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Beyond Human Shielding: Civilian Risk Exploitation and Indirect Civilian Targeting

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I. INTRODUCTION

Few violations of the law of armed conflict (LOAC) are more egregious than deliberately attacking civilians.¹ While *incidental* civilian casualties are an unfortunate and legally tolerated consequence of the conduct of hostilities during armed conflict, nothing justifies making civilians the *deliberate* object of attack.² Doing so is universally recognized as a war crime, whether in the context of an international or non-international armed conflict.³ Moreover, because deliberately attacking civilians is never justified by the LOAC, it also

1. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 72 (3d ed. 2016) (“The cardinal principle of distinction between civilians and combatants is the most fundamental pillar of LOIAC.”).

2. Prosecutor v. Galić, Case No. IT-98-29-A, Appeals Chamber Judgment, ¶ 130 (Int’l Crim. Trib. for the former Yugoslavia Nov. 30, 2006) (“The prohibition of attacks against civilians and the civilian population ‘does not mention any exceptions [and] does not contemplate derogating from this rule by invoking military necessity.’”).

3. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574 (codified in scattered sections of 10 U.S.C. (2012))

(2) ATTACKING CIVILIANS.—Any person subject to this chapter who intentionally engages in an attack upon a civilian population as such, or individual civilians not taking active part in hostilities, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; *see also* Press Release, Secretary-General, Deliberately Targeting Civilians ‘A War Crime’, Secretary-General Warns, Strongly Condemning Deadly Attack on Syria’s Aleppo University, U.N. Press Release SG/SM/14767 (Jan. 16, 2013) (“Deliberate targeting of civilians and civilian targets constitutes a war crime. Such heinous attacks are unacceptable and must stop immediately.”); MARCO SASSÒLI, *INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES, AND SOLUTIONS TO PROBLEMS ARISING IN WARFARE* 501, ¶ 10.34 (2019)

Most terrorist acts are committed either against civilians who are not in the hands of the terrorists or indiscriminately against civilians and combatants. In both IACs and NIACs, civilians may not be targeted, and “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

DINSTEIN, *supra* note 1, at 298–99

With respect to War Crimes . . . [t]hey were covered by . . . Articles 2, 3, 4, 46, 51, [including 51(7)], which prohibited the presence or movement of the civilian population to shield military objectives] of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.

would qualify as a criminal homicide, indeed a presumptive murder, under the domestic law of any State.⁴

The prohibition against deliberately attacking civilians is a corollary of the LOAC principle of distinction.⁵ This principle obligates parties to an armed conflict to distinguish constantly between lawful objects of attacks and all other persons, places, and things.⁶ Characterized as one of the four “cardinal” principles of the international humanitarian law by the International Court of Justice, the principle is codified in two important treaties that regulate both international and non-international armed conflicts.⁷ In the context of international armed conflicts, Article 48 of Protocol I Additional (AP I) to the four Geneva Conventions provides: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”⁸ In the context of a non-international armed conflict, Article 13 of Protocol II Additional (AP II) to the four Geneva Conventions states, “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.”⁹ These treaty provisions reflect the status of the distinction principle as a universally applicable obligation under customary international law. The universal applicability of this principle is further reinforced by the Interna-

4. See DINSTEIN, *supra* note 1, at 300 (“All members of the armed forces are subject to the military and criminal codes of the State that they serve, and in case of infraction they are liable to be prosecuted before domestic military or civil courts.”).

5. *Id.* at 72.

6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

7. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 78 (July 8)

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.

AP I, *supra* note 6, art. 48; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

8. AP I, *supra* note 6, art. 48.

9. AP II, *supra* note 7, art. 13(2).

tional Committee of the Red Cross (ICRC) *Customary International Humanitarian Law* study,¹⁰ as well as its treatment in the military manuals of numerous armed forces.¹¹

It is therefore unsurprising that most professional armed forces take substantial measures to ensure their personnel understand and comply with this cardinal LOAC principle.¹² Despite these efforts, it is not possible to completely prevent civilian casualties resulting from the conduct of hostilities.¹³ The unfortunate reality of armed conflict is that such casualties will often be

10. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 1, at 4 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (“Numerous military manuals, including those of States not, or not at the time, party to Additional Protocol I, stipulate that a distinction must be made between civilians and combatants and that it is prohibited to direct attacks against civilians.”)

11. *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL 63, § 2.5.2 (rev. ed. Dec. 2016) [hereinafter DOD LAW OF WAR MANUAL] (emphasis in original) (internal citations omitted)

Distinction requires parties to a conflict to discriminate in conducting attacks against the enemy. On the one hand, consistent with *military necessity*, parties may make enemy combatants and other military objectives the object of attack. On the other hand, consistent with *humanity*, parties may not make the civilian population and other protected persons and objects the object of attack.

HEADQUARTERS, DEPARTMENT OF THE ARMY, HEADQUARTERS, UNITED STATES MARINE CORPS, FM 6-27/MCTP 11-10C, THE COMMANDER’S HANDBOOK ON THE LAW OF LAND WARFARE, 2-1–2-2, ¶ 2-6 (2019) [hereinafter COMMANDER’S HANDBOOK ON THE LAW OF LAND WARFARE]

In general, civilians may not be the object of direct (intentional) attack. LOAC attempts to protect civilians by requiring combatants to apply the principles of distinction and proportionality, including by taking feasible precautions to avoid incidental harm to civilians when making decisions during armed conflicts. Commanders and their staffs utilize the risk management process to make informed decisions. Commanders should consider risk to mission, resources, and civilians.

UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 2.5 (2004) (“Since military operations are to be conducted only against the enemy’s armed forces and military objectives, there must be a clear distinction between the armed forces and civilians, or between combatants and noncombatants, and between objects that might legitimately be attacked and those that are protected from attack.”).

12. *See, e.g.*, AUSTRALIAN DEFENCE HEADQUARTERS, ADDP 06.4, LAW OF ARMED CONFLICT ¶ 5.53 (2006); CHIEF OF THE GENERAL STAFF (CANADA), B-GJ-005-104/FP-021, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS ¶ 429 (2001).

13. DINSTEIN, *supra* note 1, at 149 (“Whatever the origin of an accident, it must be acknowledged that in wartime civilians regularly get killed or wounded—and civil objects are destroyed or damaged—without anyone wishing to cause such affliction.”).

the unavoidable *incidental* consequence of deliberately attacking lawful targets.¹⁴ The LOAC proportionality principle prohibits any attack against legitimate targets when such incidental harm is assessed as *excessive* in relation to the anticipated concrete and direct military advantage derived from the attack.¹⁵ By implication, the infliction of such incidental harm is legally tolerated so long as it is *not* assessed as excessive.¹⁶

Many legal scholars have sought to better distinguish permissible and impermissible incidental civilian harm during the conduct of hostilities.¹⁷

14. *Id.*

15. AP I, *supra* note 6, art. 51(5)(b) (“[A]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”); *see also* DOD LAW OF WAR MANUAL, *supra* note 11, at 188–89, § 5.2.2 (“Military objectives may not be attacked when the expected incidental loss of civilian life, injury to civilians, and damage to civilian objects would be excessive in relation to the concrete and direct military advantage expected to be gained.”); 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 10, r. 14, at 46–50.

16. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 620–21, ¶ 1953 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS]

The armed forces and their installations are objectives that may be attacked wherever they are, except when the attack could incidentally result in loss of human life among the civilian population, injuries to civilians, and damage to civilian objects which would be excessive in relation to the expected direct and specific military advantage. In combat areas it often happens that purely civilian buildings or installations are occupied or used by the armed forces and such objectives may be attacked, provided that this does not result in excessive losses among the civilian population.

17. *See, e.g.*, SASSÒLI, *supra* note 3, at 521–22, ¶ 10.80 (“Admittedly, however, States and military lawyers have so far refused to quantify how the risk of losing one civilian life weighs in comparison to the potential of gaining a certain military advantage as well as when the relationship between the risk and the advantage becomes excessive.”); LESLIE GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 351 (2d ed. 2000) (“But there is no definition as to what is ‘excessive’, so that the decision must be made in accordance with reasonable military assessments and expectations, taking into account potential collateral damage caused to civilians, civilian objects and other protected persons or installations.”); HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 85 (1986) (“It is, of course, impossible to measure human lives against a military advantage to be gained.”); A.V.P. Rogers, *Zero-Casualty Warfare*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 165, 169 (2000) (“Application of the principle of proportionality is more easily stated than applied in practice. . . . The law is not clear as to the degree of care required of the attacker and the degree of risk that he must be prepared to take. . . . There may be occasions when a commander will have to accept a higher level of risk to his own forces in order to avoid or reduce collateral damage to the enemy’s civil population.”); Dale Stephens, *Counterinsurgency and Stability Operations: A New Approach to Legal Interpretation*, 86 INTERNATIONAL LAW STUDIES 289, 304

Nevertheless, military commanders are probably no closer to a clearly defined standard today than when the proportionality principle was first codified in AP I in 1977.¹⁸

Assessing proportionality is itself problematic due to the amorphous nature of the concept of excessiveness: the touchstone of compliance. The difficulty of assessing proportionality is compounded by the fact that each life-or-death judgment is necessarily contextual.¹⁹ Adding substantially to the complexity of these judgments is the reality that many organized armed groups routinely expose civilians to the dangers of hostilities, thus violating their obligation to take constant care to mitigate civilian harm.²⁰ Many State armed forces view this tendency as a deliberate effort to complicate attack decisions by creating the inevitability of civilian casualties.²¹

(2010) (“The principle is one that has not easily been reconciled.”).

18. Jason D. Wright, *‘Excessive’ Ambiguity: Analysing and Refining the Proportionality Standard*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 819, 833 (2012)

The five-step collateral damage estimate methodology provides a useful institutional mechanism, but it fails to answer what constitutes excessive collateral damage and otherwise does not incorporate a fully integrated targeting analysis that applies IHL in the first instance. Considering conventional and customary IHL and US doctrine as a model of a particular state’s practice, legal advisers and other practitioners are still left with the central question concerning collateral damage—what is excessive?

19. James Kilcup, *Proportionality in Customary International Law: An Argument Against Aspirational Laws of War*, 17 CHICAGO JOURNAL OF INTERNATIONAL LAW 244, 248 (2016) (“Given the vast variety of combat circumstances, a single detailed explication of proportionality would be unworkable.”).

20. Eric Talbot Jensen, *Precautions against the Effects of Attacks in Urban Areas*, 98 INTERNATIONAL REVIEW OF THE RED CROSS 147, 160–61 (2016)

Human Rights Watch has noted a number of instances where the defender apparently failed to adequately segregate the civilian population and instead took actions that may have affirmatively violated the rule but that at minimum did not take advantage of available feasible alternatives, including ‘storing weapons and ammunition in populated areas and making no effort to remove the civilians under their control from the area’; ‘fir[ring] [rockets] directly from inhabited villages’; and ‘[taking] over civilian homes in the populated village, fir[ring] rockets close to homes, and driv[ing] through the village in at least one instance with weapons in their cars.’

Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 292, 311 (2009) (“[D]uring Operation Iraqi Freedom the Saddam Fedayeen often engaged Coalition forces from behind women and children, many of whom were forcibly seized for the purpose.”).

21. Jensen, *supra* note 20, at 168–69 (“It seems unlikely that the post-onset-of-hostilities commingling by Daesh of its military headquarters with a known jail is the type of activity States were anxious to protect when insisting on the principle of feasibility to cover the defender’s obligation. Their concern, as reflected in the discussion above, was to preserve a State’s ability to develop its military infrastructure based on its topography and workforce. There is no evidence that such a placement would facilitate Daesh’s ability to deal with

The obligation of the defending force to mitigate civilian risk is reflected in the well-established LOAC prohibition against using civilians to immunize targets from attacks, commonly referred to as the use of human shields.²² Article 51(7) of AP I provides:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.²³

Clearly, the distinction and proportionality obligations imposed on an attacking force alone are insufficient to protect civilians from incidental death and injury.²⁴ Unless the defending force is equally committed to implementing

difficult topography or dense populations. Rather, as many modern scholars have argued, this and similar actions by defenders in recent armed conflicts seem more like attempts to use the law as a shield and to potentially immunize otherwise legitimate targets through the presence of civilians.”); Geoffrey S. Corn, *Targeting, Distinction, and the Long War: Guarding Against Conflation of Cause and Responsibility*, 46 ISRAEL YEARBOOK ON HUMAN RIGHTS 135, 157 (2016) (“When presented with a range of tactical options, selecting the option that exposes the most highly protected civilian property to attack is highly indicative of a deliberate violation of the passive distinction obligation.”); see also Laurie R. Blank, *Taking Distinction to the Next Level: Accountability for Fighters’ Failure to Distinguish Themselves from Civilians*, 46 VALPARAISO UNIVERSITY LAW REVIEW 765, 797 (2012) (“Without robust enforcement of this key obligation for the protection of civilians, parties will continue to locate rocket launchers, military equipment, and other military objectives in civilian areas with impunity. The effect, unfortunately, is to endanger civilians rather than protect them.”).

22. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 10, r. 97, at 337–40. In full, Rule 97 states, “The use of human shields is prohibited.” *Id.* at 337.

23. AP I, *supra* note 6, art. 51(7).

24. Jensen, *supra* note 20, at 156

[W. Hays] Parks’ inference is clear: the most effective way to ensure the safety of the civilian population is for the defender to shoulder a significant portion of the responsibility. In fact, Parks argues that “[i]f the new rules of Protocol I are to have any credibility, the predominant responsibility must remain with the defender, who has control over the civilian population.” This approach is also echoed in the new U.S. Law of War Manual, which states: “The party controlling civilians and civilian objects has the primary responsibility for the protection of civilians and civilian objects. The party controlling the civilian population generally has the greater opportunity to minimize risk to civilians.”

Douglas H. Fischer, *Human Shields, Homicides, and House Fires: How a Domestic Law Analogy Can Guide International Law Regarding Human Shield Tactics in Armed Conflict*, 57 AMERICAN UNIVERSITY LAW REVIEW 479, 489 (2007) (“In modern warfare, the effect of a defending

feasible civilian risk mitigation measures, the best efforts of the attacking force to mitigate the risk to civilians likely will be degraded, at times substantially.

It is therefore unsurprising why exploitation of civilians to shield military objectives was included as a war crime within the jurisdiction of the International Criminal Court.²⁵ Nonetheless, this other side of the proverbial distinction coin has been ineffective in preventing the practice of using civilians as human shields in an attempt to impede an opponent's military operations.²⁶ In short, even the best efforts to protect civilians by implementation of feasible precautions by an attacking force will often be negated by the defending force's failure to share an equal commitment to civilian risk mitigation with the unfortunate result being legally permissible civilian casualties.²⁷

One possible reason why the prohibition against human shielding has failed to produce its intended impact is that those who violate this prohibition may be motivated by something far more pernicious than a desire to shield a military objective from attack: an effort to force the attacking opponent into inflicting civilian casualties. Such a motive may at first seem odd, but it seems increasingly plausible when the strategic information aspect of contemporary military operations is factored into the equation. In this context, it is unsurprising that some non-State armed groups may act based on the expectation that the international community will instinctively condemn the attacking force for inflicting *incidental* death and injury of civilians and destruction to civilian property resulting from an attack reasonably assessed as lawful. Such condemnation is based on the understandable yet legally flawed assumption that the party that directly caused the harm bears legal responsibility for that harm.²⁸

party's failure to live up to its duties to separate civilian and military parties is that an attacking party cannot avoid certain civilian casualties that it otherwise would have been able to prevent.”).

25. Rome Statute, *supra* note 3, art. 8(2)(b)(xxiii) (“Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations”).

26. Blank, *supra* note 21, at 800 (“Given the widespread use of human shields, significantly greater efforts are needed to prosecute perpetrators of this serious war crime.”).

27. Fischer, *supra* note 24, at 489.

28. Schmitt, *supra* note 20, at 297

Images of dead and injured civilians transmitted across a globalized media can make it appear as if the attacker has mounted inhuman operations. In such an environment, even a tactically sound engagement causing casualties risks strategic fallout. This consequence typically constitutes the principle objective of the party employing shields; it seeks to weaken

Although it is understandable that images of civilian casualties and the destruction of civilian property commonly produce such an instinctive attribution of legal and moral responsibility,²⁹ credible attribution of such responsibility is far more complicated than this “effects-based” approach.³⁰ Nevertheless, illicit actors in armed conflict arguably seek to use the effects of combat to achieve their strategic goal of delegitimizing their opponents, even when their opponents comply with the law.³¹

This phenomenon produces perverse effects.³² First, it focuses the spotlight of condemnation on the law-compliant party by exploiting widespread lack of understanding regarding legally permissible civilian casualties.³³ Second, it incentivizes tactics that exacerbate rather than mitigate risk to civilians

support for the enemy’s war effort on the part of the international community, other states, non-governmental organizations and individuals, while enhancing its own domestic and international backing.

Corn, *supra* note 21, at 158

Embedding firing positions, command posts, and logistics in and around such sites when other buildings and areas in close proximity could have been used suggests illicit tactical decision-making in violation of the passive precaution obligation. In these circumstances, it is completely logical to infer that these tactics were motivated by the hope that the IDF would refrain from or hesitate to attack such targets, and the understanding that if attacks were launched, the inevitable damage and destruction to these sites could be leveraged for strategic information value.

29. Corn, *supra* note 21, at 168 (“It may be inevitable that LOAC-compliant armed forces will be compelled to contend with this disparity, as the tendency of the international community to engage in ‘effects based’ judgments of combat operations often nullifies the relevance of credible legal explanations for civilian casualties.”); *see also* Schmitt, *supra* note 20, at 297.

30. Eric Talbot Jensen & Ronald T.P. Alcala, *The Impact of Emerging Technologies on the Law of Armed Conflict*, in *THE IMPACT OF EMERGING TECHNOLOGIES ON THE LAW OF ARMED CONFLICT* 37 (Eric Talbot Jensen & Ronald T.P. Alcala eds., 2019)

[T]his type of approach minimizes deliberate strategies to violate the LOAC, unfortunately all too common in today’s conflicts, either because the intentional violation of the LOAC is masked by the lack of actual civilian deaths or injury, or because the focus on effects trains all attention on the attack itself and not the conduct of the defending party in using human shields, co-mingling fighters with civilians, or locating military objectives in densely populated civilian areas.

31. Corn, *supra* note 21, at 167–68; Schmitt, *supra* note 20, at 297.

32. Schmitt, *supra* note 20, at 319 (“Further, the technology fielded by asymmetrically advantaged military forces has increasingly rendered defensive systems ineffective, the ‘CNN effect’ generated by images of civilian casualties has enhanced the effectiveness of shields in precluding attack, particularly given adoption of lawfare strategies by weaker parties.”); Corn, *supra* note 21, at 153–54.

33. Schmitt, *supra* note 20, at 319; Corn, *supra* note 21, at 168.

by the defending force.³⁴ These perverse effects should be countered by increasing public awareness of the defending force's unlawful conduct. Such a response would contribute to a more credible allocation of legal and moral responsibility for civilian suffering.³⁵ In addition, this approach would amplify the reputational costs for exploiting the presence of civilians in armed conflict, thus delegitimizing these tactics, while at the same time offsetting the erosion of public confidence in armed forces that do their best to avoid such harm.

Prosecuting those responsible for the use of human shields certainly contributes to this effort.³⁶ However, it is not the only—or necessarily the best—approach to aligning legal responsibility and moral accountability with operational reality.³⁷ Accordingly, this article proposes the recognition and emphasis of a complementary approach. Specifically, it proposes that intentionally *baiting* an attacking force into directly causing civilian casualties should be condemned not only as a human shielding violation, but also as an *indirect attack* on civilians.

While it will concededly often be difficult to establish a baiting motive, more attention should be devoted to identifying what types of facts and circumstances reasonably support such a determination. If such a motive is reasonably established, characterizing the LOAC violation as human shielding not only misses the point, it dilutes the true extent of legal and moral invalidity. In such instances, where the civilians are exploited not in the hope of averting an attack but instead in the hope the attack will be executed, the defending force is in essence utilizing a *lawful* attack by its opponent to inflict

34. Amnon Rubinstein & Yaniv Roznai, *Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality*, 22 STANFORD LAW AND POLICY REVIEW 93, 109 (2011) (“The current rules governing the use of human shields and their practical application serve to benefit those parties willing to utilize civilian deaths to achieve military advantages.”); Corn, *supra* note 21, at 153 (“[F]ailing to require passive distinction by all belligerents incentivizes tactics that exacerbate—rather than mitigate—civilian risk.”).

35. Rubinstein & Roznai, *supra* note 34, at 109 (“Inquiries must also be scrupulously conducted as to whether the shielding party took appropriate safety measures to protect its civilians or, alternatively, whether it violated IHL by intentionally intermingling military objectives among civilians and relying on their presence in order to immunize its objectives from attacks.”); DINSTEIN, *supra* note 1, at 185 (“It has traditionally been perceived that, should civilian casualties ensue from an illegal attempt to shield combatants or a military objective, the ultimate responsibility lies with the Belligerent Party placing civilians at risk.”).

36. Blank, *supra* note 21, at 800.

37. *Id.* at 797.

civilian casualties.³⁸ This is nothing short of a deliberate—albeit indirect—attack on civilians and civilian property and should be condemned no differently than any other unlawful *direct* deliberate attack on civilians.

