

## SYMPOSIUM ON CRITICAL PERSPECTIVES ON HUMAN SHIELDS

### HUMAN SHIELDS: COMPLEMENTARY DUTIES UNDER IHL

*Beth Van Schaack*

The phenomenon of human shields challenges core tenets of international humanitarian law (IHL), including its careful dialectic between the imperatives of humanity and military necessity. Although the principles of distinction, precaution, and proportionality are well established in the abstract, consensus remains elusive when these concepts are applied to situations involving human shields, who blur the boundary between civilians and combatants. And while [the prohibition against using human shields is absolute](#), it is too often honored in its breach in today's asymmetrical conflicts.<sup>1</sup> Indeed, resort to human shields has become attractive precisely because it exploits protective legal rules to the detriment of those principled armed actors who value—and thus strive for—IHL compliance. These parties, in turn, are struggling to adapt their operations to a practice that has become “[endemic](#)” in the modern battlefield.<sup>2</sup>

Like other law-of-war practices, human shielding has become the subject of intense lawfare. In today's conflicts, the prohibition on the use of human shields is being cynically deployed to shield attackers from responsibility for civilian deaths. In an effort to eliminate the tactical and legal advantages that parties gain from using human shields, a range of implicated actors and norm entrepreneurs are manipulating IHL rules in ways that undermine the principle of proportionality, the presumption of civilian status, the prohibition on reprisals against protected persons, and the imperative of civilian protection. In particular, in response to the unlawful use of human shields, parties on the attack are all too liberally denying the civilian character of any of the shields in order to avoid having to consider their presence in prestrike determinations of proportionality. These schemes, however, have no basis in treaty law or in authoritative articulations of customary international law (CIL) and will do little to deter unscrupulous parties willing to use human shields in the first place. As such, efforts to “relax” or alter the principle of proportionality and the presumption of civilian status, even in the face of blatant violations of the human shields prohibition by a ruthless adversary, should be rejected. The right approach is to hold all sides to their IHL obligations, which in the case of human shields, are complementary and mutually reinforcing.

#### *Human Shields in Sri Lanka*

This instrumentalization of the prohibition on human shields is exemplified in the competing narratives around civilian casualties stemming from the civil war in Sri Lanka, where the Liberation Tigers of Tamil Eelam's (LTTE) strategic, and despicable, manipulation of the Tamil civilian population has been trotted out in defense of the government's deliberate, indiscriminate, and disproportionate attacks on civilians. By all accounts, the ending of the civil war in Sri Lanka was brutal and there were no angels in that fight. In the final weeks of the twenty-five year

<sup>1</sup> ICRC, Customary International Law Database, [Rule 97](#).

<sup>2</sup> Michael N. Schmitt, [Human Shields in International Humanitarian Law](#), 38 ISR. Y.B. HUM. RTS. 17, 18 (2008).

conflict, [upwards of forty thousand](#) civilians may have been killed in the Vanni war zone during the fateful last stand of the LTTE.<sup>3</sup> Not surprisingly, the parties differ on where to place the blame for the carnage.

To hear the triumphant government tell it, the LTTE took thousands of civilians hostage, deployed the civilian population as human shields around LTTE cadre and assets, attacked anyone trying to flee towards government-created “No Fire Zones” (NFZ); and embedded themselves in civilian areas, including NFZs, in order either to shield themselves or to draw government fire. By contrast, Tamil survivors tell a story of the government promising civilians immunity from attack and herding them toward the NFZs, but then bombarding these putative safe zones with heavy artillery notwithstanding its claimed “zero civilian casualty” policy. In defense of its own actions, the government has claimed that Tamil civilians were being “held hostage”—potentially to inspire international intervention on their behalf—and that the security forces were engaged in humanitarian operations with the [goal of “liberating them.”](#)<sup>4</sup> To the extent that they acknowledge civilian deaths, government sources shift all responsibility to the LTTE, [arguing that](#) any harm to civilians was the result of the LTTE’s “cynical choice of tactics.”<sup>5</sup>

