (10) (17 Oct. 2006). In 1991 the General Assembly named Iraq’s resort to shielding «a most grave and blatant violation of international law.» UN GA Res 134, UN Doc. A/RES/46/134 (17 Dec. 1991). Security Council condemned “use by the Taliban and other extremist groups of civilians as human shields”. UN SC Res. 1776, U.N. Doc. S/RES/1776 (19 Sep. 2007).

³³⁴*Prosecutor v. Furundzija*, supra n. 264 at 159; see Droege, supra n. 271 at 517.

³³⁵ICRC Commentary on Article 4, Protocol II at 4515. available at < <http://www.icrc.org/ihl>.>

³³⁶Vincent Chetail «The Contribution of the International Court of Justice to International Humanitarian Law 85 RIRC 850 (2003) 235-268.

³³⁷UNCHR, Minimum humanitarian standards. UN Doc. E/CN.4/RES/1995/29 (3 Mar. 1995). See Hans Heintze «On a Relationship between Human Rights Law Protection and International Humanitarian Law» 86 RIRC 856 (2004).

degrading treatment as “perhaps the lowest level of [dignity] violation possible.”³³⁸

The ICTY in *Delalić* and *Furundžija* considered the definition contained in Article 1 of the CAT to be part of customary international law applicable in armed conflict.³³⁹ Therefore, some authors argue that there is no substantial difference in terms of standard of treatment set out by a norm of absolute character.³⁴⁰ Though, in *Kunarac* case the Tribunal draw the distinction between the definition of torture under IHL and the definition of torture generally applied under IHRL. In particular, it was held that IHL definition does not comprise the same elements as analogous one in IHRL, since “the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offense to be regarded as torture under international humanitarian law”.³⁴¹ Therefore, under IHL non-state parties to the conflict may be held responsible for torture and other forms of ill-treatment committed in armed conflict, regardless of whether they are conducted with the consent of the state. Though, in terms of treatment required IHL does not suggest any special test for the substantial aspect of the norm.

As a matter of a substantial prohibition on ill-treatment, it is impossible that the breach of IHL norm would not result in infringement of the analogous IHRL rule. At the same time IHRL covers the broader range of situations which may potentially amount in breach of the prohibition against torture, inhuman and degrading treatment. Thus, even if the use of human shields is not covered by relevant provisions of IHL, it still constitutes a breach under rules of IHRL. The example of such situation is the shocking practice of Belarus traffic police, which used slamming civilian vehicles with passengers to create a human shield aiming to stop the

³³⁸Raymond Toney and Shazia Anwar, «International Human Rights Law and Military Personnel: A Look Behind the Barrack Walls» 14 AUILR 519 (1998) at 534 citing *EgoDemocratic People's Republic of Koreacheaga v. Peru*, IAmCHR, Case no. 10.970, 157, 185 Report No. 5. (1996).

³³⁹*Prosecutor v. Zejnil Delalić et al. case*, IT-96-21-T, Judgement, trial Chamber (16 Nov. 1998) at 459; *Prosecutor v. Furundžija*, IT-95-17/1, ICTY, Judgement, Trial Chamber (10 Dec.1998) at 143-146.

³⁴⁰Droege, supra n.271 at 518. But see Robert Verkaik, “Human rights in Iraq: a case to answer” Independent (29 May 2007) available at <<http://news.independent.co.uk>>.

³⁴¹*Prosecutor v Kunarac et al.* IT-96-23 & 23/1, ICTY, Judgement , Trial Chamber (22 Feb. 2001) at 495.

drunk driver.³⁴² Recently the three main North Korean state newspapers called on “the whole Party, the entire army and all the people” to “become human bulwarks and human shields in defending Kim Jong-Un unto death.”³⁴³ If this conscription is realized, the shielding may take any form, which is likely to fall out from the classical instances of using human shields partially covered by IHL. Therefore, it is necessary to set a clear standard of protection from all the forms of ill-treatment, including the use of innocent population as shields, under IHRL that would simultaneously underpin the relevant analogous standards under IHL.

³⁴² «Human shields in Belarus» (13Apr. 2010) available at <<http://rfkcenter.org/multimedia/human-rights/human-shields-in-belarus>>.

³⁴³ See e.g. «North Korea calls for 'human shields' to protect new leader» (1 Jan. 2012) available at <<http://www.reuters.com>>.

Chapter 4. APPLICATION TO HUMAN SHIELDS

IHRL does not expressly prohibit the use of human shields and there is no uniform approach to the question of how the prohibition of human shields must be classified. For this reason international bodies tend to shift the focus of decision on the use of human shields to the spheres of law, which are more even and well-established. For instance, in *Demiray v. Turkey* the ECHR addressed the use of human shield during the conflict between the Turkish state and the Kurdistan Workers' Party (PKK), but reviewed the complaint only in light of Article 2 of the Convention. Nevertheless, in the decision the Court emphasized relevance of the prohibition of ill-treatment to the case.³⁴⁴ Most likely that in the case of *Tagaeva v Russia*³⁴⁵ addressing Beslan school siege, when children were used by Chechen terrorists to defend from ongoing firearm attack, the Court would similarly shift the focus of the review under Article 2.

