

REAFFIRMING THE DISTINCTION BETWEEN COMBATANTS AND CIVILIANS: THE CASES OF THE ISRAELI ARMY’S “HANNIBAL DIRECTIVE” AND THE UNITED STATES’ DRONE AIRSTRIKES AGAINST ISIS

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I. INTRODUCTION

This millennium’s intensifying war against non-state actors, including terrorist organizations, has spurred ongoing discussions and debates about how to apply international humanitarian law (IHL) in such conflicts. Two distinct military events, occurring in different state armies, have also triggered such discussion. The first was the capture of Israeli soldier Lt. Hadar Goldin in the tunnels of Gaza during Operation Protective Edge and the decision of the Israel Defense Forces (IDF) to apply its General Staff Directive for Contending with Kidnapping Attempts (Hannibal Directive), which provides methods and procedures for both preventing and frustrating attempted kidnappings of Israeli nationals. The second was US President Obama’s authorization of drone strikes in Iraq and Syria in the fight against the Islamic State in Iraq and Syria (ISIS). These military events resemble each other in a couple of ways, despite the

differences in the technological means of warfare involved. First, the operations were intended to protect friendly combatants' lives with the awareness that such protection would inflict inevitable risk to civilian lives. Second, they were conducted within the paradigm of a non-international armed conflict; the organizations involved purposely violated the laws of armed conflict—specifically, the distinction between combatants and civilians—by using civilians as human shields.

These comparable military events illuminate this article's central questions: Should the principle of distinction and the protection of civilians be reevaluated in facing the challenges of the war on terror in general and the use of human shields in particular? In addition, how does the use of new technologies that allow removal of combatants from the actual battlefield affect the protection of civilian lives? I contend that while protecting combatants' lives is a legitimate military interest, it should only be undertaken within the boundaries of the principles of distinction and proportionality. Hence, I argue that the principle of distinction should be reaffirmed and that new technologies adapted to it. I also put forward that, in dealing with the challenge of the illegitimate use of human shields, we must not forsake the principle of distinction.

In the first part of this article, I discuss the principle of distinction. I begin with a short description of the normative and the historical development of the principle, then analyze the motivations of belligerents to target civilians in the battlefield from both civilian and combatant perspectives. I claim that these motivations are intensified by the challenges of the war against terrorism, where terrorist organizations violate IHL, particularly the principle of distinction. I nevertheless reaffirm the principle of distinction and that civilians' lives must be protected. As far as the lives of the state's combatants are concerned, while the state is obligated to respect and protect them, combatants' lives are not on par with the lives of civilians. Hence, in the article's second part, I examine the principle of proportionality, arguing that it is this principle that should govern the protection of combatants lives, rather than the principle of distinction. I particularly consider how the use of human shields could modify the application of the principle of proportionality, at times in favor of combatants' lives over the lives of civilians. In the third part, I apply my theoretical conclusions to the cases of Israel's use of the Hannibal directive in Operation Protective Edge and the US use of drone strikes during the campaign against ISIS.

II. REAFFIRMING THE PRINCIPLE OF DISTINCTION

A. Civilian Perspective

The laws of war have determined a long-established, unequivocal prohibition on the intentional killing of civilians in war. This is the "principle of distinction," and it has been grounded in the ideology and morality of war since

ancient times.¹ The principle of distinction serves as one of the core principles of modern IHL theory and practice and was formed by modern nations through “the discourses of civilization” in the nineteenth century.² These discourses, which intended to “identify collective and individual potential for progress and enlightenment,” were formed “to regulate and moderate war through the refinement of its rules and requirements.”³ Making the distinction between combatants and civilians was one of the means for this moderation.⁴

In the development of a modern legal and political theory of *jus in bello* between the 17th and 20th centuries—and particularly in the 19th and 20th centuries⁵—the principle of distinction has become a core principle in IHL. Several instructions set to distinguish between combatants and non-combatants have been directly incorporated into various instruments of IHL, such as treaties and conventions,⁶ as well as other instruments, such as the Lieber Code⁷ and the Oxford Manual of 1880.⁸ The principle of distinction has also served as an inspiring and guiding instruction in instruments that do not incorporate the principle verbatim: for example, the fourth Hague Convention Respecting the Laws and Customs of War on Land and Annexed Regulations (1907),⁹ which determined that civilian villages should be protected from attack¹⁰ and defined the qualifications of combatants;¹¹ and the fourth Geneva Convention for the Protection of Victims of Armed Conflicts (1949),¹² which is dedicated entirely to protection of civilians in times of armed conflicts.

¹ Hugo Slim, *Why Protect Civilians? Innocence, Immunity and Enmity in War*, 79 INT’L AFF. 481, 486 (2003).

² HELEN M. KINSELLA, *THE IMAGE BEFORE THE WEAPON: A CRITICAL HISTORY OF THE DISTINCTION BETWEEN COMBATANT AND CIVILIAN* 107 (2011).

³ *Id.* at 113.

⁴ *Id.*

⁵ Slim, *supra* note 1, at 494.

⁶ *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, [hereinafter AP(I)].

⁷ FRANCIS LIEBER, U.S. WAR DEP’T, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* (1863) [hereinafter LIEBER CODE].

⁸ Institut de Droit International [Inst. of Int’l Law], *The Laws of War on Land*, (Sept. 9, 1880) [hereinafter *Oxford Manual*]. In addition, the principle of distinction was adopted in numerous military manuals. *See* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 3 (2005).

⁹ Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations] (also referred to as the Fourth Hague Convention).

¹⁰ *Id.* art. 25.

¹¹ *Id.* arts. 1, 3.

¹² Convention Relative to the Protection of Civilians Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

The normative justifications for the principle of distinction (also called the principle of discrimination)¹³ are based primarily in just war doctrine (or theory), which was developed by Saint Thomas Aquinas in the 13th century to discuss both the justification of war and the permissible activities in the course of war.¹⁴ Just war theory was broadened beyond the limits of the theological discourse and became the model of legal discussion on the conduct of war in the writings of the first scholars of international law.¹⁵ It also formed the basis of the modern 20th-century discussion of IHL.¹⁶

According to just war theory, the principle of distinction suggests that civilians and combatants should be treated differently on the battlefield.¹⁷ The basic justifications for this principle are class legislation¹⁸ and a defense view.¹⁹ As Walzer states:

Combatants are a class of people who are set apart from the world of peaceful activity; they are trained to fight, provided with weapons, required to fight on command . . . it is the enterprise of their class, and this fact radically distinguishes the individual soldier from the civilians he leaves behind.²⁰

Therefore, combatants are a class of persons against whom defense is required. Because they have the means to attack their rival combatants,²¹ they are subject to attack at any time,²² as such a response is required in defense.

¹³ Asa Kasher, *Combatants Life and Human Dignity*, 44 ISR. Y.B. ON HUM. RTS. 219 (2014) [hereinafter Kasher, *Combatants Life*].

¹⁴ *Just War Theory*, INTERNET ENCYCLOPEDIA OF PHIL., <http://www.iep.utm.edu/justwar/>.

¹⁵ Francisco de Vitoria (1486-1546), Francisco Suarez (1548-1617), Hugo Grotius (1583-1645), Samuel Pufendorf (1632-1704), Christian Wolff (1679-1754), and Emerich de Vattel (1714-1767). *See id.*

¹⁶ *See, e.g.*, MICHAEL WALZER, *JUST AND UNJUST WARS* (4th ed., 2006); Thomas Nigel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 123 (1972); G.E.M. Anscombe, *War and Murder*, in *WAR AND MORALITY: BASIC PROBLEMS IN PHILOSOPHY SERIES* 42-53 (1961).

¹⁷ WALZER, *supra* note 16, at 144-46; Igor Primoratz, *Civilian Immunity in War: Its Grounds, Scope, and Weight*, in *CIVILIAN IMMUNITY IN WAR* 21, 27 (Igor Primoratz ed., 2007).

¹⁸ WALZER, *supra* note 16, at 144.

¹⁹ Primoratz, *supra* note 17, at 27.

²⁰ WALZER, *supra* note 16, at 144.

²¹ One of the core assumptions of IHL is that it is legitimate for combatants to attack their rivals, and for this reason they are afforded prisoners of war (POW) status. *See*, Hague Regulations, *supra* note 9, arts. 4-20; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 135.

²² Unless wounded or captured; *See*, WALZER, *supra* note 16, at 146.

Civilians, on the other hand, are “innocent” because they have done nothing to harm their rivals,²³ and they thus should be immune from attack.²⁴ In the words of Henry Shue:

Civilian immunity is a reaffirmation of the morally foundational “no-harm” principle. One ought generally not to harm other persons. Non-combatant immunity says one ought, most emphatically, not to harm others who are themselves not harming anyone. This is as fundamental, and as straightforward, and as nearly non-controversial, as moral principles can get.²⁵

This principle of no-harm attached to civilians in times of war is invigorated by a “civilian idea,”²⁶ which supplies additional arguments for protecting civilians in war. The civilian idea is a moral concept according to which people are “call[ed] to goodness while [they] are also drawn to violence.”²⁷ Even though the goodness of human beings is often distorted during war, it may also co-exist with their violent passions.²⁸ The civilian idea is therefore “a persistent manifestation of [the life-enhancing passions] of our nature and of our more creative passions,”²⁹ and it suggests that “people can be good in war.”³⁰ As a consequence, the civilian idea strengthens both restraint during war and the possibility of reconciliation after war.³¹ It promotes “recognizing that the enemy are also people like us,”³² which sets the background for human relationship between the rival belligerents.³³

Another argument—a practical one—for protecting civilians in war is the argument of reciprocity.³⁴ Military forces act out of self-interest and therefore should “do as they would be done to.”³⁵ The logic of this principle promotes reasonable civilian treatment by relying on the hope of reciprocal treatment.³⁶

²³ *Id.*

²⁴ Primoratz, *supra* note 17, at 29.

²⁵ *Id.*

²⁶ Slim, *supra* note 1, at 499.

²⁷ *Id.* at 500.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Slim, *supra* note 1, at 499.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 501.

³⁵ *Id.*

³⁶ Slim, *supra* note 1, at 501.

Lastly, the principle of distinction stems from a conception of “limited warfare”³⁷ rather than “total warfare,”³⁸ aiming to limit suffering in war by excluding those who do not contribute to such suffering from being targeted. This is the leading idea of the 1949 Geneva Conventions, expressed in the preamble to the fourth Convention:

Seeing that while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert. . . . According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by *the desire to diminish the evils of war, as far as military requirements permit*, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.³⁹

Despite the strength of the historical influence of the principle of distinction, which emphasizes the protection of uninvolved or “innocent” civilians during war,⁴⁰ the fact remains that the killing of civilians has not ceased in modern eras—it has increased. According to the 2015 Uppsala Conflict Data Program Report,⁴¹ between 1989 and 2014, around 700,000 people were killed in one-sided violence.⁴² Drone strikes against ISIS are also reported to have caused civilian casualties.⁴³

This data implies that states and the soldiers they send to fight have many incentives to kill civilians—either intentionally or inadvertently. Some incentives are psychological, others practical or tactical, and some strategic. At the micro level—that of the soldier on the ground who is not driven by political obligations

³⁷ Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 105, 118 ¶ 404 (Dieter Fleck ed., 1995).

³⁸ Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 10 (2005).

³⁹ Hague Regulations, *supra* note 9, pmbl. (emphasis added).

⁴⁰ Slim, *supra* note 1, at 495.

⁴¹ ERIK MELANDER, UPPSALA CONFLICT DATA PROGRAM REPORT, ORGANIZED VIOLENCE IN THE WORLD 2015, http://www.pcr.uu.se/digitalAssets/61/61335_1ucdp-paper-9.pdf [hereinafter UPPSALA CONFLICT DATA PROGRAM REPORT].