Independent inquiries by UN investigators, journalists, independent nongovernmental organizations, and human rights groups have criticized both sides for their conduct during the war. [The UN Secretary-General’s Panel of Experts](#) condemned the government for deliberately shelling NFZs, food distribution lines, and hospitals.<sup>6</sup> It also extensively documented the LTTE’s violations of the principle of distinction (including the creation of “human buffers”), and their forced recruitment of civilians and child soldiers. The UN High Commissioner of Human Rights’ [Independent Investigation on Sri Lanka](#) documented a range of IHL abuses on the part of the government, including the use of direct and indirect fire against its NFZs.<sup>7</sup> Even the government’s own [Lessons Learnt and Reconciliation Commission](#) (LLRC) took the bold and welcome step of acknowledging that government fire into civilian areas harmed civilians<sup>8</sup> (a departure from the standard government line).

In response to international efforts to document IHL violations during the war, the prior government of Sri Lanka convened a number of its own competing commissions of inquiry. Leaked copies of what purport to be the work product of American and European international law consultants to these bodies later appeared on various Sri Lankan websites. Neither the provenance nor authenticity of these analyses have been verified, and they are stripped of their footnotes, so it is impossible to verify the sources of authority cited. Regardless of whether these documents are what they purport to be, they exhibit a range of arguments using the presence of even involuntary human shields to justify reducing the legal obligations of the attacking party. Collectively, these analyses assert that breaches of the principle of distinction by the LTTE fully absolve the government of Sri Lanka of any responsibility for harm to civilians such that the LTTE should “[bear the principle liability for civilian casualties](#)” during the final stages of the war.<sup>9</sup> These conclusions are reached by manipulating the IHL principle of proportionality and the rule on precautions, ignoring the presumption of civilian status, and misusing the concepts of reciprocity and reprisals. The remainder of this piece will outline the specifics of each analytical flaw.

<sup>3</sup> Colum Lynch, [U.N.: Sri Lanka’s Crushing of Tamil Tigers may have killed 40,000 Civilians](#), WASH. POST (Apr. 21, 2011).

<sup>4</sup> See SRI LANKA, MIN. OF DEFENSE, [HUMANITARIAN OPERATION FACTUAL ANALYSIS](#) (July 2006–May 2009).

<sup>5</sup> [FULL REPORT OF THE ARMY BOARD ON LLRC OBSERVATIONS RELEASED](#) 4.

<sup>6</sup> [REPORT OF THE SECRETARY-GENERAL’S PANEL OF EXPERTS ON ACCOUNTABILITY IN SRI LANKA](#) (Mar. 31, 2011).

<sup>7</sup> [Comprehensive Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka](#), UN Doc. A/HRC/30/61 (Sept. 28, 2015) [hereinafter “OISL Report”].

<sup>8</sup> [REPORT OF THE COMMISSION OF INQUIRY ON LESSONS LEARNT AND RECONCILIATION](#) (Nov. 2011).

<sup>9</sup> David M. Crane & Sir Desmond de Silva, [What the International Experts Say, “War Crimes in Sri Lanka”](#) para. 21, THE ISLAND (Mar. 18, 2015).

*Proportionality & the Civilian Presumption Under Attack*

According to the proportionality principle, whenever civilians or civilian objects are in the vicinity of a military objective, attacks are prohibited if they “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.” As an independent duty, parties must take “all feasible precautions” to spare civilian lives, including by issuing effective advance warnings if practicable. In cases of doubt, CIL (mirroring Additional Protocol I to the Geneva Conventions) establishes a presumption of civilian status in all conflicts.

Black letter IHL would dictate that human shields enjoy these protections so long as they are not deemed to be directly participating in hostilities (DPH). Although [the law is inconclusive](#) as to when *voluntary* human shields are deemed to be DPH, the relevant rules are highly settled as regards *involuntary* shields, who are entitled to immunity from direct attack and protection from incidental harm afforded by the principle of proportionality.<sup>10</sup> In other words, involuntary human shields must be treated like all other civilians. As such, individuals who are inadvertent or coerced shields continue to enjoy immunity from direct, indiscriminate, and disproportionate attacks—i.e., from intentional and incidental harm.