In parallel, IHL also shows no consistency in establishing the clear prohibition against use of human shields. In the context international armed conflict the problem is mentioned in several provisions of the Geneva Conventions³⁴⁶ while there is no express prohibition on the use of human shields in the treaties applicable in internal conflicts.³⁴⁷ Furthermore, a number of foremost “war-fighting” States, including USA and Israel, are non-parties to Additional Protocols I and II, what precludes the application of any treaty-based human shields prohibition. This must be taken into account together with the fact that the strongest criticism of IHL violations was previously directed at the attacking parties, rather than parties who

³⁴⁴ *Demiray v. Turkey*, ECHR 27308/95 (21 Nov.2000) at 40.

³⁴⁵ *Tagaeva and Others v. Russia* and 6 other applications, 26562/07, ECHR, Communication to the parties.

³⁴⁶ Protocol I, supra n. 50, Art. 51(7); GC III, supra n. 309, Art. 23(1); GC IV, supra n. 222, Art. 28.

³⁴⁷ A rule on human shields was proposed for inclusion in Protocol II, but did not survive the Diplomatic Conference on the Reaffirmation and Develop of International Humanitarian Law Applicable in Armed Conflict (1974-77).

used civilians in order to shield themselves.³⁴⁸ The disregard for the duties of the party using shields renders the ban on this practice merely theoretical.³⁴⁹

Since there is lack of treaty-based provisions binding upon States and clearly proscribing the practice of human shielding, it is necessary to set the clear threshold of positive and negative obligations resting upon party benefiting from the presence of human shields. This framework should be based on the well-established prohibition against inhuman and degrading treatment developed under IHRL and supplemented by relevant principles of IHL reflecting the realities of modern conflict and emergency situations.

4.1. Negative Obligation to Abstain From the Use of Shields

The illegality of shielding party's use of involuntary human shields and obligation of States to abstain from the use of practice is not commonly questioned. The practice is outlawed in military manuals and the domestic law of certain states coupled with the absence of any contrary practice.³⁵⁰ The ICTY addressed human shielding on several occasions, although the technique was subjected to review in the context of other war crimes. According to ICTY ruling in *Blaskic*, the use of local residents as shields for a military headquarters amounted to inhuman and cruel treatment,³⁵¹ which constitutes a “grave breach” of the Geneva Conventions and a war crime in violation of Common Article 3(1)(a). In *Aleksovski* case the

³⁴⁸See e.g. «the [UN] has never once condemned the real violation of international law by Palestinian Authority—namely, putting civilians, deliberately, or directly, in harms way - using the civilian population as human shields» Ann Bayefsky, «The United Nations Agenda and Israel, the Fourth Annual Conference: the Balance of Israel's National Security: Setting National Priorities» (16-18 Dec. 2003) available at <<http://www.herzliyaconference.org/Uploads/1171bayefskyreport.pdf>>. See also HRW, «Fatal strikes: Israel's Indiscriminate Attacks in Lebanon» (2006), available at <<http://www.hrw.org/reports/2006/lebanon0806>>; Felice D. Gaer, «Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System» 7 HRLR 109, 135-36 (2007); Gerald M. Steinberg, Sarah Mandel, «Watching the Watchers» 43 Just. (Fall 2006) at 24-25. See also Douglas H. Fischer, «Human Shields, Homicides, and House Fires: How a Domestic Law Analogy Can Guide International Law Regarding Human Shield Tactics in Armed Conflict» 57 ALR 479, 521 (2007) at 488.

³⁴⁹Rubinstein and Roznai, *supra* n. 103 at 107.

³⁵⁰The ICRC Customary Study on IHL provides the examples of military manuals of states which adopted the ban on human shields, namely Australia, Azerbaijan, Bangladesh, Belarus, Canada, Democratic Republic of the Congo, Germany, Georgia, Ireland, Lithuania, Mali, Netherlands, New Zealand, Norway, Peru, Poland, Tajikistan, United Kingdom and Yemen. See also Bouchié de Belle, *supra* n. 199 at 887.

³⁵¹The Tribunal stated that the status of shield was irrelevant to the question of whether the crime was committed. *Prosecutor v. Tihomir Blaskic*, IT-95-1 4-T, ICTY, Judgement, Trial Chamber (3 Mar. 2000) at 716, 750. See also *Prosecutor v. Dario Kordic, Mario Cerkez*, IT- 95-14/2, ICTY, Judgement, Trial Chamber (3 Mar. 2000) at 256.

technique was interpreted as an outrage on personal dignity in breach of Common Article 3(1)(c).³⁵² More recent example are the cases of Karadzic and Mladic, where applicants were charged with “grave breach” of IHL by inhuman and cruel treatment for holding UN peacekeepers against their will at prospective NATO air targets in order to defend the area from further air-strikes.³⁵³

Such variety of approaches in treating shielding on the one hand endorses the flexibility required in complex circumstantial situations, but on the other hand leads to the inconsistency in qualification of this offense under provisions of IHL. Nevertheless, the Tribunal's case-law clearly demonstrates that the use of civilian population as human shields exposes the victims to severe mental and physical suffering sufficient to amount in inhuman and degrading treatment. The practice of shielding reaches the sufficient level of severity and debasement to be considered the grave breach of IHL and fall under the scope of the absolute prohibition against inhuman and degrading treatment. While even in the state of armed conflict which establishes the “lowest level of [dignity] violation possible”³⁵⁴ the practice was recognized unlawful, in the peace time the analogous use of innocent people in order to shield from the potential attack must be undoubtedly outlawed.