This proposal draws heavily from the criminal law concept of innocent instrumentality. The doctrine of innocent instrumentality was developed to fill an accomplice liability dilemma that arose when the party directly causing harm acted lawfully. In these instances, even when another individual baited the principal into engaging in a harmful but lawful act, accomplice liability was nullified because the bad actor that baited the principal's action did not contribute to the commission of an *unlawful* act, an essential requirement of accomplice liability. The innocent instrumentality doctrine evolved to address this illogical immunity for an individual who, with a criminal mental state, instigates or baits an innocent actor into inflicting harm.³⁹ Under this doctrine, when a party exploits the lawful act of a third party to produce an intended unlawful result, the *actus reus* of the principal, the individual directly causing the result, is attributed to the individual who instigated or baited the principal. Thus, when coupled with that individual's criminal state of mind, the innocent agent's act supports allocating direct criminal responsibility for the harm inflicted to the individual who exploited the principal as an innocent agent. While characterized differently in different jurisdictions, this doctrine is used to hold individuals accountable for the use of innocent agents to cause intended unlawful harm.

38. The hypothetical used to highlight the importance of a more accurate characterization and condemnation of civilian exploitation intended to produce injury to civilians or destruction of civilian property inflicted by an attacking force throughout this article presupposes the legality of the attack. This is not, however, an essential requirement to justify this recharacterization and condemnation. There may be instances where both the defending and attacking force violate the law of armed conflict: the defending force by deliberately exploiting civilians in an effort to produce civilian casualties; the attacking force by launching the attack without implementing feasible civilian risk mitigation precautions or in violation of the prohibition against indiscriminate attacks (proportionality). Such an attack would in no way absolve the defending force from the unlawful civilian exploitation. Instead, condemnation for both parties to the conflict would be justified. Nonetheless, the emphasis on the lawful attack decision by the attacking force is intended to emphasize both the imperative of ensuring such legality by any commander entrusted with these difficult legal and moral decisions.

39. WAYNE R. LAFAVE, CRIMINAL LAW 702 (5th ed. 2010)

One who uses an intermediary to commit a crime is not ordinarily a principal in the first degree. It is otherwise, however, when the crime is accomplished by the use of an innocent or irresponsible agent, as where the defendant causes a child or mentally incompetent or one without a criminal state of mind to engage in conduct.

I believe it is time to consider extending the rationale underlying this doctrine to the assessment of responsibility for civilian casualties (human and material) resulting from attacks during armed conflict. Doing so will better isolate and illuminate the unlawful tactics of the defending forces *and* the lawful conduct of the attacking forces. While it may be challenging to identify the demarcation point between human shielding and indirect attacks on civilians, this should not prevent the inquiry. The initial move should be a recognition of the illogic of assuming every exploitation of the presence of civilians is motivated by the same objective. In light of the undeniable impact on strategic legitimacy resulting from political, diplomatic, and public reaction to civilian casualties, this assumption is strategically naïve. This first step of recognizing the notion of deliberate but indirect civilian targeting will then lead to the second step of exploring how to identify the line between these two variants of unlawful civilian exploitation.

While it will be difficult to identify this line, there will be instances where the totality of information available enables this identification. Factors could include patterns of tactical activities implicating civilian risk creation, or, in contrast, risk mitigation. When this act supports only one rational inference (not merely the exploitation of civilians to obtain a shielding effect, but instead an effort to actually cause civilian casualties inflicted by an opponent's attack to be exploited in the information domain), the defending force is, in effect, using the attacking force as its "innocent agent" to attack civilians.⁴⁰

40. Rubinstein & Roznai, *supra* note 34, at 98 ("Some experts have further claimed that the party utilizing civilians as human shields should bear exclusive responsibility for consequent civilian casualties because that party is responsible for creating the danger to those civilians."); Louis Rene Beres, *Israel, Lebanon, and Hizballah: A Jurisprudential Assessment*, 14 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 141, 147–48 (1997)

It also constitutes perfidy to shield military targets from attack by placing or moving them into densely populated areas, or by purposely moving civilians near military targets. Indeed, it is generally agreed that such treachery represents an especially serious violation of the Laws of War. . . . The recent harms to civilian refugees in Lebanon caused by Israeli shelling are tragic and regrettable, but the *legal* responsibility for the tragedy lies with those whose perfidious conduct brought about such shelling.

Fischer, *supra* note 24, at 500–01 ("[P]lacing civilians in harm's way is the basis for culpability in a human shield scenario where the military response is justified and is not unnecessarily destructive."); Barry A. Feinstein, *Proportionality and War Crimes in Gaza Under the Laws of Armed Conflict*, 36 RUTGERS LAW RECORD 224, 246 (2009)

Furthermore, if the civilian ramifications of the attack were the result of something not under the control of the attackers, the attack would not be deemed to have been indiscriminate or disproportionate. For instance, Israel would not be responsible for casualties occurring in those attack situations in which the terrorists, using civilians as human shields

Indeed, it seems increasingly common that this is the intended outcome when vital military assets are located in the midst of civilians with no apparent tactical justification, especially when a party to a conflict encourages or even compels civilians to move to such locations when expecting an attack.⁴¹

What complicates this assessment is the undisputed fact that an attacking force is not *per se* prohibited from launching an attack with the knowledge it will produce civilian casualties in and proximate to the intended target. As long as the attacking force complies in good faith with its civilian risk mitigation obligation—meaning that it has made a reasonable assessment of attack legality after implementing its distinction, precautions, and proportionality obligations—the attack is lawful, notwithstanding the incidental death and injury inflicted on civilians and the collateral damage to and destruction of civilian property.⁴² Accordingly, the attacking force is analogous to the innocent agent who engages in an act of self-defense in response to facts and circumstances orchestrated by a third party to cause a result that, while justified from the perspective of the direct actor, is unlawful from the perspective of the instigator. By attributing responsibility for the attack to the defender, the exploitation of civilians or their property takes on an even more pernicious character: a deliberate attack on civilians.

and unknown to the IDF, forced innocent civilians either to remain in or come to the vicinity of the military objective to be attacked following advance warnings given by Israel to evacuate the area.

41. Corn, *supra* note 21, at 158.

42. *Id.* at 160

There are, of course, situations where the commander will ‘know’ with substantial certainty that an attack will produce incidental injury to civilians or collateral damage to civilian property, and will nonetheless authorize the attack. So long as those attack judgments comply with the precautions and proportionality obligations, they are legally permissible.

see also Schmitt, *supra* note 20, at 323

[C]ertain principles, mentioned earlier, apply directly to strikes involving human shields. Most importantly, the target must qualify as a military objective, a term that includes combatants and civilians directly participating in hostilities. Even if it does, the planned attack must comport with the principle of proportionality Lastly, an attacker complying with that principle must nevertheless also take feasible precautions in attack.

Laurie R. Blank, *After “Top Gun”: How Drone Strikes Impact the Law of War*, 33 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 675 (2012)

The principle of distinction mandates that all parties to a conflict distinguish between those who are fighting and those who are not, and direct attacks only at the former. The principle of proportionality seeks to minimize incidental casualties during war and operationalizes LOAC’s fundamental premise that the means and methods of attacking the enemy are not unlimited. Thus, a commander must refrain from any attack in which the expected civilian casualties will be excessive in light of the anticipated military advantage gained.

To continue this discussion and address this issue, the remainder of the article proceeds as follows. Part II provides a brief overview of cardinal LOAC principles intended to mitigate risk to civilians during the conduct of hostilities. These principles define LOAC compliance and the legality of an attacking force confronted with the unfortunate possibility of knowingly inflicting civilian casualties.⁴³ Part III then reviews the “legitimacy” dilemma resulting from the combination of civilian exploitation and the tendency to engage in effects-based condemnations when attacks produce civilian casualties. Part III also explains the innocent instrumentality doctrine in greater detail. Part IV builds on this analysis and explains how this doctrine could be incorporated into accountability and compliance assessments when attacks conducted in good faith and compliant with LOAC targeting rules nonetheless produce civilian casualties.

II. THE LAW OF ARMED CONFLICT AND THE “BASIC RULE”

The LOAC seeks to mitigate the suffering that war causes by imposing a wide array of limits on permissible belligerent conduct.⁴⁴ In the context of the conduct of hostilities—or engaging in combat—regulation is premised

43. Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICHIGAN JOURNAL OF INTERNATIONAL LAW 79, 127 (2013) (noting that “mere knowledge of the risk to nearby civilians is insufficient to establish a violation of the principle of distinction”).

44. *See, e.g.*, AP I, *supra* note 6, art. 35(1) (“In any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited.”); SASSÒLI, *supra* note 3, at 30, ¶ 3.38 (“IHL prohibits the use of means and methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering.”); HANS-PETER GASSER, INTERNATIONAL HUMANITARIAN LAW: AN INTRODUCTION 3 (1993) (“International humanitarian law seeks to mitigate the effects of war, first in that it limits the choice of means and methods of conducting military operations, and secondly in that it obliges the belligerents to spare persons who do not or no longer participate in hostile actions.”); DOD LAW OF WAR MANUAL, *supra* note 11, at 15–16, § 1.3.4 (“The main purposes of the law of war are: protecting combatants, noncombatants, and civilians from unnecessary suffering.”); COMMANDER’S HANDBOOK ON THE LAW OF LAND WARFARE, *supra* note 11, at 1-8, ¶ 1-28

Humanity is the LOAC principle that forbids inflicting suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose. Humanity is sometimes referred to as the principle of avoiding unnecessary suffering or the principle of avoiding superfluous injury. Commanders should exercise leadership to ensure that Soldiers and Marines under their command know that cruelty and the infliction of unnecessary suffering will not be tolerated.

on a simple but vitally important legal premise: the only legitimate objective in war is to weaken the enemy.⁴⁵

This premise is reflected in the foundational sources for the modern LOAC and has been reemphasized over several decades.⁴⁶ For example, Article 15 of the Lieber Code—issued to the Union armed forces during the American Civil War—defines military necessity as follows:

Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.⁴⁷

The 2016 U.S. Department of Defense (DoD) *Law of War Manual* is more succinct, and defines military necessity simply as, “the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.”⁴⁸

45. *See, e.g.*, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29/Dec. 11, 1868, 138 Consol. T.S. 297, 18 MARTENS NOUVEAU RECUEIL (ser. 1) 474 (“That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.”); SASSÒLI, *supra* note 3, at 2, ¶ 1.03 (“[IHL’s] substantive rules try to limit the use of violence in armed conflicts by . . . restricting the level of violence to the amount necessary to achieve the only legitimate aim of the conflict, which is to weaken the military potential of the enemy.”).

46. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 16, at 685, ¶ 2218 (“A military advantage can only consist in ground gained and in annihilating or weakening the enemy armed forces.”).

47. U.S. Department of War, Instructions for the Government of Armies of the United States in the Field art. 15, General Orders No. 100, Apr. 24, 1863 [hereinafter Lieber Code].

48. DOD LAW OF WAR MANUAL, *supra* note 11, at 53, § 2.2.

Both definitions reinforce the premise that attacks must only be directed at persons, places, or things that qualify as lawful targets.⁴⁹ In some cases, identifying such targets will be relatively easy, for example, enemy military personnel, equipment, and facilities.⁵⁰ In other cases, identifying who and what qualifies as a lawful object of attack will be far more challenging.⁵¹ No matter how complicated this assessment may be it is axiomatic that civilians and civilian property may not be made the deliberate objects of attack.⁵² For civilians, this protection applies at all times, with the limited exception of civilians that directly participate in hostilities, and even then, these civilians lose their protection only for such time they directly participate in hostilities.⁵³

Accordingly, the LOAC establishes a binary principle of attack legality. Military objectives, including individuals who are not protected from deliberate attack, are presumptively hostile and may be attacked unless and until they no longer qualify as such.⁵⁴ Civilians and civilian property are presumptively non-hostile and may not be attacked unless and for such time as they

49. See Lieber Code, *supra* note 47; DOD LAW OF WAR MANUAL, *supra* note 11, at 63, § 2.5.2; AP I, *supra* note 6, art. 48 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”).