⁴² *See id.* This term describes a situation in which a state or some organized non-state actor kills unarmed civilians. *Id.*

⁴³ *See, e.g.,* Ryan Devereaux, *As France Bombs ISIS, Civilians are Caught in the Middle*, THE INTERCEPT (Nov. 19, 2015), <https://theintercept.com/2015/11/19/as-france-bombs-isis-civilians-are-caught-in-the-middle/>; AIRWAR, CAUSE FOR CONCERN, (2015), <http://airwars.org/wp-content/uploads/2015/08/airwars-cause-for-concern-civilians-killed-by-coalition.pdf> (reporting that hundreds of civilians have been killed in the first year of coalition airstrikes against the Islamic state).

or strategic considerations—the immediate motivations to kill enemy civilians are the emotions of hatred and fear.⁴⁴ In this case, civilians are seen as belonging to the general group of “the enemy” because they identify with its ideology and are part of its wider enemy war effort.⁴⁵ Moreover, psychological research has discovered that even when people believe that civilians cannot harm the adversary and therefore deserve protection, “desperate human nature”⁴⁶ will compel the majority of people “to behave in such a way as to condone or actively break the norms of civilian protection.”⁴⁷

Another psychological characteristic of combatant behavior in the battlefield is that combatants will act more violently against civilians when they are involved in inter-racial or inter-religious wars.⁴⁸ According to Social-Identity Theory, “human beings have a tendency to place each other into social groups and to treat members of other groups with greater hostility and suspicion.”⁴⁹ These behaviors intensify when group members “feel threatened or are primed to consider their own survival and mortality, as would be expected in times of war.”⁵⁰

Still, at the micro level, practical considerations could lead combatants to conclude that protecting civilians is too difficult or is technically impossible.⁵¹ In that sense, killing civilians may be unintentional and might be seen as inevitable. When weighing the act of killing civilians against the need to win the battle, combatants will refer to the former as legitimate collateral damage against the value of military necessity.⁵² Indeed, the need to kill civilians is, in this sense, depicted as regrettable rather than desired, “but there is often a slippery slope from a pragmatic position of regrettable accident to an incremental . . . anti-civilian policy.”⁵³

At the macro level—that is, referring to a state’s motivation to kill civilians in the battlefield—military necessity serves both as a tactic and as a strategic incentive.⁵⁴ On the tactical level, large numbers of civilians contribute to the war effort, mainly by supplying logistical support, such as food production or weapons and ammunition. Thus, targeting them will enhance the chances of weakening the adversary and achieving victory.⁵⁵ On the strategic level, such targeting of civilians who work for the military would “spur terror among the

⁴⁴ Slim, *supra* note 1, at 500.

⁴⁵ *Id.* at 499.

⁴⁶ *Id.*

⁴⁷ *Id.* at 500.

⁴⁸ Benjamin Valentino et al., *Covenants Without the Sword: International Law and the Protection of Civilians in Times of War*, 58 *WORLD POL.* 339, 349 (2006).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Slim, *supra* note 1, at 498, 500.

⁵² *Id.* at 498.

⁵³ *Id.*

⁵⁴ Valentino et al., *supra* note 48, at 351.

⁵⁵ *Id.*

civilians co-workers, thus creating a deterring effect on them and reducing their morale and productivity.”⁵⁶ However, strategic considerations may allow states to give a broader permission to kill civilians in war beyond those who directly contribute to the war effort. States generally seek ways to lower their costs while striving for victory in war.⁵⁷ Targeting civilians may seem an efficient means for achieving a low-cost victory and winning the “contest of wills,” another of the goals of war.⁵⁸ Most states value their own citizens’ lives and safety; by threatening these, belligerent states can break the opposing state’s morale, forcing an early surrender or concessions in peace negotiations.⁵⁹

In sum, despite being morally and legally rooted in the legacy of war, and especially in the body of modern IHL, the idea of the immune civilian “has consistently remained extremely complicated or essentially objectionable to many political and military minds.”⁶⁰ In this section, I presented the principle of distinction and the core arguments that challenge it from a civilian perspective. However, as we will see in the next section, this principle and idea can also be challenged from a combatant perspective.

B. Combatant Perspective

The objections to the principle of distinction from a combatant perspective stem from criticism of the class legislation on which the distinction is based. These objections, like the arguments made against this distinction from a civilian perspective, are divided into three types: theoretical or moral, strategic, and tactical.⁶¹

The theoretical rejection of the principle of distinction posits that distinction between combatants and civilians is in fact arbitrary and leads to an arbitrary protection for civilians.⁶² According to this criticism, all people on either side are rivals or enemies, and there is no reason to distinguish between those who carry arms and those who do not.⁶³ However, this extreme criticism is hardly justified by scholars of moral philosophy,⁶⁴ and moreover, it is completely

⁵⁶ *Id.*

⁵⁷ *Id.* at 348.

⁵⁸ *Id.* at 351.

⁵⁹ Valentino et al., *supra* note 48, at 348, 351.

⁶⁰ Slim, *supra* note 1, at 495.

⁶¹ More exactly, except the first one, all of the challenges to the principle of distinction discussed below are rather modifications of the principle and not pure objections.

⁶² WALZER, *supra* note 16, at 144–45.

⁶³ *Id.*

⁶⁴ Those who suggest that the principle of distinction should be modified and adapted to contemporary battlefields do not object to the “no harm principle” in general. See, e.g., Kasher, *Combatants Life*, *supra* note 13, at 234 (suggesting that “the very idea of drawing a distinction between people who do and people who do not take active part in hostilities is of obvious moral significance. Without such a distinction, attacks are prone to

inconsistent with the legal paradigm set by modern IHL instruments discussed above.

Nevertheless, the argument of arbitrariness can be justified if refined by claiming that some civilians contribute to the war effort through varying degrees of participation in hostilities;⁶⁵ after all, not all combatants contribute equally to the war effort. These factors, rather than mere class legislation, should determine how each civilian or combatant should be treated in the battlefield.⁶⁶ These situations are, however, outside the scope of this article: here, I deal only with cases where the combatants do—and civilians do not—participate directly in hostilities.

The second theoretical and moral challenge to the principle of distinction suggests that class legislation erroneously assigns relative value to human life, which is inherently valuable, regardless of combat participation.⁶⁷ This argument relies on the principle of human dignity—the Kantian idea that every person is an end, not a means, and thus may never be regarded as an instrument.⁶⁸ Under such a premise, human dignity is inalienable, and therefore all human beings—combatants and civilians—have an inherent right to respect of their dignity.⁶⁹ This value should never be violated or diluted, “even though it may take different forms under different circumstances.”⁷⁰ Class legislation ignores the human dignity of the combatants and respects only that of civilians; in that sense, class legislation is morally wrong. In addition, class legislation misses the aspect of individuality, also a constituent of human dignity, which suggests that people are only responsible for their own deeds, not those of their government.⁷¹

It is important to stress that the argument of human dignity does not violate the protection of civilians nor does object to the moral legitimacy of targeting combatants.⁷² Yet it does suggest that permission to attack combatants

result in more calamities than if they are restricted to combatants or some of them only.”). See also Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693, 725–29 (2004) (showing a somewhat modified version of the no-harm principle).

⁶⁵ See, e.g., AP(I), *supra* note 6, at 26; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13(3), June 8, 1977, 1125 U.N.T.S. 610 [hereinafter AP(II)] (determining that civilians participating directly in hostilities will lose their immunity at the time of their participation). See also *supra* Part II.A.

⁶⁶ See, e.g., McMahan, *supra* note 64, at 725–29; Asa Kasher, *The Principle of Distinction*, 6 J. OF MIL. ETHICS 152 (2007); Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: an Israeli Perspective*, 4 J. OF MIL. ETHICS 3 (2005).

⁶⁷ Kasher, *Combatants Life*, *supra* note 13, at 224.

⁶⁸ IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Mary Gregor ed. trans., 1998).

⁶⁹ Kasher, *Combatants Life*, *supra* note 13, at 224.

⁷⁰ *Id.* at 225.

⁷¹ Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 86 (2006).

⁷² Or at least the combatants who participate actively in fighting. See Kasher, *Combatants Life*, *supra* note 13, at 225.

should be considered under the specific circumstances with due care to the principle of human dignity, as “hostile treatment of any person must be morally justified in terms of something *about that person* which makes the treatment appropriate.”⁷³

The duty to respect human dignity is even stronger in democratic regimes, where the obligation is “part and parcel.”⁷⁴ Thus, the concept of human dignity generates a moral conception of how a democracy should treat its own citizens in general and its combatants in particular.⁷⁵ Not only is a democracy responsible for protecting the human rights of its citizens, it is also accountable for its decisions before them.⁷⁶ As a consequence, military service in a democratic state is based on two ethical principles and values: a duty of the combatants to risk their lives to protect the state and its inhabitants against threats, and comradeship among the members of the armed forces.⁷⁷ These values determine the obligations of the combatants to themselves, the population they protect, and the population they endanger.⁷⁸ They also determine the state’s obligations towards its combatants.⁷⁹

Therefore, though combatants may have a duty to risk their lives, the state must ensure that it jeopardizes their lives only in combat (in the broad sense of facing enemy forces) or in an attempt to save life of comrades or other citizens.⁸⁰ Combatants, who also possess a duty to respect human dignity, should also do their utmost to fulfill their mission while minimizing casualties among the troops; they should plan and participate in operations to rescue their comrades if they are unable to rescue themselves.⁸¹ The state must supply them with the best means for protection to fulfill their missions.⁸²

All of the above obligations of the state towards members of its armed force are intensified when the combatants are conscripts rather than volunteers. In such cases, when the state builds, maintains, and develops a military force to face particular threats to the safety of its citizens and its regime, it should determine membership in the military force under certain circumstances of threat through fair arrangements of conscription and voluntary service.⁸³ Such arrangements are an expression of the state’s general obligation to protect the human rights of its citizens, and especially those citizens in uniform, whose lives it has endangered for the protection of other important values.

⁷³ *Id.* at 226.

⁷⁴ *Id.* at 232.

⁷⁵ *Id.* at 227, 232.

⁷⁶ *Id.* at 238; Valentino et al., *supra* note 48, at 347.

⁷⁷ Kasher, *Combatants Life*, *supra* note 13, at 238–39.

⁷⁸ *See id.* at 239.

⁷⁹ *Id.* at 239–40.

⁸⁰ *Id.* at 239.

⁸¹ *Id.*

⁸² Kasher, *Combatants Life*, *supra* note 13, at 240.

⁸³ *Id.* at 238.

There are also practical motivations to violate the principle of distinction⁸⁴ that are more political than legal or moral—similar to those discussed above from the civilian perspective. Obviously, the lives of combatants are an important asset for the army because saving them can result in victory—which is the aim of every belligerent.⁸⁵ This, in addition to the value of comradeship, would lead commanders to try to spare the lives of their subordinates.⁸⁶

Finally, governments are also likely to be pressed by the public to spare the lives of combatants. Typically, the public tends to be less tolerant toward casualties among its own soldiers,⁸⁷ especially in cases of conflict that seem less significant to the public's safety.⁸⁸ Because democracies are accountable to their citizens for their decisions, they are more susceptible to public pressures than non-democracies⁸⁹ and therefore tend to operate according to these pressures.⁹⁰ Thus, democratic states will tend “to shift the costs of the war away from their own citizen-soldiers and on to foreign civilians.”⁹¹ Such decisions also align with the state's general will—as discussed in the previous sub-section—to conduct less-costly wars that will end in victory in the shortest possible time.