The use of unprotected person in cases other than classic shielding constitutes a normatively more unsettled situation. The recent example demonstrating such dilemma can be found in 2005 Israeli Supreme Court decision on the tactic known as “early warning,” which was used by Israeli forces in Adalah.³⁵⁵

The “early warning” technique is military practice used in order to capture wanted person,

³⁵² *Prosecutor v Zlatko Aleksovki*, IT-95-14/1-T, ICTY, Judgement, Trial Chamber (25 Jun. 1999) at 229.

³⁵³ *Prosecutor v. Radovan Karadžić and Ratko Mladić*, IT-95-5-I, ICTY, First Initial Indictment (July 1995) at 47.

³⁵⁴ Raymond Toney & Shazia Anwar, «International Human Rights Law and Military Personnel: A Look Behind the Barrack Walls" 14 AUJLR 519 (1998) at 534 citing *Egocheaga v. Peru*, IAmCHR, Case no. 10.970, 157, 185 Report No. 5. (1996).

³⁵⁵ *Adalah (Legal Center for Arab Minority Rights in Israel) et al. v. Commander of the Central Region (Early Warning)*, 3799/02, H.C.I. (23 Jun.2005) [hereinafter: Early Warning Case] reprinted in 45 I.L.M. 491,491 (2006).

which allows militia to be assisted by local population in order to give a warning to the individuals occupying the house.³⁵⁶ The technique gives a chance for them to surrender without shedding blood, and enables civilians to leave the building before it would be necessary to use force. The intervention into the premises is employed only when all non-violent alternatives proved to be inefficient.³⁵⁷ The *Adalah* case involved a challenge to the legality of IDF guidelines, an operational directive that allowed military units to implement the practice. The guidelines also proscribed the coercion of civilian population in order to assist IDF or their utilization in circumstances that are likely to endanger their lives. The petitioners, however, argued that IDF forced Palestinian residents to scan the buildings alleged to be mined, to enter certain areas before combat forces and to serve as a shield against attack (e. g. in order to prevent gunfire local residents were located on porches of houses).³⁵⁸

All three judges on the bench unanimously condemned the practice and declared the guidelines to be incompatible with basic IHL principles, in particular principle of distinction and the non-renounceable nature of the rights afforded to protected persons. In its judgment the Court stipulated that the use of person as a human shield violated “his dignity as a human being” and constituted a “cruel and barbaric act.”³⁵⁹

In its decision the Court relied on Article 28 of the Fourth Geneva Convention and Article 51(7) of Additional Protocol I.³⁶⁰ Though the Court stressed on the general prohibition of forcing civilians to engage in military operations, the technique was found unlawful since the residents were involved to operation without consent. The ICRC commentary to Article 28

³⁵⁶Military Order (26 Nov. 2002) (B’Tselem trans.) available at www.btselem.org/english/legal_documents/advanced_warning_procedure.doc

³⁵⁷See R. Otto, «Neighbours as Human Shields? The Israel Defense Forces’ ‘Early Warning Procedure’ and International Humanitarian Law» 86 IRRC 771 (2004).

³⁵⁸Early Warning Case, supra n. 347 at 1.

³⁵⁹Ibid at 21.

³⁶⁰Ibid at 12.

addresses the use of shields in order to screen troops,³⁶¹ being silent about restrictions on positioning of military objects. However, “early warning” practice was involved for protection of individual soldiers in specific operations, which differ from classic military operations, e. g. booby-trapping. Though it was acknowledged that the practice may obviate the use of force, the Court found it illegal since individuals used as “shields” were forced “to walk through and scan buildings suspected to be booby-trapped, to enter certain areas before the combat forces and [...] to serve as a shield against attack [and] to prevent gunfire upon the houses.”³⁶²

While the instances of the coercion of civilians were not questioned to fall under the ban, the technique of using consenting civilians to deliver warning was more complex to solve. The Court dealt with this issue on the basis of Article 8 of the Fourth Geneva Convention, taken together with abovementioned rules and the general principle of distinction. The Court warned that the occupying power’s dominant position gives the reason to doubt the free nature of given consent. In addition, that it is practically impossible to assess the risk posed to residents communication warnings in advance, including the potential revenge for individuals collaborating with occupying forces.³⁶³ However, the Court neglected the developing concept of direct participation in hostilities, which deprives a person of the benefits of civilian protection.³⁶⁴ Hence, this solution was primarily linked to the conditions of military occupation.

Interestingly, Justice Beinisch in a concurring opinion added the following observation:

As it turns out, there are deviations from the procedure in the field; nor does the use made of local residents for "early warning" remain within the restrictions set out in the procedure [...] The conditions set out in the procedure, aside from being faulty in and of themselves, allow a slide down the slippery slope, which causes stark violations of the rules of international law, and of the constitutional principles of our legal system. The army must do all in its power to prevent the possibility that a detailed and official

³⁶¹Commentary on GC IV, supra n. 310 at 208.

³⁶²Early Warning Case, supra n. 347 at 23, 25.

³⁶³Ibid at para. 24.