By contrast, the leaked texts overstate the degree of legal indeterminacy in this area and advance a range of alternative theories that manipulate the relative significance of the two elements of proportionality. When it comes to the weight accorded to human shields on the civilian side of the calculus, the [opinions posit](#) that the principle of proportionality either does not apply at all<sup>11</sup> or should be adjusted to account for the fact that the LTTE used human shields—whether voluntary or involuntary—to its advantage.<sup>12</sup> Accordingly, it is argued that the government should be given a “[margin of latitude commensurate with the military exigencies that they encountered and taking into account the widespread unlawful use of civilians by the LTTE.](#)”<sup>13</sup> Indeed, [it is claimed](#) that the government could undertake “a *marked* adjustment in the ‘proportionality’ calculation” given the LTTE’s widespread policy of using civilian shields and the rebels’ “past conduct” in exposing innocent civilians to the dangers of armed conflict.<sup>14</sup>

These statements completely elide the [important legal distinction](#) between voluntary and involuntary shields<sup>15</sup> by treating those willing confederates who choose to participate in the conflict the same as those civilians who have been “[deprived of their physical freedom of action \[and\] physically coerced into providing cover in close combat.](#)”<sup>16</sup> Because voluntariness is deemed impossible to verify, the analyses conclude that the risk of civilian casualties is essentially unknowable and thus need [not be taken into account at all.](#)<sup>17</sup> By contrast, IHL demands that parties must suspend or cancel an attack that cannot adhere to the proportionality test. As such, any lack of certainty cannot eliminate or diminish the protections that are afforded. Furthermore, none of these analyses acknowledges the presumption of civilian status, which would require an attacking party to treat all human shields as civilians in the absence of adequate proof to the contrary. The leaked texts effectively invert this presumption, arguing that because it is difficult to

<sup>10</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities in International Humanitarian Law* 56 (2009).

<sup>11</sup> Crane & de Silva, *supra* note 9, at para. 22.

<sup>12</sup> Michael Newton, *A Legal Opinion for the Commission Inquiring into Disappearances* para. 43, THE ISLAND (Sept. 28, 2014); Sir Geoffrey Nice & Rodney Dixon, *Legal Opinion Concerning the Law Applicable to Military Operations in the Final Stages of the Armed Conflict between the Government of Sri Lanka and the LTTE* para. 37 THE ISLAND (Mar. 10, 2015).

<sup>13</sup> Nice & Dixon, *supra* note 12, at para. 10.

<sup>14</sup> *Id.* at para. 44 (emphasis added).

<sup>15</sup> *Public Committee Against Torture in Israel v. Israel*, HCJ 769/02, para. 36 (Isr. 2005).

<sup>16</sup> Melzer, *supra* note 10, at 60.

<sup>17</sup> Newton, *supra* note 11, at paras. 21, 43.

determine whether the shields are operating voluntarily or are coerced, the government was entitled to ignore or discount their presence.

On the other side of the proportionality ledger is the military advantage to be gained by the attacker. The reports cite the overarching goal of defeating the LTTE in order to end the conflict as a factor to be weighed against the risk of harm to civilians. Thus, it is argued, “the termination of such insidious and wholesale threats to civilian life represents a compelling military objective which already sets the bar fairly high relative to the acceptable level of civilian casualties in achieving that objective.”<sup>18</sup> Accordingly, one report argues that even assuming forty thousand civilians (12 percent) were killed in the final offensive, over 295,000 civilians were “saved” by the governmental operations in question, rendering it a “successful operation.”<sup>19</sup> The inflated military advantage of “winning” could justify even excessive collateral damage, overwhelm any IHL analysis, and render proportionality little more than an exercise in the end justifying the means.<sup>20</sup> The law actually requires that the military advantage be assessed with respect to a particular engagement or attack at the tactical or operational level and not to the goals of the entire campaign or conflict, writ large. Nor can the advantage be speculative or too remote.