50. See, e.g., John J. Merriam & Michael N. Schmitt, *Israeli Targeting: A Legal Appraisal*, 68 NAVAL WAR COLLEGE REVIEW 15, 20 (2015).

51. *Id.* (“Simple though it may appear, applying the definition [of military objective in AP I] in practice can prove challenging.”).

52. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 10, r. 1, at 3–8; DOD LAW OF WAR MANUAL, *supra* note 11, at 188–89, § 5.2.2 (“In general, military operations must not be directed against enemy civilians. In particular: Civilians must not be made the object of attack . . .”).

53. DOD LAW OF WAR MANUAL, *supra* note 11, at 127, § 4.8.2 (“Civilians may not be made the object of attack, unless they take direct part in hostilities.”); DINSTEIN, *supra* note 1, at 105 (“If civilians directly participate in hostilities, they lose their protection and become lawful targets of attack for such time as they do so.”).

54. AP I, *supra* note 6, art. 52(2); see Geoffrey S. Corn et al., *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INTERNATIONAL LAW STUDIES 536, 550 (2013) (“Accordingly, the LOAC permits attack, or deliberate targeting of individuals, based not on a manifestation of actual threat, but instead based on the presumptive threat derived from the determination of enemy belligerent status.”); see also DINSTEIN, *supra* note 1, at 110 (“The nature of a military objective is determined by its intrinsic character . . . an object must be endowed with some inherent attribute which *eo ipso* makes an effective contribution to military action. As such, the object automatically constitutes a lawful target for attack in wartime.”); Rubinstein & Roznai, *supra* note 34, at 100 (“It should be clear, however, that when protected objects are used for military functions by a party to an armed conflict those

forfeit protection by actions or use.⁵⁵ AP I codified this binary legal framework, and marked the first contemporary LOAC treaty to include comprehensive rules for mitigating risk to civilians and civilian property during the conduct of hostilities. Perhaps most importantly, Article 48, the “Basic Rule,” states, “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”⁵⁶

Respect for this basic rule is only one aspect of protecting civilians from the dangers of armed conflict. Because civilians will often be placed at risk of injury or death as the result of attacks on lawful military objectives, the LOAC imposes obligations on armed forces to minimize the harmful incidental consequences of attacking a lawful objective.⁵⁷ These include the obligation to take all feasible precautions to mitigate risk to civilians and civilian property,⁵⁸ and the prohibition against launching indiscriminate attacks on otherwise lawful military objectives.⁵⁹

objects become legitimate military targets.”).

55. AP I, *supra* note 6, art. 51(3); *see* COMMANDER’S HANDBOOK ON THE LAW OF LAND WARFARE, *supra* note 11, at 2-5, ¶ 2-22 (“LOAC authorizes combatants to make military objectives the object of an attack, but prohibits directing an attack against civilians not taking a direct part in hostilities, the civilian population as such, civilian objects, or other protected persons or objects.”); SASSOLI, *supra* note 3, at 219, ¶ 7.38 (“Civilians may not be targeted (which may be regarded as including the prohibition of indiscriminate attacks) except if and for such time as they directly participate in hostilities.”).

56. AP I, *supra* note 6, art. 51(3).

57. *See especially id.* art. 57.

58. *Id.* art. 57(2)(a)(ii) (“[T]hose who plan or decide upon an attack shall . . . take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”); DOD LAW OF WAR MANUAL, *supra* note 11, at 250–52, § 5.11 (“Combatants must take feasible precautions in conducting attacks to reduce the risk of harm to civilians and other protected persons and objects.”); Michael N. Schmitt & Eric Widmar, ‘On Target’: Precision and Balance in the Contemporary Law of Targeting, 7 JOURNAL OF NATIONAL SECURITY AND POLICY 379, 400 (2014) (“[A] general obligation, known as the requirement to take precautions in attack, is operationalized in a number of specific rules.”); *see also* COMMANDER’S HANDBOOK ON THE LAW OF LAND WARFARE, *supra* note 11, at 1-11, ¶ 1-44.

59. Geoffrey S. Corn, *War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure*, 42 PEPPERDINE LAW REVIEW 419, 420 (2015) (“Central to the regulation of hostilities are the core LOAC principles of distinction and discrimination. . . . Discrimination imposes an additional obligation to forego engaging in such an attack whenever the incidental and collateral effects will be indiscriminate, and thereby unjustifiably endanger the

The precautions obligation has been the focus of increased attention over the past decade—and for good reason.⁶⁰ Encouraging commanders to implement feasible measures that reduce risk to civilians without degrading the tactical benefit of conducting an attack aligns not only with the humanitarian objectives of the law, but also with military operational considerations.⁶¹ Indeed, why would a commander forego the opportunity to spare civilians the deadly or destructive effects of an attack when doing so will in no way compromise tactical advantage? Importantly, the obligation applies not only to a commander launching an attack, but also to decisions related to the placement of military assets.⁶² Article 58 of AP I obligates all parties

civilian population.”); *see also* DINSTEIN, *supra* note 1, at 146 (“Attacks against civilians/civilian objects are banned not only when they are direct and deliberate, but also when they are indiscriminate.”); Schmitt & Widmar, *supra* note 58, at 406 (“IHL also imposes a number of restrictions on specific tactics. The two most significant are based on the broad prohibition on indiscriminate attacks.”).

60. *See* Eric Talbot Jensen, *Precautions Against the Effects of Attacks in Urban Areas*, 98 INTERNATIONAL REVIEW OF THE RED CROSS 147, 163 (2016) (noting that in 2003 the ICRC “identified the requirements of the defender to protect the civilian populations as one of the areas that needed greater emphasis” and concluding that “[t]he corresponding increase in urban conflict, ha[s] only intensified this need.”).

61. Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC through an Operational Lens*, 47 TEXAS INTERNATIONAL LAW JOURNAL 337, 352 (2012)

The commander and planners seek to mitigate the risk of collateral damage by selecting weapons and tactics that will, to the greatest feasible extent, produce the desired effect while limiting such collateral damage. This selection process is thoroughly consistent with the LOAC, and, of equal importance, it is also consistent with operational logic. Commanders gain no benefit from wasting effects, and they therefore logically seek to maximize effects on the intended objects of attack.

id. at 369

It is not uncommon in contemporary operations for commanders to refrain from launching lawful attacks based on policy-driven concerns (it simply might not be worth the cost of having to defend the legality of the attack in the public realm, or a commander may not want to alienate the civilian population by causing casualties that, while lawful, would still be perceived as unjustified).

see also Corn, *supra* note 59, at 436 (“Preceding proportionality analysis with this initial step mitigates the risk of harm to civilians and civilian property. This aspect of the targeting process not only advances the LOAC’s humanitarian objectives, but it is also consistent with operational logic.”); Jensen & Alcalá, *supra* note 30, at 34

The principles highlight the goal of a balance between military needs and humanitarian concerns that minimizes civilian harm as much as possible, and the methodology provides guidance on how to achieve that goal by gathering and analyzing information about both the military value of a target and the consequences to the civilian population and civilian objects in the area and making choices among various operational alternatives to achieve the mission while minimizing harm to civilians.

62. AP I, *supra* note 6, art. 58.

to an armed conflict to endeavor to avoid locating military assets in a manner that unnecessarily exposes civilians to the incidental consequence of an attack on those assets.⁶³ While this “passive” precautions obligation is substantially qualified by feasibility considerations,⁶⁴ it nonetheless reflects the overall LOAC objective of ensuring commanders take “constant care” to mitigate civilian risk.⁶⁵

The LOAC also prohibits indiscriminate attacks—even against lawful targets.⁶⁶ This prohibition is codified in Article 51 of AP I, and is based on the recognition that the effects of an otherwise lawful attack, or the manner in which the attack is conducted, can be so dangerous to civilians that even when the attack is not directed against them it should nonetheless be prohibited.⁶⁷ Accordingly, Article 51(4) prohibits indiscriminate attacks and states that indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.⁶⁸

Article 51(5) continues by stating that specific types of attacks “are to be considered as indiscriminate,” namely,

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

63. *Id.*

64. Schmitt & Widmar, *supra* note 58, at 400 (“IHL only requires the taking of precautions that are feasible.”).

65. AP I, *supra* note 6, art. 57(1); DOD LAW OF WAR MANUAL, *supra* note 11, at 195, § 5.2.3.5 (“Parties to AP I have agreed that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”); COMMANDER’S HANDBOOK ON THE LAW OF LAND WARFARE, *supra* note 11, at 5-5, ¶ 5-30 (“In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians, and civilian objects.”).

66. DINSTEIN, *supra* note 1, at 146; Schmitt & Widmar, *supra* note 58, at 406.

67. AP I, *supra* note 6, art. 51(4)–(5).

68. *Id.* art. 51(4)(a)–(c).

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁶⁹

When hostilities between belligerent groups are conducted in locations with a very limited presence of civilians, compliance with these rules is relatively easy.⁷⁰ Such situations are unfortunately rare today.⁷¹ Instead, it has become the norm that hostilities occur in areas with a large presence of civilians and civilian property, which is one reason why the ratio of military to civilian casualties has increased exponentially over the past decades.⁷² Some military experts expect this trend to increase, with armed conflict in “mega cities” an anticipated likelihood in the future.⁷³

Complying with LOAC targeting rules is far more complex, and thus far more challenging, when military personnel and military assets are interspersed within the civilian population.⁷⁴ Moreover, a party to the conflict exacerbates this challenge by operating in a way that renders its personnel indistinguishable from civilians, such as by not wearing uniforms or carrying

69. *Id.* art. 51(5)(a)–(b).

70. Blank, *supra* note 21, at 774 (“In traditional conflicts, one could distinguish between soldiers – who wore uniforms – and civilians – who typically did not venture near the battlefield – in most circumstances. Similarly, identifying military and civilian objects was usually feasible.”).

71. *Id.* (“Contemporary conflicts introduce a whole new set of challenges in this area, however, demanding ever greater efforts—through intelligence-gathering and surveillance—to determine who is who in the zone of combat operations.”).

72. *Id.* (“It is precisely because of the lack of boundaries between conflict areas and civilian areas . . . that today’s conflicts pose particular challenges for distinction.”).