³⁶⁴Schmitt, supra n 2 at 39.

procedure will create gaps which will lead to a deterioration of the operations in the field to unequivocal situations of illegality. The procedure contains such a gap, and thus must be annulled.³⁶⁵

In other words, the Court stressed upon institutional reasons while arguing in favor of absolute prohibition, being concerned that the flexible elements introduced by the guidelines can be abused by military personnel. Moreover, support for such institutional considerations was also expressed by the High Court of Israel with relation to the prohibition against torture.³⁶⁶ Despite the fact that determination of the action's legal character was contingent on the nature of civilian's assistance, *Adalah's* case made the necessary emphasis on the absolute nature of the prohibition on use of human shields.

The aforementioned examples of state practice and jurisprudence prove that the use of shielding practice constitutes a form of infliction of inhuman and degrading treatment upon victims used as shields. Hence, the prohibition of using shields remains absolute and no justifications for the implementation of this technique may be invoked under both IHRL and IHL. Consequently, States are obliged to abstain from the use this practice whatever form or variation it takes.

4.2. Positive Obligations of the Party to Prevent the Use of Shields

In addition to negative obligation to abstain from the use of human shields, IHRL norms are interpreted to contain positive obligation to take appropriate steps to protect individuals from this form of ill-treatment. This obligation has an investigative and a preventative dimensions.³⁶⁷ The latter imposes a procedural obligation to investigate and provide effective

³⁶⁵Early Warning Case, supra n. 347 at 6. Concurring opinion of judge Beinisch.

³⁶⁶The 1987 Landau Commission criteria for permitting the use of "moderate measure of physical pressure" by the General Security Service in exceptional "ticking time bomb" circumstances had been commonly abused while routinely applied to Palestinian terror suspects. The understanding of that the relative legal regime sanctioned by the Landau Commission considerably eroded the prohibition against torture in GSS interrogations and led the Supreme Court of Israel to emphasize in its 1999 Public Committee Against Torture decision the absolute nature of the prohibition against torture.

³⁶⁷O'Boyle, supra n. 269 at 107.

remedy in response to the alleged infringement of the prohibition against ill-treatment.³⁶⁸ The preventive element³⁶⁹ of the obligation to protect individual from being used as human shield requires State to take all necessary steps to avoid the infliction of this form of ill-treatment on him/her. In this vein the party is obliged to comply with the customary requirement of precaution.³⁷⁰ The scope of the preventive aspect of the positive obligation resting upon the party in is subject to the scholarly discussion.

In Schmitt's opinion the key for interpretation of shielding party's obligations lies in the actor's *mens rea*.³⁷¹ Schmitt reviews obligations of the party using shields in the light of the two provisions of IHL, namely Article 51 (7) and Article 58 of Protocol I. He argues that it doesn't matter whether the use of civilians to shield is passive (their presence is beneficial to a party to the conflict) or active (e. g. they are directed to the locality they will defend) as provisions of Article 51(7) addresses both situations.³⁷²

The peculiarities of the practice of human shielding create the situations, when the compliance with positive obligation to undertake precautionary measures brings a risk that civilian population is endangered. Schmitt argues that the collocation of armed forces with civilian population must not be rendered unlawful, if such retreat is unavoidable.³⁷³ For example, the evacuation of the civilians from the combat area in the cases when “the security of the population or imperative military reasons so demand”³⁷⁴ is likely involve the presence of military forces. Though, the purposeful intermingling troops with civilian population in

³⁶⁸ *Ilhan v. Turkey*, ECHR 22277/93 (27 June 2000) at 90; see also *Macovei and others v. Romania*, ECHR 5048/02 (21 June 2007); *Boichenko v Moldova*, ECHR 41088/05 (11 July 2006).

³⁶⁹ *Costello-Roberts v. The United Kingdom*, ECHR 13134/87 (25 March 1993); *Mahmut Kaya v. Turkey*, ECHR 22535/93 (28 March 2000) at 115.

³⁷⁰ See Part I. Subchapter 1.2.3.

³⁷¹ Schmitt, *supra* n. 2 at 25-31.

³⁷² *Ibid.*

³⁷³ As a classic example Schmitt refers to “military retreat down a road along which civilians are fleeing.” Another example is practice used by Yugoslav authorities, when troops accompanied convoys of internally displaced persons with military material and personnel. OSCE, «Kosovo/Kosova: As Seen, As Told: An Analysis of the Human Rights Findings of the Kosovo Verification Mission: Oct. 1998 to June 1999 (1999).

³⁷⁴ GC IV, *supra* n. 222, Art. 49.

order to stave the attack should be considered unlawful.³⁷⁵ Hence, the lawfulness of the action should be determined by the subjective intent of the military commander. For instance, in Operation Iraqi Freedom Iraqi fighters repeatedly intermingled with civilian vehicles if they detected American helicopters nearby,³⁷⁶ what demonstrates consistency and intent to invoke the technique for defensive purposes. Similarly, the presence of the military forces in the close proximity to civilian population during evacuation should not be seen unlawful, unless the occupation forces “intentionally took advantage of the population’s evacuation to shield their own movements or to attack the enemy”.³⁷⁷ Though, the requirement of specific intent is codified in the Rome statute as an element of the war crime,³⁷⁸ even the scholars supporting the implementation of this element admit, that intent can prove difficult to identify in practice.³⁷⁹

In the cases when the effective control is established over certain territory, Article 58 of Protocol I complements the shielding ban by establishment of a positive obligation on belligerent parties to “endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives,” to avoid “locating military objectives within or near densely populated areas,” and to take other necessary precautions to ensure civilian's safety.³⁸⁰ Interestingly, the breach of the ban on shielding amounts to a war crime, in the same time non-compliance with obligations under

³⁷⁵Commentary to Additional Protocols, supra n. 51 at 1988.