The practical outcome of this section's discussion of the principle of distinction (from both a civilian and a combatant perspective) is that armies often interpret IHL in a way that limits commanders' responsibilities rather than increasing protection of civilian lives.⁹² This means preferring their own combatants' lives to the lives of enemy civilians—in other words, violating the principle of distinction. Such a conclusion is intensified in the circumstances created by new battlefields, where states are involved in armed conflicts against non-state actors, and in particular, against terrorist organizations.⁹³ In some circumstances, such armed conflicts could lead to a deterioration of the status of the principle of distinction.

⁸⁴ Benvenisti, *supra* note 71, at 95.

⁸⁵ *Id.* at 90; cf. Kasher, *Combatants Life*, *supra* note 13, at 239.

⁸⁶ Hugh White, *Civilian Immunity in the Precision-Guidance Age*, in *CIVILIAN IMMUNITY IN WAR*, *supra* note 17, at 197.

⁸⁷ Andre Barrinha & Luis da Vinha, *Precision Strikes and Interventionism in the Obama Administration*, in *PRECISION STRIKE WARFARE AND INTERNATIONAL INTERVENTION* 14, 18 (Mike Aaronson et al. eds., 2015).

⁸⁸ Benvenisti, *supra* note 71, at 95; Valentino et al., *supra* note 48, at 347; White, *supra* note 86, at 182, 197. Note, for example, that research on public opinion in the US has shown “a consistent negative relationship between the number of casualties suffered and public support for wars.” See Valentino et al., *supra* note 48, at 348; Jennifer Agiesta & Jon Cohen, *Poll Shows Most Americans Oppose War in Afghanistan*, *WASH. POST* (Aug. 20, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/19/AR2009081903066.html>.

⁸⁹ Valentino et al., *supra* note 48, at 347.

⁹⁰ *Id.* at 348.

⁹¹ *Id.*

⁹² Benvenisti, *supra* note 71, at 95.

⁹³ See generally *NEW BATTLEFIELDS, OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE* (William C. Banks ed., 2011).

C. The War Against Terror

Terrorist organizations notoriously disregard the laws of armed conflict—the principle of distinction in particular.⁹⁴ They target civilians purposely; they do not use uniforms or any other identifying insignia (and thus do not distinguish those who participate in hostilities from the civilian population);⁹⁵ and they often use civilians as human shields to protect military targets.⁹⁶ In conflict against terrorist groups who thus reject the conventions of IHL, state armies find it more difficult to abide by the principle of distinction while still preserving good chances to win the war.

This difficulty is realized in two ways. First, the blurring between combatants and civilians creates situations where it is hard to distinguish between those who do and do not participate in hostilities.⁹⁷ Second, and more relevant here, when terrorist organizations use civilians as human shields, the resources and efforts needed from the state army to protect these civilians are far greater than what would have been required in “regular” circumstances—that is, if civilians were not used as human shields.⁹⁸ In order to protect civilians, soldiers of the state armies must put their lives in greater jeopardy than if they did not abide by the principle of proportionality.⁹⁹ Accordingly, the various legal, moral, and practical arguments against the principle of proportionality would suggest they should not take that greater risk.

These concerns of state armies should neither be underestimated nor overestimated. The duty to protect the lives of combatants, while not redundant, is not on par with that to protect the lives of civilians. Civilians, unlike combatants, have no independent means to protect themselves; they are dependent on the protection given to them by the fighting forces. In addition, placing equal weight on the lives of civilians and combatants may lead to a slippery slope on

⁹⁴ Hilly Moodrick-Even Khen, *Children as Direct Participants in Hostilities: New Challenges for International Humanitarian Law and International Criminal Law*, in *NEW BATTLEFIELDS, OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE*, *supra* note 93, at 135.

⁹⁵ *Id.*

⁹⁶ Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?*, 16 *EMORY INT'L L. REV.* 445, 456 (2002).

⁹⁷ See generally Margaret T. Artz, *A Chink in the Armor: How a Uniform Approach to Proportionality Analysis Can End the Use of Human Shields*, 45 *VAND. J. TRANSNAT'L L.* 1447 (2012).

⁹⁸ See generally Amnon Rubinstein & Yaniv Roznai, *Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality*, 22 *STAN. L. & POL'Y REV.* 93 (2011); Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 *COLUM. J. TRANSNAT'L L.* 292 (2009).

⁹⁹ See Iddo Porat & Ziv Bohrer, *Preferring One's Own Civilians: May Soldiers Endanger Enemy Civilians More Than They Would Endanger Their State's Civilians?*, 47 *GEO. WASH. INT'L L. REV.* 99 (2015) (discussing this requirement in more detail). The principle of proportionality is discussed in the next section.

which a government will risk the lives of its own civilians when the public is worried about losing lives of soldiers.¹⁰⁰

While the lives of civilians should primarily be protected under the principle of distinction, the lives of combatants can be considered under the principle of proportionality. In some of the cases where human shields are involved, combatants' lives may even be protected at the expense of civilian lives.

III. THE PRINCIPLE OF PROPORTIONALITY

Despite the prominence of the principle of distinction, civilians are inevitably killed in war.¹⁰¹ Quite apart from any intentional or illegitimate positioning of civilians as human shields, the proximity of civilians to military targets results in civilian casualties in war. The unintentional killing of civilians can be justified by a moral principle called "double effect,"¹⁰² which has been interpreted legally as the principle of proportionality.¹⁰³ The principle of proportionality emanates from the principle of distinction and intends to preserve the high value of civilian lives in war. Nevertheless, in cases in which terrorist forces make it harder to avoid harming the civilian population, the principle of proportionality may sometimes serve to justify preferring the lives of combatants over the lives of civilians.

A. Double Effect

The principle of double effect, whose roots are in the Casuistics in the Middle Ages, determines that:

it is permitted to perform an act likely to have evil consequences provided the following four conditions: i) the act is good in itself or at least indifferent; ii) the direct effect is morally acceptable; iii) the intention of the actor is good, that is, he aims only at the acceptable effect; the evil is not one of his ends, nor

¹⁰⁰ See, for example the claim that IDF has been gradually adopting an undeclared policy according to which the lives of soldiers (who are all conscripts in the IDF) are in effect worth more than the lives of civilians. As one reporter wrote, "A child who lives in fear in bombarded Sderot . . . [is] worth less than a 'child' in uniform, whose death or capture in battle become a national disaster." YAGIL LEVY, *ISRAEL'S DEATH HIERARCHY: CASUALTY AVERSION IN A MILITARIZED DEMOCRACY* 141 (2012).

¹⁰¹ See *supra* Part II; see also Steven Lee, *Double Effect, Double Intention, and Asymmetric Warfare*, 3 J. OF MIL. ETHICS 233, 237 (2004).

¹⁰² WALZER, *supra* note 16, at 152.

¹⁰³ The principle of proportionality was incorporated in Article 51(5) of AP(I). AP(I), *supra* note 6, at 26.

is it a means to his ends; iv) the good effect is sufficiently good to compensate for allowing the evil effect.¹⁰⁴

The legal expression of the double effect principle in general, and in particular its fourth section (i.e., that the good effect is sufficiently good to compensate for allowing the evil effect), can be found in Article 51(5) of AP(I), which prohibits the execution of attacks that “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.”¹⁰⁵

The proportionality and double effect principles limit the principle of distinction and the duty to avoid harming civilians in order to achieve “a good cause” (in the words of the double effect principle) or “military advantage” (in the words of the proportionality principle). That is, they propose that the value of civilian lives and property and the value of military advantage should be balanced; the balance, however, should be held in a way that will not inflict excessive harm upon civilians. However, the concept of “excessiveness” is a vague yardstick.¹⁰⁶ Since it was enacted in AP(I), numerous tests of proportionality have been suggested to interpret this concept, some of which are described here.¹⁰⁷

B. Excessiveness

Three terms—“military advantage,” “direct and concrete,” and “attack”—provide context for the concept of “excessiveness” enumerated by Art. 51 of AP(I). These terms have been interpreted in various ways. For example, it is unclear whether “attack” should refer to “an isolated ground operation by a specific unit”¹⁰⁸ or have the broader sense of an act of a larger military unit, such as a brigade.¹⁰⁹ In the same way, “military advantage” anticipated from the attack

¹⁰⁴ WALZER, *supra* note 16, at 152.

¹⁰⁵ AP(I), *supra* note 6, at 16.

¹⁰⁶ Porat & Bohrer, *supra* note 99, at 106.

¹⁰⁷ See, e.g., W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 141–42 (1990) (discussing classical scholarship on the principle of proportionality); William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV., 91, 102 (1982). Accord AMICHAÏ COHEN, PROPORTIONALITY IN MODERN ASYMMETRICAL WARS, JERUSALEM CENTER FOR PUBLIC AFFAIRS (2010) (providing updated essays on proportionality and the new battlefields); Robert D. Sloane, *Puzzles of Proportion and the “Reasonable Military Commander”*: *Reflections on the Law, Ethics, and Geopolitics of Proportionality*, 6 HARV. NAT’L SEC. J. 299 (2015); Michael N. Schmitt & John J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 37 U. PA. J. INT’L L. 53 (2015).

¹⁰⁸ See Oeter, *supra* note 37, at 162 ¶ 444.

¹⁰⁹ Fenrick, *supra* note 107, at 102.

is usually interpreted as relating to a “compound operation,”¹¹⁰ while the International Committee of the Red Cross (ICRC) commentary on the Additional Protocols to the Geneva Convention accepts a narrower interpretation that does not include advantages that would only be clarified in the long run.¹¹¹ Nevertheless, the “directness” of the military advantage dictates that it should reflect only the advantageous results of the acts of the armed forces and not the political advantages to which the belligerent state aspires.¹¹²

Within this wide spectrum of interpretations, the concept of excessiveness remains vague as well.¹¹³ Case law and scholarly writing have not provided clear-cut meanings for “excessive harm.” Both the Israeli Supreme Court¹¹⁴ and the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia¹¹⁵ determined that excessive harm should be decided on a case-by-case basis.¹¹⁶ In addition, the NATO Campaign report concluded that excessiveness should be determined according to “an *overall* assessment of the totality of civilian victims as against the goals of the military campaign.”¹¹⁷ On the other hand, the International Criminal Tribunal for the Former Yugoslavia has opined that:

in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of

¹¹⁰ Oeter, *supra* note 37, at 162 ¶ 444. Parks suggests that a military operation can even be regarded as the whole battle. See Parks, *supra* note 107, at 141–42. The Rome Statute of the International Criminal Court accepted the broad interpretation of the term and determined that the military advantage is an “overall military advantage.” See Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 2004.

¹¹¹ INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 684 (Yves Sandoset al. eds., 1987).

¹¹² This is the premise of AP(I). See AP(I), *supra* note 6, at 26. Cf. Parks, *supra* note 107. Parks’ criticism of this premise, according to which war should be regarded as a political process aiming for wider advantages than the pure military ones and including strategic, political, and economic advantages.

¹¹³ Porat & Bohrer *supra* note 99, at 106.

¹¹⁴ HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel (2) ISR. L. R. 459, 506 (2006) (Isr.) [hereinafter Targeted Killings Case].

¹¹⁵ North Atlantic Treaty Org. [NATO], Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, <http://www.icty.org/x/file/Press/nato061300.pdf> [hereinafter NATO Report].

¹¹⁶ *Id.* ¶ 50; Targeted Killings Case, *supra* note 114, at ¶ 46.