73. David Shunk, *Mega Cities, Ungoverned Areas, and the Challenge of Army Urban Combat Operations in 2030-2040*, SMALL WARS JOURNAL, <https://smallwarsjournal.com/jrnl/art/mega-cities-ungoverned-areas-and-the-challenge-of-army-urban-combat-operations-in-2030-2040> (“Mega cities will complicate and greatly challenge Army urban combat missions in the 2030–2040 timeframe.”); Patrick N. Kaune, *Analysis of U.S. Army Preparation for Megacity Operations* 16 (Institute for National Security and Counterterrorism, U.S. Army War College, Civilian Research Project, 2016) (“Reliance on current technology within the megacity presents a challenge “since dense urban infrastructures make it difficult for US forces to fully employ long-range sensors and munitions. Moreover, civilian populations are an ever-present reminder of the need to avoid collateral damage.”).

74. Blank, *supra* note 21, at 776 (“In all of these situations, the great fluidity between hostile persons and innocent civilians and the conscious blending of hostile persons into the civilian population makes the task of identifying legitimate targets nearly impossible.”).

arms openly.⁷⁵ Still, the law demands that commanders and their subordinates take all good faith efforts to comply with these obligations, no matter how complex or challenging target identification and selection may be.⁷⁶

A different type of complexity arises where an enemy deliberately exploits the presence of civilians to shield assets from attack.⁷⁷ As discussed previously, this tactic is commonly characterized as “human shielding” or the use of “human shields.” The U.S. DoD *Law of War Manual* emphasizes the complexity that this tactic introduces to military operations, stating,

Adversary use of human shields can present complex moral, ethical, legal, and policy considerations. Use of civilians as human shields violates the rule that protected persons may not be used to shield, favor, or impede military operations. The party that employs human shields in an attempt to shield military objectives from attack assumes responsibility for their injury, although the attacker may share this responsibility if it fails to take feasible precautions.⁷⁸

Of course, the use of human shields, or “human shielding,” is a blatant LOAC violation,⁷⁹ and most egregious when it results in death or injury to the civilians.⁸⁰ Nonetheless, it would be perverse to allow the attacking party to abandon its civilian risk mitigation obligation simply because an enemy is utilizing this unlawful tactic.⁸¹ This is reflected in Article 51(8) of AP I, which provides that “[a]ny violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian

75. *Id.*

76. *Id.* at 774 (“The legal obligation remains the same however, requiring parties to distinguish between an innocent civilian and an individual who, although dressed in civilian attire, may pose an immediate threat, and is therefore a legitimate target.”).

77. See 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 10, r. 97, at 337–40.

78. U.S. DOD LAW OF WAR MANUAL, *supra* note 11, at 269–70, § 5.12.3.4.

79. Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 652 (Int’l Crim. Trib. for the former Yugoslavia July 29, 2004) (noting that the Appeals Chamber stressed that the use of prisoners of war or civilian detainees as human shields constitutes a violation of the Geneva Conventions regardless of whether they were actually harmed or attacked).

80. Schmitt, *supra* note 20, at 332 (“Indeed, populations and groups at risk are the very ones likely to be compelled into [human] shielding.”).

81. See Blank, *supra* note 21, at 772 (“The obligation to target only military objectives is one means of implementing the age-old principle that the means and methods of warfare are not unlimited.”).

population and civilians, including the obligation to take the precautionary measures provided for in Article 57.”⁸²

The prohibition on the use of human shields is found in AP I Article 51, which states:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.⁸³

As the *Commentary on the Additional Protocols* indicates, the rule already included certain protected persons, such as prisoners of war or the wounded and sick, in various provisions of the 1949 Geneva Conventions.⁸⁴ The ICRC customary law study concluded that the prohibition on the use of human shields is a rule of customary international law applicable to both international and non-international armed conflicts. More specifically, the commentary to Rule 97 states,

The prohibition of using human shields is contained in numerous military manuals, many of which extend the prohibition to all civilians. Using human shields constitutes a criminal offence under the legislation of many States. This practice includes that of States not, or not at the time, party to Additional Protocol I or to the Statute of the International Criminal Court.
...

With respect to non-international armed conflicts, Additional Protocol II does not explicitly mention the use of human shields, but such practice would be prohibited by the requirement that “the civilian population and individual civilians shall enjoy general protection against the dangers arising

82. AP I, *supra* note 6, art. 51(8); DINSTEIN, *supra* note 1, at 184 (“Article 51(8) of AP I insists that a violation of the prohibition of shielding military objectives with civilians does not release a Belligerent Party from its legal obligations *vis-à-vis* the civilians.”).

83. AP I, *supra* note 6, art. 51(7).

84. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 16, at 627, ¶ 1986 This provision affords measures of protection to the whole of the civilian population and all civilians, thus extending to them measures which already exist for two categories of persons: prisoners of war and civilians protected by the fourth Convention. In fact, according to Article 23 of the Third Convention, prisoners of war may not be used to render certain points or areas immune from military operations.

from military operations.” . . . In addition, deliberately using civilians to shield military operations is contrary to the principle of distinction and violates the obligation to take feasible precautions to separate civilians and military objectives⁸⁵

The practice of using civilians as human shields is so fundamentally inconsistent with the most basic principles of the LOAC that there can be no credible dispute with the ICRC’s conclusion. Unfortunately, the universal recognition of the prohibition of this practice has not eliminated its use.⁸⁶ Several military manuals highlight examples of this unlawful practice,⁸⁷ while scholars have shown that non-State organized armed groups routinely utilize this tactic to offset the military advantages of their opponents.⁸⁸

As noted above, the deliberate use of civilians to shield personnel, equipment, or facilities from attack does not negate the attacking force’s obligation to mitigate civilian risk.⁸⁹ It is, however, only logical that human shielding will undermine such efforts. It is thus unsurprising that the LOAC categorically condemns the use of such tactics.

85. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 10, r. 97, at 337–38.

86. Merriam & Schmitt, *supra* note 50, at 24.

The LOAC clearly forbids the use of human shields. This has not prevented many states and nonstate actors from regularly using them, since the tactic holds out the prospect of either discouraging an attack by the adversary or mischaracterizing its strike as an intentional attack on protected civilians or as one that violates either the rule of proportionality or the requirement to take precautions in attack.

87. Schmitt, *supra* note 20, at 339–40.

Most examples given in military manuals, or which have been the object of condemnations, have been cases where persons were actually taken to military objectives in order to shield those objectives from attacks. The military manuals of New Zealand and the United Kingdom give as examples the placing of persons in or next to ammunition trains. There were many condemnations of the threat by Iraq to round up and place prisoners of war and civilians in strategic sites and around military defence points. Other condemnations on the basis of this prohibition related to rounding up civilians and putting them in front of military units in the conflicts in the former Yugoslavia and Liberia.

88. *See, e.g.*, Michael N. Schmitt & Michael Schauss, *Uncertainty in the Law of Targeting: Towards a Cognitive Framework*, 10 HARVARD NATIONAL SECURITY JOURNAL 148, 151 (2019) (“[O]rganized armed groups that are asymmetrically disadvantaged in terms of conventional warfare have grasped that failing to distinguish themselves from the civilian population complicates their enemy’s targeting, especially when that enemy is committed to compliance with the international humanitarian law (IHL) principle of distinction.”); *see also* Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness*, 77 BROOKLYN LAW REVIEW 436 (2012).

89. AP I, *supra* note 6, art. 51(8).

Condemning this practice advances the LOAC's humanitarian objectives,⁹⁰ which has led to a recognition that the use of human shields qualifies as a war crime and provides the basis for individual criminal responsibility.⁹¹ As the ICRC discussion on Rule 97 indicates, the use of civilians as human shields has been prosecuted as a war crime in ad hoc war crimes tribunals and is a war crime within the jurisdiction of the International Criminal Court as well as the criminal statutes of several States.⁹²

The U.S. DoD *Law of War Manual* also includes a rule prohibiting the taking of hostages, and indicates that this practice amounts to human shielding, stating, “[t]his prohibition is understood to include a prohibition against threatening to harm detainees whose lives are valued by the adversary in order to induce the adversary not to attack, but is also understood to include the prohibition against using hostages as human shields.”⁹³ From an operational standpoint, the unlawful nature of this tactic is quite well understood⁹⁴

90. *Id.*

91. Rome Statute, *supra* note 3, art. 8(2)(b)(xxiii); Rubinstein & Roznai, *supra* note 34, at 102 (“[A] violation of the prohibition on human shielding constitutes a war crime and will lead to individual criminal responsibility.”).

92. *Practice Relating to Rule 97: Human Shields*, IHL DATABASE: CUSTOMARY IHL, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule97 (last visited (June 9, 2020))

In its review of the indictment in 1996, the ICTY Trial Chamber upheld the charges and stated that these acts could ‘be characterised as war crimes (taking UNPROFOR soldiers as hostages and using them as human shields)’. The Trial Chamber noted that civilians were used as human shields against other troops.

The ICRC includes a multitude of examples of States recognizing this act as a war crime in military manuals, national legislation, and the caselaw of individual States.

As discussed in note 90, the Rome Statute also recognizes this act as constituting a war crime in Article 8(2)(b)(xxiii). However, under the Rome Statute, jurisdiction for this crime arises only in the context of an international armed conflict. Thus, while the ICRC concludes that the use of human shields is a war crime in any armed conflict, for the ICC, the prosecution of this offense is limited to international armed conflicts. No analogous crime falls within ICC jurisdiction for non-international armed conflicts, but this apparent gap is somewhat ameliorated by the crime of taking hostages applicable in the context of non-international armed conflicts, defined in Article 8(2)(c) of the Rome Statute.

93. DOD LAW OF WAR MANUAL, *supra* note 11, at 52, § 2.2.

94. Rubinstein & Roznai, *supra* note 34, at 109 (“The current rules governing the use of human shields and their practical application serve to benefit those parties willing to utilize civilian deaths to achieve military advantages.”).

and almost certainly regarded as among the most pernicious LOAC violations.⁹⁵ In addition to qualifying as a war crime, this tactic is simply inconsistent with the notions of honor and legitimacy that provide the foundational pillars of the profession of arms. In short, the exploitation of innocent civilians to gain a tactical advantage is immoral.

For purposes of human shielding, the offense turns on proof indicating an intentional exploitation of civilians to obtain a shielding benefit. Of course, in the context of hostilities in areas with dense civilian populations, this intent may not be easily established, as the very nature of urban armed conflicts will result in the co-mingling of military assets amongst the civilian population.⁹⁶ However, where the evidence is sufficiently compelling, condemnation of this practice must be consistent and unqualified.

It is important to note that the prohibition against human shielding is more conduct than result based, in that the essence of the violation is the shielding conduct even absent any resulting civilian harm. Thus, even when circumstances clearly support the conclusion that civilians are being deliberately used as human shields, condemnation is based on that illicit act and not on resulting civilian harm or the lack thereof. In this sense, human shielding is, by its nature, a conduct violation. However, the exploitation of civilians resulting in civilian death or injury logically aggravates the human shielding violation, and is especially more pernicious in situations where the totality of the circumstances point to one rational inference: an intent to produce this result. A deliberate effort to produce the result of civilian casualties is simply not analogous to creating a *risk* of such casualties in an effort to avert an enemy attack. While both obviously unlawfully exploit the presence of civilians and civilian property, the intended outcome of the shielding tactic is that harm is not inflicted (although this can never be guaranteed). In contrast, if civilians are exploited in the hopes that the opponent will nonetheless attack, the intended outcome is death or injury to civilians or destruction of civilian property. This, unlike the shielding motive, renders the exploitation functionally indistinguishable from deliberately and directly attacking civilians or civilian property.