³⁷⁶Human Rights Watch, «Off Target: The Conduct of the War and Civilian Casualties in Iraq» 67 (2003) at 67.

³⁷⁷Schmitt, supra n. 2 at 27

³⁷⁸“The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations”. ICC, Elements of Crimes, Art. 8(2)(b)(xxiii), UN Doc. PCNICC/2000/1/Add.2 (2000).

³⁷⁹Schmitt, supra n. 2 at 27; Quéguiner, supra n. 147 at 816.

³⁸⁰ The ICRC Study on Customary IHL states that Article 58 is a restatement of customary law applicable in international armed conflict, while in non-international armed conflict the rules are “arguably” customary. Though, in *Kupreskic*, the ICTY stated that the Article 58 provisions are “now part of customary international law, not only because they specify and flesh out general preexisting norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol”. *Prosecutor v. Kupreskic*, IT-95-16-T, ICTY, *Judgment*, Trial Chamber (2000) at 524. See also Gary D. Solis «The Law of Armed Conflict: International Humanitarian Law in War» CUP [2010] at 296.

Article 58 is not.³⁸¹ Despite the complementary nature of the Article 58, it imposes a standard dissimilar to the one enshrined in Article 51(7): violation of this provision does not require specific intent and merely entails nonexempt failure to enforce. Hence, the norm is breached when the party failed to transfer civilians from military objectives or made no attempt to abstain from placing them near civilian population if it was feasible. This may be explained by the following logic: even if intent is necessary to establish the breach of the ban on shield's involvement, it is irrelevant for assessment of the obligation to take precautions against placing military objectives in densely populated areas.³⁸²

While assessing the situation purely from human rights perspective, the requirement of intent for the shielding party loses its weight since provisions of Article 51(7) and Article 58 of Protocol I are, in fact, reflective of negative and positive obligations of state under the IHRL prohibition against inhuman and degrading treatment. Thus, even if defending party fulfills the negative obligation to abstain from the use of civilian population to shield from the attack embodied in Article 51(7), the non-reaction to voluntary shield would amount to violation of a the positive obligation under Article 58. In order to establish the breach of the prohibition against ill- treatment it is necessary to accord both obligations with the same weight and importance.

Rubinstein and Roznai suggest another approach in interpretation of shielding party's obligations. They suggest that the responsibility for the use of shields in defensive operations rests upon both parties (not only the impeded one) and depends on whether shielding is forced upon civilians or is conducted in their own volition.³⁸³ According to this interpretation, practices involving the use of involuntary shields, including the use of hostages to defend

³⁸¹ Rome Statute, supra n. 57, Art. 8(2)(b)(xxiii).

³⁸² This argument as invoked by Rubinstein and Roznai in their critique of Goldstone's report, while arguing that criminal intent of shielding the combatants by Hamas fighting from within urban areas from counter-attacks by IDF forces is irrelevant for the purposes of Article 58 and its application. See Rubinstein and Roznai, supra n. 112 at 106.

³⁸³ Rubinstein and Roznai, supra n. 112 at 110.

from the attack, are unquestionably unlawful. An example of such practice is the technique used by the Free Syrian Army during the battle of Aleppo, when rebel forces attempted to defend themselves from the intensive shelling and aerial attacks in civilian dwellings, which were seized for that purpose.³⁸⁴

The cases involving “voluntary shielding” appear to be more complex in this respect. The ICRC notes that it is “unlikely that [the shielding] norm was originally devised to cover an event where individuals acted knowingly and on their own initiative,”³⁸⁵ but IHL and IHRL must remain responsive to the nature of modern warfare. The problem of the definition of voluntary shields was previously discussed in Part I Subchapter 2.1 of this paper. Though, it is necessary to address this issue in the light of shielding party's obligations.

Schmitt argues that the mere presence of local population does not automatically makes them voluntary shields since their choice to stay in the area regardless of an occasion to leave may be explained by the various reasons: e. g. escape from the area may be risky or they may leave to safeguard their property and possessions.³⁸⁶ For this reason, in Schmitt's opinion, these individuals may qualify as voluntary shields only if the primary rationale for their presence is the desire to complicate the adversary's actions. This argument is sound and reasonable, but in order to assess the obligations of parties to the conflict correctly, the stress should be made not on the subjective intent of civilians remaining in the zone, but the objective factual outcome.

If the attacker complied with the obligation to undertake all feasible precautions before the attack, civilian population electing to stay within the combat zone knowingly endanger themselves and the attacking forces: their presence creates legal and physical obstruction for

³⁸⁴«Syria: Aleppo Civilians at Great Risk» (10 Aug. 2012) available at <<http://www.hrw.org/news/2012/08/10/syria-aleppo-civilians-great-risk>>

³⁸⁵ICRC/International Institute of Humanitarian Law, 30th San Remo Round Table on Current Issues of International Humanitarian Law, The Conduct of Hostilities, Background Document (Aug. 2007) at 9.