¹¹⁷ NATO Report, *supra* note 115, at ¶ 52.

such acts entails that they may not be in keeping with international law.¹¹⁸

Thought has also been given to the vagueness of the proportionality norm and how it “grants military commanders extensive discretion, allowing the result to vary depending on the assessor’s viewpoint and in light of the case-specific circumstances.”¹¹⁹ While the NATO Campaign report concluded that this discretion “is not unlimited,” it suggested that the yardstick for determining which acts will be “considered clearly disproportional and, therefore, illegal”¹²⁰ is rather procedural. According to that interpretation, in order to assess the legality of operational decisions, one must scrutinize the procedure applied instead of examining the commander’s operative decision.¹²¹ In cases where decisions were taken under an administratively proper procedure—for example, where all the relevant information was taken into consideration—the executive (military) decision will be considered legitimate and the harm to civilians not excessive.¹²²

Although it seems that the obscurity of the standards of excessiveness makes it impossible to decide right from wrong in the battlefield—particularly in the case of excessive harm to civilians—one scholar has suggested applying common sense: “Combatants can be held to such a standard in the same way that all of us are held to a similar standard of avoiding recklessness in our daily lives.”¹²³ This illumination rescues the discussion of proportionality from the nihilistic conclusion that combatants’ actions on the battlefield cannot be judged.

As the mission of achieving the balance between the competing values (that is, civilians’ lives and property versus military advantage) is dependent on combatants’ activities in the battlefield, combatants should certainly risk their lives to fulfill their mission.¹²⁴ However, this conclusion spurs several questions: should combatants risk their lives to protect enemy civilians? If so, what extent of the risk should they bear? Does terrorist organizations’ use of civilians as human shields change the scope of the combatants’ obligations towards enemy civilians?¹²⁵

¹¹⁸ Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgement, ¶ 526 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

¹¹⁹ Porat & Bohrer, *supra* note 99, at 153.

¹²⁰ See NATO Report, *supra* note 115, ¶ 49–50.

¹²¹ COHEN, *supra* note 107, at 29–30, 33–35.

¹²² *Id.*

¹²³ Lee, *supra* note 101, at 246.

¹²⁴ The concept of class legislation suggests that combatants are “trained to fight, provided with weapons, required to fight on command . . . it is the enterprise of their class.” See WALZER, *supra* note 16, at 144. See also Porat & Bohrer, *supra* note 99, at 43.

¹²⁵ Another dilemma, which is beyond the scope of this paper, is whether the risks combatants should bear to protect their own civilians are greater than the risks they should bear to protect enemy civilians. Other papers analyze this question more thoroughly. See Porat & Bohrer, *supra* note 99; Lee, *supra* note 101, at 237–38.

C. Risks to Civilians Versus Combatants

In approaching the above question, the point of departure is the principle of distinction and the concept of the innocent civilians who neither inflict harm on the counter-forces nor have means to protect themselves. Therefore, civilians must be protected regardless of their nationality.¹²⁶ As Walzer suggests, because civilians are subject to harm caused by the acts of the counter-forces, the combatants' duty to prevent excessive harm to civilians and civilian property includes a duty to minimize expected harm to civilians and their property.¹²⁷ Walzer, therefore, adds to the double effect principle a principle of double intention,¹²⁸ according to which, "aware of the evil involved, [the actor] seeks to minimize it, accepting costs to himself."¹²⁹

In order to minimize the risk to civilians, the attacker should seek alternative means that require imposing lesser risks on civilians.¹³⁰ Yet attackers are not expected to bear unreasonable risks to themselves; moreover, the standard for determining what is a reasonable risk is much more relaxed in wartime than in times of peace.¹³¹ In addition, the attacker may calculate into the reasonable risks imposed on civilians "the extent to which the achievement of the military objective would further the cause of victory in the war."¹³² That is, the greater the importance of the military advantage, the more risks the belligerent can legitimately impose on civilians.

Nevertheless, it is not axiomatic that the stakes of a reasonable risk to civilians are always high in war. The stakes should be determined on a case-by-case basis¹³³ and may vary according to the circumstances. In sum,

[r]easonableness is determined by weighing the extent of the civilian risk an alternative imposes against other relevant factors, such as: the extent of the combatant risk the alternative imposes; the likelihood that it would achieve the military

¹²⁶ Lee, *supra* note 101, at 238. Note also that "customary law refutes the claim that [t]he proportionality principle does not itself require the "attacker" to accept any measure of risk in order to reduce civilian danger." See Porat & Bohrer, *supra* note 99, at 155–56.

¹²⁷ WALZER, *supra* note 16, at 155.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Lee, *supra* note 101, at 242.

¹³¹ *Id.* at 241.

¹³² *Id.* at 245. A more limited version of this principle requires that the military advantage refer to a specific operation and not to the whole battle. Note Parks' criticism of this concept, according to which such an interpretation misses the political aims of war to achieve strategic, economic, or psychological advantages. See Parks, *supra* note 107, at 141–42.

¹³³ See also NATO Report, *supra* note 115, ¶ 48–52 (discussing the principle of proportionality).

objective; and the extent to which the achievement of the objective would further the cause of victory in the war.¹³⁴

The duty of the attacker to reduce the risks to civilians is supported in IHL by Article 57, AP(I), which determines that belligerents must take precautionary measures in favor of the civilian population before the commission of attacks, such as giving warnings of attacks that may affect the civilian population, and taking “all feasible precautions in the choice of means and methods of attack with a view to avoiding (and in any event to minimizing) incidental loss of civilian life, injury to civilians and damage to civilian objects.”¹³⁵ However, Article 57 also determines that the belligerent should only apply “feasible means,” and hence, it does not advocate subjecting attackers to unreasonable risks to themselves.

D. Force Protection

The duty to risk the lives of combatants in order to protect enemy civilians should be mitigated by the concept of force protection. Force protection is the concept through which belligerents seek means to minimize risks and casualties to their own troops.¹³⁶ It is interpreted by the military forces as the “commander’s right and obligation of self-defense.”¹³⁷ As such, it allows the commanders to apply means and strategic tactics to preserve the lives of their own troops.¹³⁸ Force protection may also include the state’s obligation towards the soldiers it sent to carry out a mission in its name.¹³⁹

Force protection should not be understood as an absolute value.¹⁴⁰ One extreme position with regard to this concept—which, if we abide by the concept of human dignity, we should reject—narrowly interprets force protection as not according more value to combatants’ lives “than the mission-specific military advantage that will be attained by keeping them alive during the course of that

¹³⁴ Lee, *supra* note 101, at 246.

¹³⁵ AP (I), *supra* note 6, at 29.

¹³⁶ Robin Geiss, *The Principle of Proportionality: ‘Force Protection’ as a Military Advantage*, 45 ISR. L. REV. 71, 71–72 (2012).

¹³⁷ Thomas W. Smith, *Protecting Civilians...or Soldiers? Humanitarian Law and the Economy of Risk in Iraq*, 9 INT’L STUD. PERSP. 144, 152 (2008).

¹³⁸ See generally Geiss, *supra* note 136.

¹³⁹ See *supra* Part II.B (discussing the state’s obligations towards its soldiers); Kasher, *Combatants Life*, *supra* note 13, at 236.

¹⁴⁰ However, the 2003 rules of engagement (ROE) card of the US troops in Iraq that listed protocols covering targeting of combatants and using force against civilians. Smith recites the top of the card which stated “in bold capital letters”: “NOTHING IN THESE RULES PROHIBITS YOU FROM EXERCISING YOUR INHERENT RIGHT TO DEFEND YOURSELF and OTHER ALLIED FORCES.” Smith, *supra* note 137, at 152.

specific mission.”¹⁴¹ A less severe and more palatable interpretation suggests that force protection should be factored “into the proportionality assessment of each and every attack”¹⁴² so that force protection becomes a relevant consideration among others, such as “the target, the urgency of the moment, the available technology and so on.”¹⁴³

Hence, force protection allows for a mitigation of the principle of distinction and combatants’ duty to protect enemy civilians that results from this principle. However, it can only *mitigate* this duty, not *annul* it. As the principle of double intention reiterates, the combatant is always led by an *intention* to minimize damage to civilians. Therefore, a minimum level of protection that combatants owe to foreign civilians must be determined.¹⁴⁴ Yet, the standard of the risk is not so rigid that it requires the combatant to ensure that the harm to civilians will always be reduced.¹⁴⁵ Force protection is among the legitimate considerations that are calculated into the “reasonable risks”¹⁴⁶ combatants should take on themselves while being subjected to a standard of minimum obligations towards enemy civilians.

However, the standard of minimum obligations towards enemy civilians is quite often abused when civilians are used as human shields to protect military targets. This is because under such circumstances, combatants find themselves required to bear more risks than they would have to take if civilians had not been placed in the vicinity of the targets.

E. Use of Human Shields

Human shielding is a military tactic aimed at “deter[ing] attacks on combatants and military objectives,”¹⁴⁷ thus essentially “immunizing” military targets from attack.¹⁴⁸ This is achieved by positioning persons who are not legitimate targets, such as civilians,¹⁴⁹ in the vicinity of the military targets that the

¹⁴¹ Porat & Bohrer, *supra* note 99, at 154. *See also* Geiss, *supra* note 136, at 72–74 (listing scholars who object to the concept of force protection in sources cited).

¹⁴² Geiss, *supra* note 136, at 72–72, 88–89.

¹⁴³ Porat & Bohrer, *supra* note 99, at 156.

¹⁴⁴ Benvenisti, *supra* note 71, at 82.

¹⁴⁵ Porat & Bohrer, *supra* note 99, at 156.

¹⁴⁶ Lee, *supra* note 101, at 244.

¹⁴⁷ Schmitt, *supra* note 98, at 293.

¹⁴⁸ The literature and practice distinguish between voluntary human shields and involuntary human shields. *See, e.g.*, Targeted Killings Case, *supra* note 114, ¶ 36; Rubinstein & Roznai, *supra* note 98, at 112–13; Artz, *supra* note 97, at 1474; *see generally* Schmitt, *supra* note 98. For the purpose of this article, I will assume that all human shields are involuntary, and therefore should not be regarded as direct participants in hostilities but rather treated according to the principle of proportionality.

¹⁴⁹ Or other persons who are not legitimate targets, such as prisoners of war. *See* Schmitt, *supra* note 98, at 293.

defender intends to protect.¹⁵⁰ Since the American Civil War in the 19th century and through to World War II, both state and non-state actors have employed this tactic;¹⁵¹ despite the clear prohibition on its use in AP(I),¹⁵² it has continued to serve terrorist organizations such as Hamas,¹⁵³ Hezbollah,¹⁵⁴ and ISIS¹⁵⁵ in the 20th century.

The use of human shields invokes proportionality and has implications for the standards applied to determine proportionality. Presumably, the attacker has two conflicting options. The first is to attribute no meaning to the illegal act of the defender who jeopardizes the shielding civilians. In such a case, the attacker should grant human shields the protection afforded to civilians in times of war.¹⁵⁶ When this policy dictates the calculations required to determine excessive harm to civilians forbidden by the principle proportionality, it is anticipated that “the analysis will rarely allow a combatant to act against human shields in order to attain a shielded military objective.”¹⁵⁷ The second option is to have the defender who violated IHL by using human shields bear the consequences of the illegal act.¹⁵⁸ The proportionality standard dictated by this policy will not regard the harm caused to the shielding civilians as excessive,¹⁵⁹ despite the fact that in practice more civilians would be harmed than would have been the case if they were not used as human shields. These two options have implications for the level of risk combatants should bear in protecting enemy civilians. The first option incurs more risks to combatants’ lives, as it prevents what is considered forbidden excessive harm to civilian lives; the second option incurs fewer risks to soldiers’ lives and hence its legality and morality might be questionable.

The first option accords better with the IHL’s view of the major significance of civilian lives, and for this reason it “dominate[s] among

¹⁵⁰ *Id.*

¹⁵¹ Rubinstein & Roznai, *supra* note 98, at 96.

¹⁵² AP(I), *supra* note 6, at 29 (stating that “the parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.”).

¹⁵³ Mathew Blake, *Hamas Admits it DID Use Schools and Hospitals in Gaza Strip as ‘Human Shields’ to Launch Rocket Attacks on Israel—but Claims It Was ‘Mistake’*, DAILYMAIL (Sept. 12, 2014, 3:07 AM), <http://www.dailymail.co.uk/news/article-2753176/Hamas-DID-use-schools-hospitals-Gaza-Strip-human-shields-launch-rocket-attacks-Israel-admits-says-mistake.html>.