To be sure, the drafters of the Statute of the International Criminal Court added the word “overall” before “military advantage” and “clearly” before “excessive,” when it comes to assigning criminal liability before that institution; and, some states have entered treaty reservations to the effect that “the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.”<sup>21</sup> Nonetheless, the ultimate strategic goal of prevailing in the conflict or the generalized objective of halting all IHL breaches by an adversary are too amorphous and remote to serve as weighable factors in a rigorous proportionality analysis, which requires a consideration of the “concrete and direct military advantage anticipated.”

### *The Ban on Reprisals Against Civilians & the Irrelevance of Reciprocity*

The goals of ending violations of IHL by the LTTE—including but not limited to the use of human shields—and of “rescuing” civilians trapped behind the front lines<sup>22</sup> are also cited as “military advantages” to be considered in calculating whether a planned attack will be proportionate.<sup>23</sup> The objective of ending the LTTE’s IHL breaches as relevant to measuring proportionality sounds of collective punishments<sup>24</sup> and reprisals. As one leaked analysis argues:

In psychological terms, the Sri Lanka strikes directed at military objectives, despite the presence of human shields should be categorized as a form of positive punishment designed to end the unwanted behavior.<sup>25</sup>

Reprisals—otherwise unlawful acts that are allowed as a last resort if committed in response to a breach by an adversary with the goal of bringing that party back into compliance—are prohibited against protected persons

<sup>18</sup> Crane & de Silva, supra note 9, at para. 39.

<sup>19</sup> Id.

<sup>20</sup> Nice & Dixon, supra note 12, at para. 43.

<sup>21</sup> Declaration of the United Kingdom of Great Britain and Northern Island (July 2, 2002).

<sup>22</sup> Crane & de Silva, supra note 9, at para. 43.

<sup>23</sup> Nice & Dixon, supra note 12, at para. 44.

<sup>24</sup> ICRC, supra note 1, *Rule 103*.

<sup>25</sup> Newton, supra note 12, at para. 21(a).

under IHL, including civilians.<sup>26</sup> To be sure, the ICRC considers this CIL rule to be applicable [only in international armed conflicts](#),<sup>27</sup> but there is little justification for not [applying this rule across the conflict spectrum](#).<sup>28</sup> An even broader ban on reprisals against civilians finds support from the [Vienna Convention on the Law of Treaties](#), which states that a material breach of humanitarian treaty provisions dedicated to “the protection of the human person” does not entitle the other party to suspend its own obligations, particularly when it comes to any form of reprisals against persons protected by such treaties.<sup>29</sup>

Even when the defending party is in breach of these rules, the attacking party [remains subject to its own IHL obligations](#) vis-à-vis the shields.<sup>30</sup> It is axiomatic that [reciprocity plays no role in determining whether a party must obey IHL](#), and *tu quoque* is no longer a viable defense.<sup>31</sup> As such, the attacker’s obligations are owed *erga omnes* and [remain intact](#) even in the face of breaches by the adversary and [even though the defender violates IHL](#).<sup>32</sup> The law would be perverse indeed if it were to allow the attacker to “punish” the party using human shields by attacking those very shields.

There is an obvious appeal to assigning the responsibility of any civilian deaths to the party originally placing those civilians at risk. The defender’s IHL duty to protect civilians under its control is a pressing one that deserves robust enforcement. There is no question that the international community should endeavor to develop and strengthen the norm against using, or benefiting from, the conduct of human shields, whether voluntary or involuntary. This norm should be enforced through the apportionment of both state responsibility and individual criminal responsibility as well as through diplomatic action in nonjudicial fora. In the event that civilians are harmed in an armed conflict, it is not a binary question of allocating all responsibility to one party or another. Rather, liability can be shared by, and apportioned across, multiple actors through principles of comparative fault familiar from domestic tort law. Accordingly, the LTTE’s rampant violations of the principle of distinction did not suspend or alter the Sri Lankan government’s obligations, which remained intact and fully enforceable against it. The duties of the attacking and the defending parties are complementary and both should be scrupulously enforced in this deadly dyad, even if we may agree that the ultimate responsibility from a moral sense resides with the party willing to use civilians to shield otherwise lawful military objectives.