³⁸⁶Schmitt, *supra* n. 2 at 317.

the military action. Regardless of the rationale behind their choice, they should be qualified as voluntary human shields. Nevertheless, if such voluntary shields preclude the attacker from military response to ongoing attack of the shielding party, their status amounts to direct participation in hostilities.³⁸⁷ Being a direct participant through the active contribution in hostile action, such voluntary shields knowingly subject themselves to all possible risks posed by the warfare as any other combatant engaged in hostilities.³⁸⁸ Schmitt correctly notes that “no prohibition exists in international humanitarian law barring a party from using directly participating civilians.”³⁸⁹ Thus, the cease of protection for these individuals is linked not to the mere presence on certain territory in the proximity of military objectives, but conscious creation of physical obstruction immunizing one party of the conflict from the real and imminent danger. This exception is the only instance where the use of people (possessing the status of direct participants in hostilities) as shields may not be qualified as inhumane and degrading treatment. Though, such exception may not be interpreted as to release defending party from the obligation to undertake all feasible precautions before the commission of military action as prescribed by norms of customary international law³⁹⁰ i. a. reflected in Article 58 AP I.

Article 58(a) requires that belligerents “to remove the civilian population, individual civilians and civilian objects [...] from the vicinity of military objectives.” The party to the conflict must also take into account “imperative military reasons, proper accommodation to receive the persons concerned, satisfactory conditions of transfer (hygiene, health, safety, nutrition,

³⁸⁷Protocol I, supra n. 50, Article 51(3). The norm was accorded a customary nature and envisages the removal of the protection accorded to civilian population for individuals falling under the definition of direct participation in hostilities.

³⁸⁸See Boushie de Belle drawing the line between the inherent risk run by voluntary shield and heightened risk run by voluntary shield acting as direct participant. Bouchié de Belle, supra n. 199 at 896-897.

³⁸⁹Schmitt, supra n. 2 at 321.

³⁹⁰See Part I Subchapter 1.2.3.

members of the same family not separated, the Protecting Power be kept informed).”³⁹¹

Article 58(b) requires that the warring parties “avoid locating military objectives within or near densely populated areas.” Notably, in respect of fixed military objective this obligation rests upon parties regardless of whether the actions take place at the time of peace or war. In respect of portable military objects, e. g. troops or weaponry supplies, the rule demands that military units should avoid coming near densely populated areas. If such trespass is unavoidable “they must pass through the populated area as swiftly as possible and deploy in such a manner as to create the least possible risk to the civilian population and civilian objects.”³⁹² In the cases of siege warfare this requirements becomes one of the most problematic since this rule sometimes makes it practically impossible for warring party to find any alternative to defend itself.

Article 58(c) contains the open clause, which prescribes that the party to the conflict must “take the other necessary precautions to protect the civilian population”. State practice and scholarly writings suggest various examples of additional precautionary measures: construction of shelters, the establishment of civil defense organizations, the installation of systems to alert and evacuate the civilian population, creation of programs providing assistance to the wounded, fire-fighting, decontamination.³⁹³ Though, some precautionary measures are seen redundant in the circumstances of the modern warfare. For instance, the requirement to place markings on buildings subject to special protection has proved itself to be insufficient with regard to increase in civilian loss especially in aerial situations.³⁹⁴ In general, the customary obligations of party to undertake precautionary measures against the effects of attacks do not in principle substantially vary from the respective attacker's

³⁹¹This provision of Article 58 of Additional Protocol I is the express reference to the A 49 of GC IV. ICRC Commentary on Article 58, Ptotocol I at 2248 available at < <http://www.icrc.org/ihl>>.

³⁹²Quéguiner, *supra* n. 147 at 818.

³⁹³*Ibid.*

³⁹⁴*Ibid* at 817.

obligations.

Under condition the actor complied with his positive obligation to undertake all necessary and feasible precautionary measures before the attack, the civilian population voluntarily remaining in the combat zone and obstructing ongoing military action may not be considered as subjected to inhuman and degrading treatment. Firstly, defender's willingness to undertake necessary precautionary measures testifies the good faith and respect to the civilian population posed under the risk. Secondly, in such case the ill- treatment would not be inflicted on the civilian population by any party of the conflict since civilians by themselves choose to subject themselves to the risk.³⁹⁵ The treatment may not be seen as degrading since individual continuously, willingly and fully aware of the risks chooses to subject itself to the risk of being killed. Thus, the dignity of the voluntary shield reaching the status of direct participant in hostilities is not ceased, but is accorded the same standard of protection as dignity of any other combatant.

Consequently, the use of human shields is a form of inhuman and degrading treatment which is absolutely prohibited under both IHRL and IHL. The State's compliance with this ban depends on fulfillment of the negative and positive obligations. Therefore, the State is required to comply with negative obligation to abstain from use of this practice, but also positive obligation to undertake all necessary steps to avoid the infliction of this form of ill-treatment on individuals. The preventive aspect of the positive obligation should be interpreted in the light of customary IHL rules requiring party to undertake all feasible precautions. Compliance with preventative positive obligation allows defender to spare between involuntary, voluntary shields and civilians acting as direct participants in hostilities and makes the compliance with negative obligation practically possible.