¹⁵⁴ *Hezbollah’s Human Shields*, WASH. TIMES (July 30, 2006), <http://www.washingtontimes.com/news/2006/jul/30/20060730-093558-9976r/>.

¹⁵⁵ Ben Farmer, *Islamic State Jihadists Using Human Shields to Avoid Air Strikes*, THE TELEGRAPH (Nov. 20, 2015), <http://www.telegraph.co.uk/news/uknews/defence/12004264/Islamic-State-jihadists-using-human-shields-to-avoid-air-strikes.html>.

¹⁵⁶ Schmitt, *supra* note 98, at 327.

¹⁵⁷ Artz, *supra* note 97, at 1474.

¹⁵⁸ Schmitt, *supra* note 98, at 327.

¹⁵⁹ Artz, *supra* note 97, at 1475.

international humanitarian law experts.”¹⁶⁰ This inclination towards favoring the interests of the outlaw defender is supported by “an astounding absence of condemnations by NGOs on the [use of human shields which] renders the prohibition on human shields merely theoretical.”¹⁶¹ However, the first option¹⁶² has also faced many critics, who contend that it unreasonably stretches the limitations placed on belligerents so that—paraphrasing the words of the Israeli Supreme Court—democracies find themselves fighting terrorists with *both* hands tied.¹⁶³ The criticism focuses, therefore, on the requirement placed on the counter-terrorist force to jeopardize more of its military assets, even its military advantage and lives of combatants, for the sake of protecting civilians’ lives.

However, the second option also cannot be accepted in its obvious form, as there is “scant precedent to support the loss of protected status by a civilian due to the wrongful acts of one of the parties to the conflict.”¹⁶⁴ Nevertheless, it could be legally and morally supported when modified to take into account the major significance of civilians’ lives and yet avoid allowing the outlaw defender to enjoy an unjustified advantage while abusing the law in its favor. According to a modified version of the second option, and taking into consideration the primacy of the principles of distinction and proportionality, human shields “retain their immunity from attack, but . . . should . . . ‘be discounted’ when calculating incidental injury for proportionality and precautions in attack purposes.”¹⁶⁵ When discounting those civilians from the calculation of proportionality, the attacker still acknowledges that those human shields qualify as civilians, and hence deserve the protections of civilians;¹⁶⁶ yet, the discount—allowed because the defender acted illegally and interfered with the normal calculation that should have been made—changes the result of the proportionality test in favor of the attackers.¹⁶⁷

The method of “discounting” human shields from the calculation of proportionality is, in fact, a mode of implementing the principle of proportionality.¹⁶⁸ Yet, this mode of implementation is allowed only under the following preconditions: First, when the use of human shields is widespread and systematic, as otherwise the attacker would not be compelled to attack and could

¹⁶⁰ Schmitt, *supra* note 98, at 328. See also Artz, *supra* note 97, at 1474 (providing additional sources supporting this approach).

¹⁶¹ Rubinstein & Roznai, *supra* note 98, at 107.

¹⁶² See Artz, *supra* note 97, at 1480.

¹⁶³ Rubinstein & Roznai, *supra* note 98, at 127. Chief Justice Barak of the Israeli Supreme Court opined that a democracy must fight terrorism with one hand tied behind its back. See HCJ 5100/94 The Public Committee against Torture in Israel v. the State of Israel, 53(4) PD 817.

¹⁶⁴ Schmitt, *supra* note 98, at 327.

¹⁶⁵ *Id.* at 328.

¹⁶⁶ *Id.* at 331.

¹⁶⁷ See U.K. Ministry of Defence, *The Manual on the Law of Armed Conflict* (2004).

¹⁶⁸ Schmitt, *supra* note 98, at 331.

abort the mission without significantly giving up its military advantage.¹⁶⁹ Second, attacks of human shields are warranted only when these civilians shield targets that pose clear and present danger to the adversary.¹⁷⁰ Third, attacks will be considered lawful only after adequate warnings have been given to the civilians. The warnings should either notify the civilians of their proximity to military targets or warn them against an intended attack on these targets.¹⁷¹

In some cases in which human shields are used by the defender, the proportionality calculation tilts in favor of the attacker, enabling the attacker to preserve its military advantage. Since force protection is one of the elements creating military advantage, the proportionality calculation may also result in less risk for combatants' lives. Truly, the attacker "is not relieved from his duty to exercise reasonable precautions to minimize the loss of civilian life, [yet] neither is he obligated to assume any additional responsibility as a result of the illegal acts of the defender."¹⁷² The modified version of the second option discussed above, which affords the civilians in principle protection but avoids letting the defender abuse this protection, implements this conclusion: Combatants will bear risks to their lives to the point where it is reasonable.¹⁷³ Additional risk required by the illegal acts of the defender will not be counted reasonable and will not be asked of those combatants.

IV. CASE ANALYSES

A. IDF's Hannibal Directive in Operation Protective Edge

Responding to "months of increasing rocket and mortar fire directed at its civilian population" in the spring and summer of 2014,¹⁷⁴ Israel launched an aerial operation against Hamas, which began on July 7, 2014.¹⁷⁵ This action, named "Operation Protective Edge," continued as a joint ground and aerial push from July 17 until August 26 to neutralize the cross-border assault-tunnel threat posed by Hamas from that date.¹⁷⁶

¹⁶⁹ Rubinstein & Roznai, *supra* note 98, at 120–21.

¹⁷⁰ *Id.* at 123.

¹⁷¹ *Id.*

¹⁷² Schmitt, *supra* note 98, at 329–30 (citing Parks, *supra* note 107).

¹⁷³ Lee, *supra* note 101, at 244–45.

¹⁷⁴ And specifically to a barrage of approximately 300 rockets and mortars fired into Israel by Hamas and other organizations between June 12 and July 7. See STATE OF ISRAEL, 2014 GAZA CONFLICT REPORT 1 ¶ 4 (2015), <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf> [hereinafter GAZA CONFLICT REPORT].

¹⁷⁵ *Id.* ¶ 1.

¹⁷⁶ *Id.* ¶ 7. Note that this operation has been the last of three military operations against Hamas aimed to thwart the firing of rockets at Israeli civilian population that Hamas started in 2007. The first operation was "Cast lead" (December 27, 2008- January

The two general military advantages that Israel sought from the operation—degrading Hamas’ ability to fire rockets and mortars at the civilian population in Israel¹⁷⁷ and neutralizing the cross-border assault-tunnel infrastructure¹⁷⁸—were achieved by targeting specific military targets. Among these were buildings used by organized armed groups for command, control, communications, and intelligence activities; buildings used for armament production and storage; launching sites; and house openings and exits to combat and cross-border tunnels.¹⁷⁹ The operation also attacked civilian objects whose “purpose” and “use” supplied military advantage to the adversary,¹⁸⁰ referring to them as military objectives.¹⁸¹ These included, for example, situations of the enemy using “a civilian residence as a command center, a school as a weapons storage facility, or the roof of a hospital as a location from which to launch rockets.”¹⁸²

During a battle fought on the northeastern edge of Rafah aimed at locating a tunnel reported not to have been destroyed, IDF soldier Lt. Hadar Goldin was dragged away by Hamas militants, perhaps with intent of kidnapping. However, according to Israeli authorities, Lt. Goldin did not survive the initial ambush and was killed in action.¹⁸³ To subvert the capture, IDF troops were ordered to apply the IDF General Staff Directive for Contending with Kidnapping Attempts (the Hannibal Directive), which provides methods and procedures for preventing and frustrating attempted kidnappings of Israeli nationals.¹⁸⁴

Some describe the Hannibal directive as “one of the military’s most dreaded and contentious directives.”¹⁸⁵ According to an Israeli Ministry of Foreign Affairs report, the directive, whose specific content is classified, “explicitly prohibits actions intended to kill the kidnapped person,”¹⁸⁶ but the report also admits that “any military action designed to thwart kidnapping entails some risk to

18, 2009), the second was “Pillar of Defense” (November 14-21, 2012), and the last was “Protective Edge” (July 7- August 26, 2014).

¹⁷⁷ What began as firing rockets at border towns spread to wide areas in Israel and reached major cities in Israel such as Jerusalem and Tel-Aviv. See Yaakov Lappin & Herb Keinon, *Hamas Rockets Reach Jerusalem and Tel Aviv*, JERUSALEM POST (Aug. 8 2014), <http://www.jpost.com/Operation-Protective-Edge/Iron-Dome-intercepts-second-rocket-over-greater-Tel-Aviv-361994>.

¹⁷⁸ GAZA CONFLICT REPORT, *supra* note 174, ¶ 77.

¹⁷⁹ *Id.* at 272.

¹⁸⁰ See AP(I), *supra* note 6, at 27.

¹⁸¹ Schmitt & Merriam, *supra* note 107, at 103.

¹⁸² *Id.* at 104.

¹⁸³ Isabel Kershner, *Signs of War Crimes Seen in Israeli Hunt for Ambushed Soldier*, INT’L N.Y. TIMES (July 29, 2015), http://www.nytimes.com/2015/07/30/world/middleeast/report-cites-possible-war-crimes-in-israeli-hunt-for-ambushed-soldier.html?_r=0.

¹⁸⁴ GAZA CONFLICT REPORT, *supra* note 174, ¶ 335.

¹⁸⁵ Kershner, *supra* note 183. According to those claims, the directive allows for the use of maximum force to prevent captors from getting away with their captives, even at the risk of endangering the lives of captured Israelis.

¹⁸⁶ GAZA CONFLICT REPORT, *supra* note 174, ¶ 336.

life.”¹⁸⁷ As a consequence, the directive is known “[as] allow[ing] for the use of maximum force to prevent captors from getting away with their captives, even at the risk of endangering the lives of captured Israelis.”¹⁸⁸

Israel has not yet supplied an official version of the details on how the directive was employed to thwart Lt. Goldin’s capture, since these events are being investigated by IDF’s fact-finding assessment (FFA) Mechanism.¹⁸⁹ However, according to an Amnesty International report¹⁹⁰ as well as to the independent commission of inquiry established by the UN Human Rights Council,¹⁹¹ the directive led to “intensified shelling” of the area in which the troops feared the captured soldier was located.¹⁹² The Amnesty International report refers to the military actions taken by the IDF after the capture as “black Friday.”¹⁹³ It claims that in the first three hours, when it was not yet clear whether Lt. Goldin was dead or alive, Israel fired more than 1,000 artillery shells in Rafah and dropped more than 40 bombs.¹⁹⁴ Two one-ton bombs were dropped on a residential area in the Al Tannur neighborhood of eastern Rafah, destroying several largely empty buildings and killing at least 16 civilians on the streets. In the four days after Lt. Goldin was captured, at least 135 people were killed in the area, as Israeli forces unleashed a barrage of artillery and airstrikes meant to prevent the militants from taking him deeper into Palestinian coastal territory.¹⁹⁵

Israel’s Ministry of Foreign Affairs dismissed the Amnesty report as “fundamentally flawed in its methodologies, in its facts, in its legal analysis and in its conclusions,”¹⁹⁶ yet Israel did not supply official data regarding the events on its behalf. Because the IDF fact-finding committee has not yet published its conclusions, the available data regarding the operation remains incomplete. Thus,

¹⁸⁷ *Id.*

¹⁸⁸ Kershner, *supra* note 183.

¹⁸⁹ According to the State of Israel Gaza Conflict Report “the FFA [fact finding assessment] Mechanism has provided its findings and collated materials to the MAG [Military Advocate General] for a decision regarding whether a criminal investigation is required. In accordance with the MAG’s continuing efforts at transparency, the MAG intends to release additional information in due course.” See GAZA CONFLICT REPORT, *supra* note 174, n.458.