95. *Id.*; see also 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 10, r. 97, at 337–40.

96. Rubinstein & Roznai, *supra* note 34, at 94 (“The modern battlefield has moved from the front to populated urban environments, thereby dramatically increasing civilian involvement in hostilities.”).

There is another negative consequence resulting from conflating human shielding with indirect civilian targeting: condemnation dilution. This is because the natural focal point of such condemnation typically gravitates towards the harmful result. This focus on civilian casualties creates an inherent risk of distorting the assessment of actual legal responsibility for such casualties. While several scholars have challenged this trend of “effects-based” condemnation by emphasizing the illogic of allowing effects to become the dispositive indicator of LOAC non-compliance,⁹⁷ it is naïve to assume that this trend will abate. In practice, this unfortunate trend creates a potential attenuation between how commanders and legal advisors assess LOAC compliance and how the broader public and international community does. For

97. See, e.g., Geoffrey S. Corn, *Humanitarian Regulation of Hostilities: The Decisive Element of Context*, 51 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 763, 766

Nothing could be more corrosive to the logic of reasonableness than the continued gravitation towards ‘effects-based condemnations’ based primarily—if not exclusively—on the infliction of civilian casualties and destruction of civilian property. Such an approach penalizes commanders whose good-faith efforts to implement civilian risk mitigation measures fail to produce the desired outcome; rewards commanders who disregard civilian protection legal obligations yet produce outcomes that fortunately do not manifest themselves in actual civilian harm; incentivizes enemy efforts to expose civilians to the risks of combat and thereby increase the probability that friendly civilian risk mitigation efforts will have minimal effect; and undermines respect for the law by those entrusted with its implementation by creating an unrealistic ‘zero-civilian casualty’ expectation.

GAZA CONFLICT TASK FORCE, JEWISH INSTITUTE FOR NATIONAL SECURITY OF AMERICA, 2014 GAZA WAR ASSESSMENT: THE NEW FACE OF CONFLICT 46 (2015), <http://jinsa.org/wp-content/uploads/2018/10/2014GazaAssessmentReport.pdf> (“Effects-based critiques distort this equation by relying on *post hoc* consequences as the sole indication of LOAC compliance. However, the legal standard for compliance turns on the reasonableness of the attack decision at the time it was made based on available information.”); Laurie R. Blank, *Assessing LOAC Compliance and Discourse as New Technologies Emerge: From Effects-Driven Analysis to “What Effects?”*, in THE IMPACT OF EMERGING TECHNOLOGIES ON THE LAW OF ARMED CONFLICT, *supra* note 30, at 36 (“The effects-driven approach . . . disregards the notion of targeting as a methodology and ignores these operational realities that are at the heart of and inform the targeting process and any careful analysis thereof.”); Eric Talbot Jensen, *The Future of the Law of Armed Conflict: Ostriches, Butterflies, and Nanobots*, 35 MICHIGAN JOURNAL OF INTERNATIONAL LAW 253, 259–60 (2014) (“Recent examples of this phenomenon abound and many LOAC scholars argue that the current LOAC regime in fact encourages non-compliance and incentivizes fighters to use the LOAC as a shield to give them an advantage when fighting LOAC-compliant forces.”); Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 455, 457 (2005)

The principle of proportionality is often misapplied. For instance, in some cases the mere quantum of collateral damage and incidental injury causes critics to condemn a strike as disproportionate. However, the extent of harm and damage is relevant only in relation to the military advantage reasonably expected as the attack was launched.

the commander, it is the *ex-ante* nature of the obligation to take constant care to mitigate civilian risk that must be the focal point of compliance.⁹⁸

Those good faith efforts will ideally produce outcomes that enhance the mitigation of civilian risk. But commanders also know that no matter how determined their civilian risk mitigation efforts may be, when an attack nonetheless results in civilian casualties, it will be that outcome and not their *ex-ante* efforts that will be the focal point of criticism.⁹⁹ And so does the enemy. Hence, the unfortunate reality is that even the best efforts to mitigate civilian risk by an attacking force cannot guarantee that outcome, a reality that is all the more obvious when an enemy seeks to produce the exact result the attacking force is trying to mitigate and avoid.¹⁰⁰

A better result would be for the law to align the condemnation of civilian exploitation with the true nature of that exploitation. Doing so will help offset the tendency to engage in “effects-based” criticism of the party to the conflict that directly caused civilian casualties as the result of an attack, and redirect the criticism to the opponent that indirectly targeted civilians by using the attacking force as its “innocent agent.”¹⁰¹

98. See AP I, *supra* note 6, art. 57.

99. Blank, *supra* note 42, at 9

Rather than assess the lawfulness of an attack from the commander’s perspective at the time of the attack—as mandated by LOAC—this effects-based approach is driven primarily or entirely by the effects of the attack. Thus, the death of civilians or damage to civilian objects becomes the sole factor in claims of LOAC violations irrespective of the information available to the commander at the time of the attack or the intervening factors that contribute to a result different from that anticipated at the time of the attack.

Kilcup, *supra* note 19, at 257 (“Because of the unpredictable nature of conflict in real time, there are doubtless attacks that appear to be disproportionate *ex post* that were not disproportionate *ex ante*. Consequently, an *ex post* analysis would likely affect the legal outcome in adjudications of the war crime of disproportionate force.”).

100. Blank, *supra* note 97, at 12

[T]he effects-driven approach enables and incentivizes the exploitation of the law by the defending party for its own defensive and propaganda purposes. If one party knows that any civilian deaths will produce claims of war crimes and the ensuing international condemnation, the defending party will simply position its forces and equipment in and around the civilian population, effectively guaranteeing greater civilian casualties and increased civilian suffering, the very opposite of the LOAC’s core goal—and the intent of those incorrectly relying on an effects-based analysis, in an unfortunate twist.

see also Schmitt, *supra* note 97, at 464 (“Iraqi forces furthermore regularly used human shields and civilian objects . . . in order to deter precision attacks.”).

101. Jensen & Alcala, *supra* note 30, at 43 (“On one level, the end of reliance on effects as a measure of law compliance will be welcome and will help to recalibrate the expert and public discourse on the LOAC to a more appropriate and nuanced space.”).

The tendency to conflate effects-based condemnations and a conduct-based violation does not mean that the prohibition against the use of human shields has no significance. To the contrary, this prohibition plays an important role in credible assessments of *responsibility* for civilian casualties. However, it is equally clear that no matter how pernicious the conduct of using human shields may be, it is the civilian suffering that produces that is the most aggravated consequence. In other words, the use of human shields must be condemned even when the tactic does not result in civilian injuries or casualties. But, when injuries and especially casualties do result from the exploitation of civilians, a further question is warranted: what was the intended use of these civilians?

It is the exploiting of civilians to produce civilian casualties that can then be leveraged to discredit the attacking party that warrants a greater level of condemnation than human shielding provides. When civilian exploitation results in death or injury to civilians directly caused by an opponent's attack, the responsibility must be carefully assessed. When it is the result of an effort to shield an object from attack, the human shield characterization is logical. However, when the information indicates that causing civilian casualties was the intended effect, the gravity of the LOAC should align with the nature of the condemnation. In such situations, condemnation should focus not only on the conduct offense of using human shields, but also on the intended result of that use: a deliberate attack on those civilians.¹⁰² And contrary to the assumption that responsibility for such deliberate attacks falls on the attacking force; it is the party exploiting the civilians *so that they are likely to be killed or injured* that should be treated as responsible for the attack,¹⁰³ hence, this article's use of the term indirect civilian targeting (ICT).

III. THE DOCTRINE OF INNOCENT INSTRUMENTALITY

The characterization of an "indirect" attack may seem odd when applied to the unlawful exploitation of civilians that results in death or injury. After all, it is the party launching the attack that directly causes that death or injury. As noted earlier, however, the criminal law doctrine of innocent instrumentality offers a useful approach for attributing the act of attack to the party unlawfully exploiting the presence of civilians.¹⁰⁴

102. Rubinstein & Roznai, *supra* note 34, at 98.

103. *Id.*

104. *See supra* notes 39–42 and accompanying text.

This doctrine evolved in response to the difficulty associated with imposing criminal accountability on an individual who exploits an innocent agent to perform a harmful act.¹⁰⁵ In such situations, even if another party with a criminal mental state aided and abetted the actor that caused the direct harm, the bad actor could raise the defense that the underlying act was lawful, thereby negating accomplice liability. Thus, neither the “instigator,” nor the “aider and abettor” could be found guilty as an accomplice because criminal liability for accomplices derives from the criminal responsibility of the principal.¹⁰⁶ And where the principal was not legally responsible for the alleged offense, the aider and abettor had not contributed to a crime.¹⁰⁷

For example, imagine an adult who uses a young child to commit a murder. The adult might tell the child, “Take this toy gun, and go shoot mommy.” If the child shoots and kills the adult’s intended victim, the adult would seem legally responsible as an accomplice.¹⁰⁸ However, the child—the ostensible principal—is not legally responsible for the killing because of the doctrine of infancy.¹⁰⁹ This outcome creates an obstacle to convicting the adult as an accomplice, as there is no crime upon which to base derivative criminal liability.¹¹⁰ The innocent instrumentality doctrine overcomes this obstacle, as the instigator used the child as an “innocent instrumentality” to avoid directly engaging in the act that caused the unlawful result he or she sought to produce.¹¹¹

105. LAFAVE, *supra* note 39, at 883–84.

106. *Id.*

107. *Id.* at 729

On these facts it was held that A could not be convicted of burglary. A was not the principal in the first degree, as he did not himself enter the premises, and thus he could be held for the burglary only as an accessory to B. B, however, did not commit a burglary, for he lacked the intent to permanently deprive C of the food. Thus, concluded the court, A could not be held as an accessory to B’s burglary, for B committed no burglary.

108. *Id.* at 709

Such terms as ‘advise,’ ‘command,’ ‘counsel,’ ‘encourage,’ ‘induce,’ and ‘procure’ suggest that one may become an accomplice without actually rendering physical aid to the endeavor. This is the case. One may become an accomplice by acting to induce another through threats or promises, by words or gestures of encouragement, or by providing others with the plan for the crime.

109. *Id.* at 511–12 (“At common law, children under the age of seven are conclusively presumed to be without criminal capacity.”).

110. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIFORNIA LAW REVIEW 323, 369 (1985) (“Since the liability of the accomplice derives from that of the principal, the former cannot be held liable unless the latter has acted in violation of the law.”).