³⁹⁵The authors also show some skepticism on the question whether human dignity should be seen as an "objective value," at least from a legal theory perspective, since there is no indignity in consenting to be "humiliated." Therefore, in cases of voluntary shielding one would agree to being degraded by others precisely because one did not feel humiliated by the experience. Tatjana Hörnle & Mordechai Kremnitzer, «Human Dignity as a Protected Interest in Criminal Law» 44 *Isr.L.R.* 143 (2011) at 146-47.

CONCLUSION

The addition of a customary IHL principles to the existing IHRL framework governing the use of lethal force in a law enforcement context renders a modified framework designed to consider the human shields dilemma, which is effective and in line with the rule of law, as well as realities of modern warfare and the dynamics of the decision-making in emergency situations. Since the factual mode of shielding is complex, such framework necessitates the review of obligations of impeded party and shielding party in the separate but not isolated evaluation.

The attacker's position within the human shielding mode raises the question of the legality of attack against the legitimate target defended by shield. International human rights conventions, with the exception of the ECHR, make no explicit provision for the taking of human life in combat or for acceptable levels of collateral damage. Since IHRL does not expressly outlaw the attacks on human shields, the legality of such attack should be assessed under generally applicable prohibition on arbitrary deprivation of life. Due to the peculiarities of the tactic of shielding and the typical context of its occurrence, the test of the arbitrariness of attacker's actions is contingent upon the customary IHL principles. Irrespective of the type of emergency situation or the conflict in question, the lawfulness of direct strike against targeted person is governed by customary requirements of distinction, proportionality and precaution.

The principle of distinction requires to define whether the person in question is a peaceful civilian or civilian engaged in and actively supporting hostile action, who may be qualified as directly participating in hostilities. In the latter case such person would constitute a legitimate military target and may be attacked for as long as he/she participates in the act posing an immediate threat to the adversary. In cases of human shields involvement it is practically

impossible to construct the definition of direct participation in such a way that it would not reward the party which benefits from the presence of human shields. Nevertheless, the category of direct participation should be interpreted to include not only offensive acts, but also defensive ones if they contribute to the party's military capacity.

Disarmed civilians who willingly locate themselves in the vicinity of a military objective which pose an imminent and real danger to the adversary with the intent to prevent it from being attacked are thereby intentionally engaging in defensive act. Thus, they are directly causing harm to the attacker and should qualify as direct participants in hostilities. However, this status should not be accorded in case if civilians do not have an intent to cause harm to the adversary but are staying in the locality of the military targets. For example, if the combat zone in the large-scale operation extends to the densely populated civilian areas, civilians trapped in this area may not satisfy the standard of direct participation unless they actively engage in the hostile action and create a physical obstruction for attacker's military action. In the cases of doubt the attacker should regard civilians impeding the attack against legitimate military target as involuntary human shields. If attacker's obligation under this principle is fulfilled, it becomes possible to distinguish between the adversary and civilian population.

In a case of a lawful attack on a military objective, the principle of proportionality requires the military commander to estimate the particular attacks collateral damage and to consider whether the anticipated military advantage justifies the commission of such an attack. In the context of human shielding, the principle of military proportionality requires to distinguish between the categories of involuntary and voluntary human shields and to some extent accord them with different treatment. Involuntary or unknowing shields should be included in evaluation of the "excessive" collateral damage. In respect of voluntary shields the situation is more complex. Those of them who fall into the category of "directly participating in hostilities" should be excluded from the assessment. In the cases of doubt and uncertain

proportionality an attacker is required to refrain from launching the strike. The adjustment of proportionality principle may also be permissible in the cases of systematic use of involuntary human shields if attacker faces the clear and imminent danger for civilian population or military forces, but only if the requirement of precautions was adhered to. Thus, the compliance with the principle of distinction enables the attacker to establish an adequate balance between the military advantage of the operation and potential collateral damage within the proportionality principle.

In order to fulfill the requirements of distinction and proportionality, attacker, while planning and conducting the operation, is obliged to take all feasible precautions to spare civilian population and minimize incidental injury to civilian objectives. The precautionary measures on the preparatory stage of operation require party to verify that targeted persons are military objectives, choose means and methods which would lessen the collateral damage and refrain from launching the operation if it is likely to cause excessive casualties to civilian population. In context of the use of human shields the principle of precaution obtains the utmost importance.

The obligation to verify the objective overlaps with the duty to distinguish between civilians voluntarily defending the military objectives and peaceful civilian population. For this purpose attacker is required to give an effective advance warning to the civilian population endangered by planned attack. The effective warning should be understood as credible, clear and precise notice on the forthcoming attack sufficiently in advance to allow the evacuation of civilians. The tactics of the delivery of warning must not put at risk the civilian population and keep the proper balance between the safety of civilians engaged as shields and safety of military forces. During the actual conduct of the operation party is required to suspend or cancel the operation if it is expected to cause the excessive collateral damage or if the targeted object does not constitute a legitimate aim.