¹⁹⁰ Kershner, *supra* note 183 (stating the conclusions of this report).

¹⁹¹ Independent commission of inquiry established by the UN Human Rights Council “to investigate all violations of international humanitarian law and international human rights law in the Occupied Palestinian Territory . . . particularly in the occupied Gaza Strip, in the context of the military operations conducted since 13 June 2014.” Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Situation in Palestine and Other Occupied Arab Territories, ¶ 1, U.N. Doc. A/HRC/29/52, (June 24, 2015) [hereinafter *Indep. Int’l Comm’n Report*].

¹⁹² *Id.* ¶ 57.

¹⁹³ Kershner, *supra* note 183.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

my analysis of the case will focus on the emanating theoretical questions concerning the principle of proportionality and the value of combatants' lives.

The dilemma this case illustrates is the following: What is considered proportionate or non-excessive harm to civilians and civilian objects for the attainment of military advantage resulting from saving a captured combatant? While the dilemma seems obvious, solving it is difficult. The military advantage is straightforward; it pertains only to the soldier's life. Indeed, it seems clear that thwarting the capture of a soldier would prevent Hamas from acquiring the strategic advantage over Israel of using the soldier's life as a "bargaining chip" to convince Israel to change its military plans or even to abort the whole military operation.¹⁹⁷ According to AP(I), however, this kind of advantage cannot be considered "direct and concrete."¹⁹⁸

Therefore, what is at stake is the life of a soldier versus the lives of civilians. Despite the simplicity and clarity of values, the vagueness of the criteria set by the principle of proportionality is eminent in this case. While civilians should be protected and combatants must take a minimum level of risk to ensure this protection, the principle of human dignity and the state's obligations to its combatants allow it (or even obligate it) to use force to preserve combatants' lives. We can apply the earlier-mentioned tests to evaluate the proportionality of this situation, such as "an *overall* assessment of the totality of civilian victims as against the goals of the military campaign,"¹⁹⁹ the cumulative effect of the military actions, or the procedural test.²⁰⁰ Nevertheless, these tests do not provide definitive standards.

I can, however, shed light on two guiding considerations. The first is the question of alternatives. The military actions taken to thwart the capture would not have been proportionate if any feasible alternatives could have resulted in less harm to civilians.²⁰¹ Furthermore, if the capturers were hiding among the civilian population in order to use them as human shields, the balance would have tilted in favor of the attacking Israeli forces, but only if the use of human shields were widespread and systematic and if warnings had been given to the civilians.²⁰²

Lt. Goldin's capture and the application of the Hannibal directive to prevent it exemplifies the conclusion that, despite an overriding demand to protect the lives of civilians in the first place, protecting combatants' lives is in itself a legitimate purpose and end for a belligerent. Nevertheless, it is important to stress

¹⁹⁷ See Rivka Weill, *Exodus: Structuring Redemption of Captives*, 36 CARDOZO L. REV. 177 (2014) (describing how the capture of soldiers by terrorist organizations influenced past Israeli government's operative decisions and considerations in negotiations).

¹⁹⁸ See also discussion of the concept of direct and concrete military advantage, *supra* Part III.B.

¹⁹⁹ NATO Report, *supra* note 115, ¶ 52.

²⁰⁰ See *supra* Part III.B.

²⁰¹ See Geiss, *supra* note 136, at 71–72.

²⁰² Rubinstein & Roznai, *supra* note 98, at 113, 121–22.

that this purpose can be justified by IHL only when balanced by the principle of proportionality and never through annulling the principle of distinction.

B. US Drones in the War against ISIS

1. Assessment of Proportionality

Drones, officially known as “unmanned aerial vehicles” (UAVs), have been gradually integrated into the armies of several states²⁰³ as well as into US aircrafts, especially since the beginning of the 21st century.²⁰⁴ These vehicles, which are remotely controlled by operators and depend on operator input,²⁰⁵ are used for reconnaissance and armed attack missions.²⁰⁶ The Obama administration has increased their use for targeted killing missions in overseas contingency operations (OCO)²⁰⁷—a term used by Obama to replace George W. Bush’s “war on terror.”²⁰⁸ Drones are being used in Pakistan,²⁰⁹ Yemen,²¹⁰ and Libya;²¹¹ and since August 2014, the United States has begun airstrikes against ISIS in Iraq and in Syria.²¹² The British Royal Airforce (RAF) joined the attacks against ISIS militants in November 2014.²¹³

The question of the legality of using drones and other autonomous weapons in the battlefield and its consistency with IHL has been thoroughly

²⁰³ *World of Drones: Military*, INT’L SECURITY, <http://securitydata.newamerica.net/world-drones.html> (last visited Sept. 20, 2016).

²⁰⁴ Ian G. R. Shaw, *The Rise of the Predator Empire: Tracing the History of U.S. Drones*, UNDERSTANDING EMPIRE, <https://understandingempire.wordpress.com/2-0-a-brief-history-of-u-s-drones/> (last visited Sept. 20, 2016); LOUISA BROOKE-HOLLAND, OVERVIEW OF MILITARY DRONES USED BY THE UK ARMED FORCES, BRIEFING PAPER NO. 06493 (Oct. 8, 2015), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06493#full-report> (UK).

²⁰⁵ Tetyana (Tanya) Krupiy, *Of Souls, Spirits and Ghosts: Transposing the Application of the Rules of Targeting to Lethal Autonomous Robots*, 16 MELBOURNE J. OF INT’L LAW 145, 148 (2015). Note that drones are not autonomous weapons, since they are operated by human beings and are not capable of making autonomous decisions. For the definition and different types of autonomous weapons, see *id.*

²⁰⁶ JAMES DESHAW, ANALYZING THE DRONE DEBATES 87 (2014).

²⁰⁷ WALI ASLAM, THE UNITED STATES AND THE GREAT POWER RESPONSIBILITY IN INTERNATIONAL SOCIETY: DRONES, RENDITION AND INVASION 81–82 (2013).

²⁰⁸ DESHAW, *supra* note 206.

²⁰⁹ Barrinha & Da Vinha, *supra* note 87, at 22.

²¹⁰ *Id.* at 23.

²¹¹ *Id.* at 22.

²¹² *Id.* at 26–28.

²¹³ Chris Cole, *UK Launches Drone Strikes in Iraq (Again)*, DRONE WARS UK (Nov. 11, 2014), <http://dronewars.net/2014/11/11/uk-launches-drone-strikes-in-iraq-again/>.

debated in recent years.²¹⁴ The main pros and cons in the IHL analysis regard the question of whether or not the military advantages achieved by the use of drones—especially force protection and economical savings—result from disproportionately excessive harm to the civilian population.

The drone's advantages emanate from its technological superiority over more conservative means of warfare. Sparing the need for a human pilot to fly the plane results in both economic efficiencies²¹⁵ and an improvement in military capabilities.²¹⁶ In financial terms, “capital replaces labor,”²¹⁷ since “drones . . . offer a highly valued product at discounted costs compared to the alternatives;”²¹⁸ it is cheaper to maintain drones than an army of soldiers.²¹⁹ Since drones are a force multiplier, they allow militaries to use fewer combatants;²²⁰ for example, only one operator is needed to fly a drone, whereas four pilots are required to operate an airplane.²²¹ Finally, “[drones] allow parties to the conflict to conduct military operations over a wider area, in addition to allowing them to strike the enemy at longer range,”²²² and “mission duration can be vastly extended, with rotating crews.”²²³ With drones there is no need to either “stay awake for long missions, [or] endure the physical and mental stresses of flying.”²²⁴

The financial advantages are translated into another military asset that is both practical and moral: force protection. In the practical sense, when fewer human resources are required, the army's resources can be directed differently, which increases the army's military capacity. In the moral sense (and as claimed throughout this article) force protection is a legitimate value aspired to by the military. Using drones to keep the soldiers removed from the battlefields achieves the goal of force protection, as it tasks the machines with dangerous missions and reduces casualties of combatants.²²⁵ Moreover, as battlefields become more cruel, it seems immoral to expose combatants to “biological or chemical toxins, torture

²¹⁴ See, e.g., ASLAM, *supra* note 207; DESHAW, *supra* note 206; PRECISION STRIKE WARFARE AND INTERNATIONAL INTERVENTION, *supra* note 87; CHRISTIAN ENEMARK, ARMED DRONES AND THE ETHICS OF WAR: MILITARY VIRTUE IN A POST-HEROIC AGE (2014); BRADLEY JAY STRAWSER, OPPOSING PERSPECTIVES ON THE DRONE DEBATE (2014).

²¹⁵ DESHAW, *supra* note 206, at 22.

²¹⁶ *Id.*

²¹⁷ Barrinha & Da Vinha, *supra* note 87, at 25.

²¹⁸ DESHAW, *supra* note 206, at 22.

²¹⁹ Krupiy, *supra* note 205, at 147.

²²⁰ *Id.* at 146.

²²¹ DESHAW, *supra* note 206, at 22. It is even claimed that “a single controller could maneuver many drone aircraft simultaneously.” *Id.*

²²² Krupiy, *supra* note 205, at 146.

²²³ Major Jason S. Deson, *Automating the Right Stuff? The Hidden Ramification of Ensuring Autonomous Aerial Weapon Systems Comply with International Humanitarian Law*, 72 A.F. L. REV. 85, 96 (2015).

²²⁴ *Id.*

²²⁵ Krupiy, *supra* note 205, at 146.

and murder by terrorists and psychological trauma”²²⁶ if these unnecessary risks can be avoided.

Yet the force protection achieved by the use of drones is attained by “dehumanizing”²²⁷ the battlefield—or at least one side of the conflict—as combatants are removed from the actual battlefield and operate the machines from a distance. Drone technology transfers the technical missions of the fighter pilot to the drone—that is, the machine—and leaves the decision-making missions to the human operator. In so doing, it neutralizes some of the human weaknesses involved in the process of targeting—such as response time, fatigue derived from the flight conditions,²²⁸ and the “trepidations and traumas of the battlefield”²²⁹—that may affect the pilot’s reactions. It may thus alleviate the difficulties of deciding whether a target is legitimate “in the fog of war.”²³⁰ The alienation of the decision-maker from the material battlefield “allows more time to consider targets and have a legal review.”²³¹

Despite these advantages, however, this dehumanization has numerous negative effects. Indeed, the remoteness of combatants from the battlefield has crucial negative moral implications. Remote killings neutralize the actual experience of combatants with their victims, thus turning them into “automats” and their actions into a “remote and even potentially automated killing detached from human behavioral cues.”²³² That is, remote killing has the potential to remove the psychological restraints generated by the horrors of the battlefield and to “place whatever ethics of war exists in peril.”²³³ Two additional implications of the dehumanization of the battlefield are both moral and operational. First, because machines do not have the ability to question orders,²³⁴ there is a higher risk that illegal orders will be given and applied. Second, because commanders are unable to communicate with lower-level leaders,²³⁵ they make decisions on their own, thus losing the important input these leaders may have.

Finally, a more general moral objection to the use of drones regards future implications of this use on the incentives to wage war or abstain from it. The risk-free environment for combatants provided by drones could lessen the reluctance of state leaders and other decision makers to use force and engage in armed conflicts.²³⁶ This is because reducing the risk of casualties to soldiers will be interpreted as reducing the political costs and risks of going to war.²³⁷ In fact,

²²⁶ DESHAW, *supra* note 206, at 85.

²²⁷ *Id.* at 89.

²²⁸ *Id.* at 22.

²²⁹ *Id.* at 24.

²³⁰ Deson, *supra* note 223, at 96.

²³¹ DESHAW, *supra* note 206, at 25.

²³² *Id.* at 89.

²³³ *Id.*

²³⁴ *Id.* at 92.