### Conclusion

The reports ostensibly produced for the Government of Sri Lanka reveal the way in which the prohibition on the use of human shields can be manipulated to the detriment of those civilians it is designed to protect. To be sure, one must acknowledge the profound difficulties faced by field commanders confronting an adversary actively breaching the principle of distinction by using civilians as human shields, or otherwise taking advantage of the civilian presence in order to screen its activities. In light of the many ways that coercion can operate in situations of armed conflict, it is virtually impossible to verify agency, particularly from the perspective of a targeteer or military lawyer committed to conducting a genuine collateral damage estimate. However, this is precisely where the

<sup>26</sup> [Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts](#) art. 51, June 8, 1977, 1125 UNTS 3 [hereinafter Protocol I].

<sup>27</sup> ICRC, [supra note 1](#), [Rule 146](#). See Article 3(2) Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices art. 3(2), May 3, 1996, 1342 UNTS 168 (1983) (prohibiting reprisals against civilians).

<sup>28</sup> [Prosecutor v. Kupreškić](#), Case No. IT-95-16-T, Judgement, paras. 513, 527–36 (Jan. 14, 2000).

<sup>29</sup> [Vienna Convention on the Law of Treaties](#) art. 5, May 23, 1969, 1155 UNTS 331.

<sup>30</sup> OISL Report, [supra note 7](#), at para. 764.

<sup>31</sup> ICRC, [supra note 1](#), [Rule 140](#).

<sup>32</sup> Protocol I, [supra note 26](#), art. 51; ICRC, [supra note 1](#), [Rule 22](#).

presumption of civilian status—as a binding rule and prudential practice—provides clarity and a legitimate course of action.

Moreover, it is tempting to insist that the law should deprive a party benefiting from the presence of human shields, and the immunity they rightfully enjoy, of its unjust advantage. Otherwise, it is argued, IHL will punish a party in compliance for the adversary's criminality. Legal rules don't work this way, however. There are many real-world factors that intervene to stymie otherwise lawful attacks—bad weather, poor infrastructure, imperfect equipment, etc. The architects of IHL had to choose: either hamstringing an attacker in the presence of human shields or sacrifice civilians to enable an attack against a proper military objective to go forward. They chose to do the former. Parties confronting human shields must thus treat this inhumane tactic as another obstacle to be lawfully surmounted on the modern battlefield.

Given the difficulty of ensuring voluntariness, the safest course for parties truly committed to the values underlying IHL and for lawyers advising embattled clients is to treat all human shields as civilians when it comes to calculating acceptable (i.e., proportional) collateral damage, unless there is irrefutable proof of willing participation in hostilities. This close-to-categorical approach finds support in the presumption of civilian status under IHL and the duties of warring parties to take “all feasible precautions” to protect the civilian population. To the extent that there are ambiguities in the law, resort to a teleological interpretive approach, as dictated by the Martens Clause, yields the same result. This is also the most prudent course in light of the risk that harm to individuals acting as human shields—even if technically sanctioned by the law as acceptable collateral damage—will exert a high political cost and offer a propaganda windfall to the adversary. Furthermore, respecting these constraints will not only ensure compliance with the law of armed conflict, it will also protect our war fighters’ “morality [and] their ability to live with the emotional consequences of” their conduct in war.<sup>33</sup>

<sup>33</sup> Chris Jenks, *Moral Touchstone, not General Deterrence: The Role of International Criminal Justice in Fostering Compliance with International Humanitarian Law*, 96 ICRC REV. 776, 782 (2014).