Hence, the legality of an attack against adversary using human shields depends on State's compliance with the set of negative and positive obligations. The negative obligation encompasses the requirement to refrain from attack if such attack is likely to cause excessive collateral damage and is disproportionate. The adequate assessment of the proportionality of the outcomes of attack is contingent upon compliance with the principle of distinction and precaution. These two requirements embody the positive obligations of the attacking party. In this way the above mentioned principles comprise elements of test defining whether the deprivation persons used as shields of life is arbitrary.

The position of the shielding party or party which is likely to benefit from the human shields defense demonstrates the other type of legal lacuna. IHRL similarly contains no provision that expressly proscribes the use of human shields and there is no uniform approach to the question of how the prohibition of human shields must be classified. For this reason international bodies tend to shift the focus of decision on the use of human shields to the spheres of law, which are more even and well-established. In parallel, IHL also shows no consistency in establishing the clear prohibition against use of human shields. In the context international armed conflict the problem is addressed in a number of provisions of the Geneva Conventions, but there is no treaty-based rule that expressly prohibits the use of human shields in non-international armed conflicts. Furthermore, a number of key “war-fighting” States are non-Parties to both Additional Protocols, what precludes the application of any treaty-based human shields prohibition.

Since there is lack of treaty-based provisions binding upon States and clearly proscribing the practice of human shielding, it is necessary to set the threshold of positive and negative obligations resting upon party benefiting from the presence of human shields. This framework should be based on the well-established prohibition against inhuman and degrading treatment developed under IHRL and supplemented by relevant principles of IHL

reflecting the realities of modern conflict and emergency situations.

The prohibition of torture and other forms of ill-treatment in IHRL instruments is formulated as absolute prescription. The ban on all forms of ill-treatment codified in human rights treaties is non-derogable and commonly expressed in unqualified terms. Consequently, it must be respected even in situations of public emergency or an armed conflict. Therefore torture, or cruel, inhuman or degrading treatment or punishment is likewise prohibited under IHL regardless of any state of alleged necessity and is reflected in the set of norms applicable in international and internal armed conflicts. The obligation of any party to a conflict to treat anyone in their power humanely stands at the core of IHL.

The studied state practice and relevant jurisprudence prove that the use of shielding practice constitutes a form of infliction of inhuman and degrading treatment upon victims used as shields. Hence, the prohibition of using shields remains absolute and no justifications for the implementation of this technique may be invoked under both IHRL and IHL. The State's compliance with this ban depends on fulfillment of the negative and positive obligations. Therefore, the State is required to comply with negative obligation to abstain from use of this practice whatever form or variation it takes and positive obligation to undertake all necessary steps to avoid the infliction of this form of ill-treatment on individuals. This obligation has an investigative and a preventative dimensions. The procedural obligation requires party to investigate and provide effective remedy in response to the alleged infringement of the prohibition against ill-treatment. The preventive aspect of the positive obligation should be interpreted in the light of customary IHL rules requiring party to undertake all feasible precautions. Compliance with preventative positive obligation allows defender to spare between involuntary, voluntary shields and civilians acting as direct participants in hostilities and makes the compliance with negative obligation practically possible.

Under condition the actor complied with his positive obligation to undertake all necessary

and feasible precautionary measures before the attack, the individuals voluntarily remaining in the combat zone and obstructing ongoing military action may not be considered as subjected to inhuman and degrading treatment. The dignity of the voluntary shield reaching the status of direct participant in hostilities is not ceased, but is accorded the same standard of protection as dignity of any other combatant. Notably, the element of intent to use shield with defensive purposes is not a necessary precondition for the assessment of party's compliance with both sets of obligations. Though, in cases when it may be proven it may be considered additional factor in the process of judicial review of the legality of party's actions. In order to evaluate the obligations of parties to the conflict correctly, the stress should be made not on the subjective intent of civilians remaining in the zone, but the objective factual outcome.

The human shielding is an example of situation which commonly occurs during armed conflicts and in which human rights instruments have no ready criteria for the legality of use of force or set of preventative measures required. Since IHRL protection imposes the high (commonly unrealistically high) constraints on the use of force, the judicial bodies may find it unavoidable to resort to criteria embodied in IHL, especially the principles of proportionality and distinction while adjudicating on concrete cases. Therefore, this thesis urges the condemnation of any variation of the practice of human shielding and calls for the new international law to be developed in order to resolve the problems associated with the technique. For this aim the cogent and reasonable interpretation is required towards the laws governing the use of persons as human shields and the employment of lethal force against targets shielded by civilian population.

The practical value of this thesis is oriented towards enhancing the possibility to enforce the ban on human shields. The existing treaty-based prohibition against the use of human shields applies only in international armed conflicts. Even though, there are no individual complaints procedures available to the victims of IHL infringements at international level, since IHL is

principally concerned with State-to-State relations. In opposite, IHRL imposes constraints upon States through the implementation of the individual complaints procedures. This thesis suggest the analytical framework which allows victims used as human shields to construct the complaint based on enforceable IHRL provisions, but which realistically accounts the developing rules under IHL particularly relevant to practice of shielding.

The findings of this paper might be a good start for further research on the questions of the responsibility of non-international actors for the breach of human shields prohibition under respective provisions of IHL and IHRL, as well the problems of legitimate response to hostage-taking in the time of peace. The present research may also be relevant in the further studies on the problems raised by the increasing cases of indiscriminate terrorism.

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