²³⁵ *Id.*

²³⁶ DESHAW, *supra* note 206, at 83.

²³⁷ *Id.*

some claim that the risk-free environment created by drones is already encouraging the US to launch military operations in countries with which the US is not at war,²³⁸ such as the drone strikes in Pakistan,²³⁹ Yemen,²⁴⁰ and Libya.²⁴¹ Thus, “the use of unmanned systems and precision weapons may actually encourage more bellicosity and longer wars.”²⁴²

In response to the moral arguments raised against the use of drones that focus on the remoteness of humans from the battlefield, it should be mentioned that drones are not the first technology to remove combatants from the battlefield; weapons such as artillery, bombers, and missile cruises had the same effect.²⁴³ Given that no new international law prevented these technologies’ widespread use, UAV technology will not likely be banned in the near future.

Indeed, while some states oppose using this technological development in the battlefields and others pursue integrating it into armed conflicts,²⁴⁴ the international community has not officially or legally banned the use of unmanned systems, including drones.²⁴⁵ Moreover, the International Committee of the Red Cross (ICRC), one of the most important institutions interpreting and applying IHL, has not joined a call for an outright ban.²⁴⁶ Nevertheless, the ICRC has demanded that such systems be developed and deployed only in cases where it is guaranteed that they can perform in accordance with IHL.²⁴⁷ In the following paragraphs, I will pursue the ICRC’s demand by examining whether drones were applied according to IHL’s relevant principles of distinction and proportionality. I will assume that the use of drones accords with the former principle, as the drone operators direct them in principle to attack only legitimate targets; that is, combatants and military objectives.²⁴⁸ But the principle of proportionality is

²³⁸ Barrinha & Da Vinha, *supra* note 87, at 27.

²³⁹ *Id.* at 22.

²⁴⁰ *Id.* at 23.

²⁴¹ *Id.*

²⁴² DESHAW, *supra* note 206, at 83.

²⁴³ *Id.* at 90.

²⁴⁴ Krupiy, *supra* note 205, at 146.

²⁴⁵ Deson, *supra* note 223, at 88. But note two documents from 2013 suggesting an outright ban on such weapons. Human Rights Council, Rep. of Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, U.N. Doc. A/HRC/23/47 (Apr. 9, 2013); HUM. RTS. WATCH, LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS (2013).

²⁴⁶ Deson, *supra* note 223, at 88.

²⁴⁷ *Id.* See also Peter Muarer, *The Use of Armed Drones Must Comply with Laws*, INT’L COMM. OF THE RED CROSS (May 10, 2013), <https://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm>.

²⁴⁸ Note that experts claim that drone operators have “greater technical capabilities at making determinations of combatant status,” and that regarding drone strikes in Pakistan “data shows that UAV strikes were far better at non-combatant discrimination than all other methods used for engaging Taliban fighters in the region.” ASLAM, *supra* note 207, at 90. See also Krupiy, *supra* note 205, at 156–58 (elaborating on drones and the principle of distinction).

relevant in this context because, although drone attacks are able to mitigate unintentional collateral damage, they cannot annul it. Incidental harm to civilians and civilian objects is inevitable.²⁴⁹

An assessment of whether drone operations accord with the principle of proportionality requires determining whether the harm caused to civilians and civilian objects by these systems is not excessive in relation to the military advantage achieved. The balance required by the proportionality test can be held only with regard to specific circumstances, from which the military advantage and the harm to civilians can be extrapolated. In the next sub-section, I will apply the proportionality test to the use of drones by the US in the war against ISIS. Before this, however, I will discuss the general military advantages normally emanating from drone use (in addition to those already discussed above) and the assessments of the general collateral damage caused to civilians in such situations.

In addition to force protection and economic advantages, drones have geopolitical strategic efficiencies.²⁵⁰ Using drones allows the state to avoid long periods of deployment in foreign countries, which harm the resilience of its forces²⁵¹ and threaten the sovereignty of those foreign countries.²⁵² The use of drones, on the other hand, is usually more easily borne by those countries, and they are more willing to acquiescence to airstrikes aimed at terrorists in their territory.²⁵³ Lastly, the use of drones avoids arousing the hostility of the local population toward armies deploying in foreign countries;²⁵⁴ however, this strategic advantage can be subverted by the claim that using drones evokes hostile feelings and “generates widespread public outrage”²⁵⁵ in cases where the populace is mistakenly targeted.²⁵⁶ It has even been claimed that the “violent asymmetries of power”²⁵⁷ between a state using drones and its adversaries results in “a psychology of terror,” in which the terrifying effect of the drone attacks is considered a “tactic of terrorism.”²⁵⁸

²⁴⁹ Conway Waddington, *Drones: Degrading Moral Thresholds for the Use of Force and the Calculations of Proportionality*, in *PRECISION STRIKE WARFARE AND INTERNATIONAL INTERVENTIONS*, *supra* note 87, at 124; Krupiy, *supra* note 205, at 162.

²⁵⁰ DESHAW, *supra* note 206, at 25.

²⁵¹ *Id.*

²⁵² *Id.* at 27.

²⁵³ *Id.*

²⁵⁴ *Id.* at 25.

²⁵⁵ DESHAW, *supra* note 206, at 21.

²⁵⁶ *Id.* at 27.

²⁵⁷ *Id.* at 88.

²⁵⁸ *Id.*

The effect of drone use on the civilian population relates to the question of assessing the precision and level of collateral damage of such strikes. There is good reason for the claim that drones “have the capacity to accurately strike a precise target almost anywhere in the world given the right conditions.”²⁵⁹ Moreover, because humans are still involved in the kill chain of “find, fix, track, target, engage and assess,”²⁶⁰ remote killing allows armies more time to consider the principles of distinction and proportionality.²⁶¹ The potential to reduce collateral damage caused by the operator’s fatigue, emotions, or psychological distress and impairment is increased both because of higher moral demands that targets are properly selected and civilians are spared²⁶² and because of immunity to “irrational pressures owing to peer pressure or hatred of the enemy.”²⁶³ The drone is considered more accurate than other remote attack techniques, such as shelling neighborhoods, carpet bombing wide geographic areas, or deploying missiles.²⁶⁴ Indeed, according to various sources, civilian death tolls are declining in recent years.²⁶⁵ As experts observe, “prior to drone usage, high value targets could escape while waiting for independent verification or for cruise missiles to be fired from distant platforms.”²⁶⁶ Furthermore, the technological accessories of drone operations, such as video streaming and array of sensor readings and intercepts, greatly reduce civilian casualties.²⁶⁷ The ability of drones for “sustained persistence over potential targets”²⁶⁸ and to “verify targets by multiple pilots and analysts”²⁶⁹ improves both the ability and incentive to distinguish between civilians and combatants.²⁷⁰ Finally, drone operating includes external review mechanisms, before and after the fact. Every strike is liable to review; in the United States, when more than 35 civilians are estimated to be killed, an external review is done before a strike is applied.²⁷¹

Nevertheless, it is difficult to assess the exact rates of collateral damage caused by drone attacks, especially those conducted by the United States.²⁷² The US government “has consistently argued that drone strikes are responsible for very few civilian casualties as a result of the technological benefits of drones and the efforts of those directing the . . . strikes.”²⁷³ Yet the government refuses to

²⁵⁹ *Id.* at 31.

²⁶⁰ DESHAW, *supra* note 206, at 91.

²⁶¹ *Id.* at 92.

²⁶² *Id.* at 91.

²⁶³ *Id.* at 92, 95.

²⁶⁴ *Id.*, at 32; Waddington, *supra* note 247, at 118.

²⁶⁵ DESHAW, *supra* note 206, at 40.

²⁶⁶ *Id.* at 32.

²⁶⁷ *Id.* at 36.

²⁶⁸ Barrinha & Da Vinha, *supra* note 87, at 22.

²⁶⁹ DESHAW, *supra* note 206, at 36.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Waddington, *supra* note 247, at 119; DESHAW, *supra* note 206, at 32.

²⁷³ Waddington, *supra* note 247, at 120.

provide information about strikes and official strikes figures.²⁷⁴ Research conducted by the Human Rights Clinic in Columbia Law School tracked the civilian casualty figures collected by three tracking organizations and found that “despite the strong efforts of these organizations, their estimates of civilian casualties are hampered methodologically and practically.”²⁷⁵

Increasing the fog surrounding the figures of collateral damage in drone attacks is the method of “signature strikes” applied by the United States in its OCO.²⁷⁶ Signature strikes are a doctrine that has emerged to guide drone strikes on targets defined by a profile based on behavioral patterns;²⁷⁷ that is, the profile of “military age men in a given geographic location who appear to follow a pattern that represents the signature of a terrorist.”²⁷⁸ Unlike personality strikes, which aim at a specific target, the targets of signature strikes do not need to be pre-identified through intelligence input.²⁷⁹ Signature strikes are led by a “guilt by association” approach, which considers as a terrorist anyone in the vicinity of target cities in which terrorists are located.²⁸⁰ Such an approach makes it much more difficult to estimate figures of civilian casualties because it is unclear whether persons harmed were civilians or terrorists. This evaluation becomes even harder when combatants use civilians as human shields and hide among them.²⁸¹ Even where there is consensus on the number of strikes and numbers of deaths, a substantial fundamental dispute remains over the distinction between combatants and non-combatants;²⁸² if all persons in a signature strike zone are defined as combatants, it can be concluded that no civilians were killed at all.²⁸³ Hence, the figures estimated out of signature strikes might change how unknown casualties—those confirmed as neither civilians nor terrorists—were counted.²⁸⁴

²⁷⁴ *Id.* at 120; HUMAN RIGHTS CLINIC, COLUMBIA LAW SCHOOL, COUNTING DRONE STRIKE DEATHS 9–11 (2012), <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/COLUMBIACountingDronesFinalNotEmbargo.pdf> [hereinafter COLUMBIA HUMAN RIGHTS CLINIC REPORT].

²⁷⁵ COLUMBIA HUMAN RIGHTS CLINIC REPORT, *supra* note 274.

²⁷⁶ Jack Serle, *Drone war report January – June 2015: Controversial ‘Signature Strikes’ Hit Yemen and Pakistan*, BUREAU OF INVESTIGATIVE JOURNALISM (July 1, 2015), <https://www.thebureauinvestigates.com/2015/07/01/drone-war-report-january-june-2015-controversial-signature-strikes-hit-yemen-and-pakistan/>.

²⁷⁷ Barrinha & Da Vinha, *supra* note 87, at 24.

²⁷⁸ DESHAW, *supra* note 206, at 31; Waddington, *supra* note 247, at 126. Signature strikes are sometimes called “crown killing” or “terrorist attack disruption strikes” by CIA officials. In 2008, George W. Bush adopted signature strikes against anonymous suspected al Qaeda and Taliban fighters in Pakistan who bear the characteristics of Qaeda or Taliban leaders on the run. Obama extended and expanded this practice to Yemen. *See* DESHAW, *supra* note 206, at 31.

²⁷⁹ Waddington, *supra* note 247, at 126.

²⁸⁰ *Id.* at 121.

²⁸¹ DESHAW, *supra* note 206, at 41.

²⁸² Waddington, *supra* note 247, at 122.

²⁸³ DESHAW, *supra* note 206, at 37.

²⁸⁴ Waddington, *supra* note 247, at 121.

Finally—and adding to the problem of identifying who is targeted and killed—there is often a lack of accounting in the aftermath of a strike. Since virtually no post-strike investigation is conducted, few civilians are likely to be tallied.²⁸⁵ Ultimately, the empirical truth about the number of civilians being killed by drone strikes is likely to remain impossible to prove indisputably.²⁸⁶

The above general analysis thus outlines the relevant factors of the principle of proportionality in IHL in the context of drone use: on the one hand, the military advantages such as force protection, financial savings, and better precision abilities; and on the other hand, the estimated harm to civilians resulting from the use of drones. In the next sub-section I will apply the conclusions reached in this section to my analysis of the US use of drones in the war against ISIS.