111. LAFAVE, *supra* note 39, at 702

Infancy and a lack of mental responsibility are not the only situations in which an actor may be treated as an innocent agent. A much more relevant situation arises when an individual with a criminal intent to produce harm exploits another individual's act of lawful self-defense or defense of others to directly cause that intended harm.¹¹² This practice has become common enough that the term "swatting" is now used to characterize it. Swatting involves an individual who makes a false 911 emergency call that someone is in mortal danger in the home of an intended victim who is at that time playing a violent video game.¹¹³ When police arrive and hear the sounds of weapons in the home they may employ force based on a reasonable yet erroneous judgment of necessity.

In such a situation, any resulting injury or death to the occupant will be legally justified by the reasonable judgment of self-defense necessity, and therefore the police who directly cause that injury or death have not committed a criminal act. As with the use of a child as an innocent agent, exploiting a third party's act in self-defense based on that party's reasonable perception of requisite necessity would result in a legally justified act of violence. Yet, the individual who baited the police into an encounter in order to exploit their *lawful* response to produce an intended *unlawful* result should not be permitted to avoid criminal responsibility because of the officer's legal justification for using force. The innocent instrumentality doctrine attributes the officer's direct action to the instigating individual, which, when coupled with the criminal mental state supports conviction.

In the context of an attack during the conduct of hostilities, the notion of "innocence" means the agent is engaged in conduct that is legally justified or excused, and therefore lawful.¹¹⁴ As a result, the encouragement of that

In such a case the intermediary is regarded as a mere instrument and the originating actor is the principal in the first degree. The principal is accountable for the acts or omissions of the innocent or irresponsible person, and the principal's liability is determined on the basis of that conduct and the principal's own mental state.

112. *See, e.g.*, Bailey v. Commonwealth, 229 Va. 258, 329 S.E.2d 37 (1985) (noting that in this case, the defendant unsuccessfully argued that the actions of his innocent instruments (the police) constituted justifiable homicide because the self-defensive nature of their actions meant that no crime occurred).

113. Matt Stevens & Andrew R. Chow, *Man Pleads Guilty to 'Swatting' Hoax That Resulted in a Fatal Shooting*, NEW YORK TIMES, Nov. 13, 2018, <https://www.nytimes.com/2018/11/13/us/barriss-swatting-wichita.html>.

114. Neve Gordon & Nicola Perugini, *The Politics of Human Shielding: On the Resignification of Space and the Constitution of Civilians as Shields in Liberal Wars*, 34 ENVIRONMENT AND PLANNING D: SOCIETY AND SPACE 168, 172 (2016) ("While the term human shield does not

conduct could not support criminal responsibility based on principles of accomplice liability¹¹⁵ because such liability is contingent on the principal committing an unlawful act.¹¹⁶

In a situation of innocent instrumentality, an individual seeks to produce an unlawful result by someone else's hand. To do so, the individual uses another individual to produce that result. However, because the conduct directly responsible for that result is legally justified or excused, there is no unlawful act to support accomplice liability. Accordingly, the party that exploited the innocent agent would assert there is no basis for the imposition of accomplice liability.

To address this situation, the common law treated the *actus reus* of the innocent agent as if it were committed by the party exploiting that agent.¹¹⁷ When coupled with the criminal state of mind that actuated the exploitation of the innocent agent, this allowed the instigator to be treated not as an accomplice, but as the principal responsible for the criminal result.¹¹⁸

The case of *Bailey v. Commonwealth* illustrates the application of this doctrine.¹¹⁹ This case arose from a police shooting that killed a homeowner in Virginia.¹²⁰ The police had been dispatched to the home as the result of a 911 call from the man who was ultimately convicted of the killing.¹²¹ That man and the victim had been long-time antagonists on Ham radio.¹²² The defendant knew the victim was legally blind and one evening told the victim that he was coming to his home to confront him.¹²³ The victim responded he would be waiting on the front porch with a gun.¹²⁴

The defendant then placed a 911 call to report that a man at that address was on his porch threatening people with a gun.¹²⁵ When the police arrived,

actually appear in the document, the Fourth Geneva Convention provides de jure protection to militaries that kill human shields.”).

115. LAFAVE, *supra* note 39, at 883–84.

116. *Id.*

117. JOSHUA DRESSLER, CRIMINAL LAW 57 (2d ed. 2010) (“[A Principal in the First Degree] is the person who, with the requisite mens rea, personally commits the offense, or who uses an innocent human instrumentality to commit it.”).

118. *Id.*

119. *Bailey v. Commonwealth*, 229 Va. 258, 329 S.E.2d 37 (1985).

120. *Id.* at 259.

121. *Id.* at 261.

122. *Id.* at 260.

123. *Id.*

124. *Id.*

125. *Id.* at 261.

the victim was indeed on his porch.¹²⁶ Unable to see sufficiently to recognize that it was the police, the defendant assumed it was his antagonist.¹²⁷ He raised his firearm in a threatening manner, and in response, the police officers, acting in self-defense, fired on the man and killed him.¹²⁸

The defendant was convicted of murder for the killing.¹²⁹ On appeal to the Virginia Supreme Court, he argued that the conviction was invalid because the police shooting was legally justified as an act of self-defense.¹³⁰ According to the defendant, this meant that there was no unlawful killing to connect to him as an accomplice.¹³¹ The Virginia Supreme Court rejected his appeal, but not by treating him as an accomplice to the police shooting.¹³² Instead, the Court concluded that the evidence established the defendant had used the police as his innocent instrumentality to produce the unlawful killing.¹³³ As a result, the Court concluded that the action of the police officer that shot and killed the victim was properly attributed to the defendant as if he had committed that act.¹³⁴ When coupled with his criminal *mens rea*, this established the crime of murder.¹³⁵

The Model Penal Code, a model criminal code developed by the American Law Institute to assist states to update and standardize their criminal statutes,¹³⁶ adopts the approach.¹³⁷ More than two-thirds of U.S. states have adopted the Model Penal Code, either in its entirety or in large part.¹³⁸ Recognizing the invalidity of allowing a defendant like Bailey to avoid criminal responsibility when using an innocent agent to commit a crime, the Model

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 259.

130. *Id.*

131. *Id.* at 262.

132. *Id.* at 265.

133. *Id.* at 263.

134. *Id.*

135. *Id.*

136. PAUL H. ROBINSON & MARKUS D. DUBBER, *THE AMERICAN MODEL PENAL CODE: A BRIEF OVERVIEW* (2007).

137. MODEL PENAL CODE § 2.06 (AMERICAN LAW INSTITUTE, Proposed Official Draft 1962).

138. *Model Penal Code*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/model-penal-code> (last updated May 20, 2020) (noting that 36 U.S. states have adopted criminal codes influenced by the Model Penal Code).

Penal Code treats the use of an innocent instrumentality as a basis for accomplice liability.¹³⁹ Specifically, Section 2.06(2)(a) provides that “a person is guilty of an offense that she [or he] did not personally commit if, acting with the requisite *mens rea*, she [or he] ‘causes an innocent or irresponsible person’ to commit the crime.”¹⁴⁰

Liability based on this doctrine is contingent on proof that the defendant not only used an innocent agent to engage in such conduct, but that he or she did so with the criminal mental state related to the offense charged. Thus, the doctrine does not *ipso facto* establish criminal liability, but instead is used to satisfy the *actus reus* element of such liability. For purposes of both condemnation and criminal accountability, this same rationale would provide a logical response to a party to a conflict that exploits civilians in an effort to bait the opponent into conducting an attack that may be lawful under the circumstances but will cause civilian casualties. In such circumstances, this approach would support characterizing this exploitation as an attack on civilians, albeit an indirect attack.

Attacking civilians is not only a clear violation of the LOAC’s “basic rule” of distinction; it is also a war crime.¹⁴¹ As noted above, this is reflected in a variety of treaties and legal sources, including the offenses falling within the scope of the ICC’s jurisdiction.¹⁴² While the unlawful use of human shields or taking of hostages are also war crimes, when the totality of the information indicates civilians were deliberately exposed to the risk of an attack, that can and should be condemned not as human shielding, but as indirect civilian targeting.¹⁴³

Concededly, it will often be difficult to credibly assess the line between unlawful human shielding and deliberate indirect attack on civilians. Should this difficulty deter efforts to draw a distinction between these two variants of unlawful civilian exploitation and to identify each? No. Indeed, this effort is especially important considering what many States perceive as an increasingly common tactic of non-State armed groups engaged in hostilities with State armed forces to generate civilian casualties in order to delegitimize their State opponents.¹⁴⁴ Organized armed groups such as Hamas, Hezbollah, and ISIS understand the strategic value of forcing their opponents to conduct

139. MODEL PENAL CODE, *supra* note 137, § 2.06.

140. *Id.* § 2.06(2)(a).

141. DINSTEIN, *supra* note 1, at 300.

142. *Id.*

143. Rubinstein & Roznai, *supra* note 34, at 98.

144. Schmitt & Schauss, *supra* note 88, at 151.

attacks in situations where civilian casualties are inevitable.¹⁴⁵ These casualties are then leveraged to undermine the legitimacy of their opponents' military efforts,¹⁴⁶ reaping a two-prong reward. First, the attacking force will often change its attack plans to mitigate the extent of civilian casualties, giving the party using the unlawful tactic an unjustified military advantage.¹⁴⁷ Second, if the opponent launches an attack after assessing the risk to civilians consistent with LOAC obligations, the ensuing civilian casualties will be exploited as part of a strategic information campaign to delegitimize the State opponent.¹⁴⁸

This tactic should be characterized as an attack on civilians that exploits not only the presence of civilians, but the opponent's conclusion that attacking the shielded target is lawful even with full knowledge the attack will cause civilian casualties. Treating the shielding tactic as an attack on civilians produces a more logical alignment between the nature of the condemnation and the intended outcome of this unlawful tactic.

But this also means that the use of civilians or other protected persons to shield forces, equipment, or facilities from enemy attack is not itself sufficient to justify characterizing that tactic as a deliberate attack on civilians. Instead, that characterization will only be credible based on information that

145. See, e.g., Rubinstein & Roznai, *supra* note 34, at 98 (“In recent years, facing superior adversaries, terrorist organizations, such as Hezbollah, Taliban, and Hamas, have also adopted the human shields tactic.”).

146. Margaret T. Artz, *A Chink in the Armor: How a Uniform Approach to Proportionality Analysis Can End the Use of Human Shields*, 45 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1447, 1483 (2012) (“Belligerents who use human shields have thus far skillfully reoriented the court of public opinion from their Article 51(7) [AP I] violation to the potential [Article] 51(8) violation of the attacking party.”).

147. Rubinstein & Roznai, *supra* note 34, at 95 (“[T]he attacking party . . . might refrain from attacking due to moral or legal constraints regarding harm to civilians.”).