2. Drone Use in the War Against ISIS

The United States has been conducting drone strikes in Iraq and Syria both in supplying humanitarian aid and in attack missions, such as destroying rebel positions²⁸⁷ and signature and personality strikes to eliminate suspected terrorists.²⁸⁸ Evaluating the legality of these missions, especially the attacks, according to the proportionality principle requires assessing the military advantages aimed at and the level of collateral damage rendered by these attacks.

According to the social sciences theory known as “risk society,” the war the United States has been waging against terrorists since September 2001—and especially the drone attacks intensified by Obama²⁸⁹—is a “risk war.”²⁹⁰ The underlying assumption of a risk society is that “there is no end to risks . . . [they] are at once unpredictable and manufactured;”²⁹¹ “these risks should ‘not . . . be solved but merely managed.’”²⁹² Hence, in terms of security, war has risk management goals;²⁹³ “security policies informed by this risk condition do not aim to deal with a particular threat but rather to reduce our anxiety level by managing a security concern.”²⁹⁴ Drone strikes are thus a clear expression of risk wars, as

²⁸⁵ DESHAW, *supra* note 206, at 38. Human Rights Watch found no evidence of any post-strike investigations to verify civilian casualties. *See id.*

²⁸⁶ Waddington, *supra* note 247, at 122.

²⁸⁷ *See supra* Part IV.B.

²⁸⁸ Greg Botelho & Barbara Starr, *U.S. ‘Reasonably Certain’ Drone Strike Killed ISIS Mouthpiece ‘Jihadi John’*, CNN (Nov. 14, 2015) <http://edition.cnn.com/2015/11/13/middleeast/jihadi-john-airstrike-target/>.

²⁸⁹ Barrinha & Da Vinha, *supra* note 87, at 16.

²⁹⁰ *Id.* at 15.

²⁹¹ *Id.*

²⁹² *Id.* at 17.

²⁹³ *Id.*

²⁹⁴ Barrinha & Da Vinha, *supra* note 87, at 17.

these strikes are used as solutions to US security challenges.²⁹⁵ The precision-strikes that drones conduct are portrayed as an attempt to “control the future by transforming risks into individualized threats, which subsequently generate new risks.”²⁹⁶ Moreover, “precision strikes are no longer used to win, but to manage; they are not part of a war effort but the whole effort, they are not aimed at targets, but at individuals.”²⁹⁷

The war conducted against ISIS fits the above analysis. Its goal is not to occupy territories. Like other wars against terrorism, it does not have a clear territory, enemy, or ending.²⁹⁸ The more troubling question is whether it is even aimed at winning, or is just “an endless risk-management exercise.”²⁹⁹ This question cannot be unequivocally answered, but guidelines for the answer can be drawn by analyzing the nature of the signature and personality strikes. If the strikes are aimed at high value targets—that is, high level terrorist organization leaders—the United States has a good chance to degrade the terrorists’ organizational capacity, crush insurgencies and curtail insurgent attacks.³⁰⁰ However, some claim that a high percentage of signature strike targets are low-level militants, which puts the ability of those strikes to eradicate terrorist organizations in significant doubt.³⁰¹

Hence, the challenge of successfully managing the risk engendered by ISIS terrorists rests on the military advantage side of the “proportionality equation.” On the other side of the equation is the question of collateral damage to civilians. According to an extreme and even cynical position, risk wars, such as those fought by drones, are a practice not only of risk management but also of risk transference.³⁰² That is, the ultimate goal of the belligerent state to avoid or at least minimize the risk to its own troops inevitably determines that risks will be placed on the enemy, including the civilian population.³⁰³ Under such a premise, the proportionality calculation is “subjectively tied to the security priorities and perhaps also the underlying psyche of US strategic security culture.”³⁰⁴

Yet even a less extreme position results in serious doubts about the proportionality of collateral damage in relation to the military advantage of drone strikes against ISIS, especially as these strikes are mostly signature strikes. The accuracy of signature strikes on true militants can be quite low, given that “as many as one out of every four killed in CIA drone strikes are labeled ‘other militants’ identified with circumstantial evidence and no direct confirmation of

²⁹⁵ Waddington, *supra* note 247, at 124.

²⁹⁶ Barrinha & Da Vinha, *supra* note 87, at 16.

²⁹⁷ *Id.* at 18.

²⁹⁸ *Id.* at 26.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 23; DESHAW, *supra* note 206, at 34. Note, for example the claim that al Qaeda command is believed to be seriously weakened by such strikes. *Id.*

³⁰¹ Barrinha & Da Vinha, *supra* note 87, at 23; DESHAW, *supra* note 206, at 34.

³⁰² Barrinha & Da Vinha, *supra* note 87, at 18.

³⁰³ *Id.* at 18, 25.

³⁰⁴ Waddington, *supra* note 247, at 125.

who the targets truly were.”³⁰⁵ In addition, the “guilt by association” approach that is an integral part of signature strikes undermines the sincerity of US intentions to aim only at combatants, since these strikes are not pre-planned in terms of being intelligence based.³⁰⁶ As one commentator has argued:

To employ such a tactic on the part of the U.S. is to knowingly engage in actions that may result in collateral damage without any particular confidence that the intended targets are of particular value let alone that they are legitimate targets at all. Such a tactic borders on indiscriminate use of force.³⁰⁷

Such a use of force would be prohibited by Article 51 of AP(I) and therefore be a violation of the principle of proportionality.

One final element that intensifies the potential for disproportionate collateral damage in drone attacks against ISIS is the fact that President Obama excluded these attacks from the policy standards and procedures³⁰⁸ accepted by the administration for “reviewing and approving operations to capture or employ lethal force against terrorist targets outside the United States and outside areas of active hostilities.”³⁰⁹ These standards include an obligation to set a legal basis for using lethal force, and they condition the use of lethal force, *inter alia*, on the following: (i) choosing targets that pose a continuing, imminent threat to US persons; (ii) acquiring an assessment that capture is not feasible at the time of the operation; and (iii) having near certainty that non-combatants will not be injured or killed.³¹⁰ President Obama explained that the strikes against ISIS do not take place outside of areas of active hostilities, and hence are not subject to these policy standards.³¹¹

Yet denying a formal obligation to condition attacks on verifying, to near certainty, that civilians will not be hurt and on ensuring that there are no alternatives violates two proportionality requirements: first, the requirement to minimize expected harm to civilians while the combatants bear reasonable risk on themselves, which emanates also from the double-effect principle;³¹² second, the

³⁰⁵ DESHAW, *supra* note 206, at 37.

³⁰⁶ Waddington, *supra* note 87, at 126.

³⁰⁷ *Id.*

³⁰⁸ Jim Acosta & Kevin Liptak, *White House Exempts ISIS Strikes from Civilian Casualty Guidelines*, CNN POLITICS (Oct. 2, 2014), <http://edition.cnn.com/2014/10/01/politics/wh-isis-civilians/>.

³⁰⁹ Press Release, White House, Office of the Press Secretary, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.

³¹⁰ *Id.*

³¹¹ Acosta & Liptak, *supra* note 308.

³¹² See discussion *supra* Part III.

requirement to conduct an act that jeopardizes civilians only when other options were considered but rejected as unfeasible.³¹³ Finally, the drone attacks at ISIS fail another proportionality test, that is, the ICTY cumulative test: most repeated drones attacks will “fall . . . within the grey area between indisputable legality and unlawfulness,”³¹⁴ and hence their cumulative effect will render them illegal and disproportionate.³¹⁵ The only proportionality test the attacks may barely pass is the NATO report’s overall assessment test “of the totality of civilian victims as against the goals of the military campaign.”³¹⁶ However, this will only be the case if the strikes are aimed at proven high value personnel in ISIS, not if the targets are too general and not representing a “concrete and direct” military advantage.³¹⁷ A relevant military advantage cannot be proven if this war turns out to be everlasting—a war that can never be won and aims only at risk management.³¹⁸ Since the proportionality test of AP(I) requires that collateral damage be balanced only by a concrete and direct military advantage,³¹⁹ in the case of such a vague advantage, the collateral damage will be determined excessive or disproportionate.

V. CONCLUSION

Although the protection of civilians has always been a core legal and moral principle, its enforcement has been accompanied by difficulties since the inception of war. Prominent among those difficulties is the tension between democracy’s obligations toward its citizens (including citizens wearing uniform, i.e., combatants) and the obligation of combatants to bear risks and avoid harming civilians, regardless of their nationality or loyalty. These difficulties have intensified with the war on terror in which terrorists violate IHL and its core principles, including the principles of distinction and proportionality and use human shields to twist and abuse the protections given to civilians by the laws of war.

In this article, I have argued that despite the difficulties pertaining to the principle of distinction, it should be meticulously observed, and the primacy of civilian lives should be recognized and honored. Nevertheless, I suggested that the value of combatants’ lives can be observed through the principle of proportionality. I claimed that the principle of proportionality should be interpreted to acknowledge force protection as one of the legitimate military advantages to be weighed against the significance of civilian lives. According to the principle of proportionality, combatants should bear a minimum level of risk in order to protect civilians, but those risks should be reasonable. Moreover, in

³¹³ See discussion *supra* Part III.

³¹⁴ Kuperskic, *supra* note 118, ¶ 526.

³¹⁵ *Id.*

³¹⁶ NATO Report, *supra* note 115, ¶ 52.

³¹⁷ AP(I), *supra* note 6, at 26.

³¹⁸ See Discussion of Risk Wars, *supra* Part IV.B.2.

³¹⁹ See *supra* Part III.

cases where terrorist organizations abuse the protection of civilians through the use of human shields, those civilians can be discounted from the proportionality calculation, but only when three specific preconditions are fulfilled: first, when the military advantage of the operation is of great importance; second, when the frequency and intensity of the use of human shields are high; and third, after warnings have been given to the civilians in the vicinity of the military targets.

I applied these conclusions on two case analyses: the use of the IDF's Hannibal directive in Operation Protective Edge and the use of US drones in the war against ISIS. In the Israeli case, I examined whether the Hannibal Directive's aim to protect the lives of captured soldiers violates the principle of proportionality. I concluded that in principle this directive does not *prima facie* violate the principle of proportionality, since force protection is a legitimate protected military advantage; however, due to the lack of official data I could not reach conclusive findings on the specific case. I stressed, nonetheless, that the purpose of saving Lt. Goldin's life in order to prevent future pressure on Israel to abstain from military activities or to free more Hamas captives cannot be considered a direct and concrete advantage for the purposes of the principle of proportionality.

In the case of the US drones, I suggested that the aim to protect combatants by keeping them remote from the battlefield should not be prohibited. Nevertheless, under the specific circumstances of the war against ISIS, drone strikes are likely not proportional to the inflicted collateral damage. Indeed, drone strikes realize the goal of the "zero casualty doctrine" to a state's own troops that was aimed at in the NATO bombing of Kosovo, while avoiding the high civilian casualties of those bombings.³²⁰ However, other advantages of the drone strikes against ISIS remain too vague. First, those strikes are an expression of a risk war paradigm, whose achievements could only be realized in the far future. Second, because most strikes are signature strikes, they cannot sufficiently impair ISIS's insurgence ability. Finally, given the fog surrounding the figures of collateral damage, these strikes would likely not count as proportional to most of their achievements.

New battlefields still face old challenges. States use new technologies and terrorist organizations employ new strategies. Yet the basic rules of law and morality descended from the laws of chivalry are valid to this day. Technology and strategies may change in warfare, but civilian populations remain. It is therefore still relevant to reaffirm and ensure, both morally and legally, the protection of civilians in battlefields.

³²⁰ Smith, *supra* note 137, at 146.