148. GAZA CONFLICT TASK FORCE, *supra* note 97, at 8 (arguing that Hamas “deployed a well-orchestrated information campaign of distorted facts and legal principles to create a narrative of Israeli legal culpability for civilian casualties to undermine Israel’s international legitimacy”); GEMUNDER CENTER HYBRID WARFARE TASK FORCE, JEWISH INSTITUTE FOR NATIONAL SECURITY OF AMERICA, ISRAEL’S NEXT NORTHERN WAR: OPERATIONAL AND LEGAL CHALLENGES 7 (2018), <https://jinsa.org/wp-content/uploads/2018/10/Hybrid-Warfare-TF-October-2018-Report.pdf>

Hezbollah will seek to portray Israel as an arbitrary, immoral, and illegal murderer of civilians by illegally exposing Lebanese civilians to harm, manipulating the media narrative, and exploiting widespread misconceptions about the law of armed conflict (LOAC). By weaponizing information and the law, Hezbollah will hope to survive to fight another day while delegitimizing Israel in the eyes of the world before the IDF can achieve a decisive military victory.

establishes three essential findings. First, that the civilians or protected persons were exploited to impede enemy attack. Second, that the tactic was motivated by an effort to bait the enemy force into launching an attack that would expose the shields to a substantial risk of death or injury. Third, that the attack was lawful under the circumstances. The following Part examines these essential findings more fully.

IV. WHAT MAKES AN ATTACK “INNOCENT” FOR THE PURPOSES OF THE INNOCENT INSTRUMENTALITY DOCTRINE?

The innocent instrumentality doctrine is based on the assumption that the individual who engages in the conduct attributed to the defendant acted with lawful justification or lacked a criminal state of mind. In the context of an attack that results in civilian casualties, only the first category—a lawful justification—would indicate the “innocence” of the actual attack.

This means that the attribution of the attack that causes civilian casualties to the party exploiting the presence of civilians necessitates a finding that the attack was not excessive when conducted. In this regard, it is important to note that such an assessment will often be credible even when the attacking party anticipates causing civilian casualties. It is true, as noted above, that the deliberate exposure of civilians to the effects of attack does not release the attacking party from its obligation to mitigate civilian risk.¹⁴⁹ However, when the risk of such casualties is reasonably assessed as unavoidable without completely foregoing an attack, a proportionality assessment may conclude that these effects are not excessive in comparison to the anticipated concrete and direct military advantage, thereby rendering the attack lawful.¹⁵⁰ Furthermore, the enemy’s deliberate use of civilians in such a manner will almost certainly influence this proportionality assessment. Indeed, the U.S. DoD *Law of War Manual* reflects this position, stating, “The party that employs human shields in an attempt to shield military objectives from attack assumes

149. AP 1, *supra* note 6, art. 51(8).

150. *Id.* art. 51; see DINSTEIN, *supra* note 1, at 157 (“The principle of proportionality does not bar the destruction of that military asset, notwithstanding the presence of civilians and the expectation of substantial casualties among them.”); SASSÖLI, *supra* note 3, at 366–67, ¶ 8.332; see also Beth Van Schaack, *The Law & Policy of Human Shielding*, in COMPLEX BATTLESPACES: THE LAW OF ARMED CONFLICT AND THE DYNAMICS OF MODERN WARFARE 463 (Winston S. Williams & Christopher M. Ford eds., 2019).

responsibility for their injury, although the attacker may share this responsibility if it fails to take feasible precautions.”¹⁵¹ Further, the citation supporting this provision states, “In no case may a combatant force utilize individual civilians or the civilian population to shield a military objective from attack. A nation that utilizes civilians to shield a target from attack assumes responsibility for their injury, so long as an attacker exercises reasonable precaution in executing its operations.”¹⁵²

This provision was subject to significant criticism.¹⁵³ However, it does reflect a pragmatic understanding of the operational impact of this unlawful tactic. Perhaps more importantly, by emphasizing the potential mutual responsibility for civilian casualties, the provision reinforces the logic of the innocent instrumentality doctrine. If good faith efforts are made to mitigate the risk to civilians or other protected persons being exploited by an enemy, the attack qualifies as lawful. As a result, while the attack will be the direct cause of civilian casualties and injuries, responsibility for those harms is attributed to the party that indirectly targeted the civilians.

Accordingly, in the context of conducting an attack, the concept of innocence is best understood as lawfulness.¹⁵⁴ And central to this aspect of the analysis is the basic construct of LOAC targeting law. As noted above, targeting law categorically prohibits any deliberate attack on civilians or other protected persons, but it also permits the knowing infliction of death and injury as a related consequence of an attack directed against a lawful military

151. DOD LAW OF WAR MANUAL, *supra* note 11, at 52, § 2.2.

152. *Id.* at 285, § 5.16.5 and n.509.

153. See, e.g., Adil Ahmad Haque, *The Defense Department’s Indefensible Position on Killing Human Shields*, JUST SECURITY (June 22, 2015), <https://www.justsecurity.org/24077/human-shields-law-war-manual/>.

154. See Corn, *supra* note 21, at 162

There are, of course, situations where the commander will ‘know’ with substantial certainty that an attack will produce incidental injury to civilians or collateral damage to civilian property, and will nonetheless authorize the attack. So long as those attack judgments comply with the precautions and proportionality obligations, they are legally permissible.

objective.¹⁵⁵ In this sense, attacks do not violate the LOAC whenever a commander anticipates the infliction of such casualties.¹⁵⁶ Only when those anticipated casualties are assessed as excessive in relation to the concrete and direct military advantage anticipated from the attack does the law characterize the attack as unlawful.¹⁵⁷

The difference between purpose and knowledge of the anticipated infliction of death or injury to civilians or other protected persons is a vital demarcation between lawful and unlawful attacks.¹⁵⁸ Such casualties should never be inadvertent or unexpected, as the law imposes on the commander the obligation to calculate the risk of such casualties as part of the proportionality assessment.¹⁵⁹ Thus, in the context of attack decision making, the

155. Shannon Bosch, *Targeting Decisions Involving Voluntary Human Shields in International Armed Conflicts in Light of the Notion of Direct Participation in Hostilities*, 46 *COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTHERN AFRICA* 447 (2013) (“Consequently, ‘in the case of human shields a sufficiently significant military advantage in relation to the danger to which human shields are exposed could render an attack on a military objective legitimate, despite their presence.’”).

156. *Id.*

157. AP I, *supra* note 6, art. 51(5)(b).

158. Ohlin, *supra* note 43, at 82

Simply put, black-letter international criminal law (ICL) establishes that intentionally directing an attack against civilians constitutes a war crime. . . . The problem here is the deep ambiguity over what is meant by the concept of intent. . . . This is precisely why, for instance, the U.S. Model Penal Code (MPC) abandoned the ambiguous language of intent in favor of the more precise categories of purpose and knowledge to express these differences. The more common phrases in civil law jurisdictions, *dolus directus* and *dolus indirectus*, cover the same conceptual territory as acting with purpose and acting with knowledge.

see also id. at 104

Acting with purpose (*dolus directus*) involves the highest form of volition, i.e., a desire to bring a particular state of affairs into being. Acting with knowledge (*dolus indirectus*) also involves a volitional component because the actor brings about a state of affairs that is practically certain to obtain, even though that state of affairs is not his or her purpose for acting.

159. AP 1, *supra* note 6, art. 57(2)(a)(iii) (“Those who plan or decide upon an attack shall refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”); *DOD LAW OF WAR MANUAL*, *supra* note 11, at 260, § 5.12 (“Combatants must refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained.”); *see also* SASSÖLI, *supra* note 3, at 31, ¶ 3.41

IHL requires those planning and deciding on an attack to take additional precautionary measures, including taking all feasible measures to verify that the target of attack is a legitimate target, taking all feasible precautions in the choice of means and methods of warfare to avoid or minimize incidental civilian damage and refraining from initiating the attack if

knowledge that an attack will cause such casualties does not render the attack unlawful.¹⁶⁰ Indeed, an unreasonable failure to assess such risk is itself a breach of the obligation to take all feasible precautions to identify the target and assess the risk to civilians and other protected persons.¹⁶¹

When an opponent uses civilians to impede an attack or, even worse, to bait the opponent into an attack intended to cause civilian casualties, that tactic alone suggests that the shielded target qualifies as a lawful military objective. Furthermore, the use of civilians supports the inference that the enemy perceives the target as valuable and that its total or partial destruction will offer the attacking force a definite military advantage. This inference would normally explain why the enemy employs human shields. The only other explanation would be an effort to bait the attacking force into the mistaken conclusion that the object was a military objective when the enemy's goal was simply to produce civilian casualties.

In either case, as long as the attacking force (1) makes a reasonable assessment that the object attacked is a military objective,¹⁶² (2) takes all feasible precautions to mitigate the risk to the civilians or other protected persons used as human shields,¹⁶³ and (3) assesses the anticipated death or injury to

it is expected that incidental loss of civilian life or destruction of civilian objects will outweigh the military advantage anticipated from the attack.

DINSTEIN, *supra* note 1, at 158 (“The whole assessment of what injury or damages is ‘excessive’ in the circumstances entails a mental process of weighing in the balance dissimilar considerations—to wit, the expected civilian losses/damage and the anticipated military advantage”); RUBINSTEIN & ROZNAI, *supra* note 34, at 100 (“[E]ven with regard to a lawful attack on a military objective, the principle of proportionality entails a duty on the military commander to assess the attack’s collateral damage (i.e., civilian casualties or damage to civilian objects), and to consider it against the anticipated military advantage.”).

160. GREEN, *supra* note 17, at 155 (“Injury caused to civilians or civilian objects incidental to a legitimate attack against a military objective does not render the attack illegal.”).

161. *Id.* at 350 (“Attacks which fail to distinguish between military and civilian personnel or military objectives and civilian objects are forbidden as indiscriminate.”).

162. AP 1, *supra* note 6, art. 48; DOD LAW OF WAR MANUAL, *supra* note 11, at 215, § 5.6.7.2 (“The attack of the object must, ‘in the circumstances ruling at the time,’ offer a definite military advantage for the object to be considered a military objective.”); SASSÖLI, *supra* note 3, at 30, ¶ 3.39 (“[A]n attack may only be directed at legitimate targets. Legitimate targets include . . . military objectives”).

163. AP 1, *supra* note 6, art. 57(2)(a)(ii); DOD LAW OF WAR MANUAL, *supra* note 11, at 198–99, § 5.4.2 (“Combatants must take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack.”); SASSÖLI, *supra* note 3, at 31, ¶ 3.41; CORN & CORN, *supra* note 61, at 348 (“Precautions in the attack require that commanders utilize feasible measures for the purpose of mitigating the risk to the civilian population (such as issuing warnings or

the human shields is not excessive in relation to the concrete and direct anticipated military advantage, the attack complies with LOAC and is therefore lawful.¹⁶⁴ Where the available information supports the conclusion that the enemy sought to exploit both the presence of civilians as human shields¹⁶⁵ and the decision by its opponent to launch the attack with the knowledge it would result in casualties to them, that attack is essentially being used by the opponent to cause unlawful death or injury to those used as shields.¹⁶⁶ Accordingly, the attack should be attributed to the party baiting it and the conduct should qualify as a *deliberate* attack on civilians.¹⁶⁷

V. WHY APPLYING THIS DOCTRINE WILL ENHANCE CONDEMNATION OF CIVILIAN EXPLOITATION

In response to the tendency of some organized armed groups to exploit civilians for tactical or strategic advantage, States should seek to leverage all

timing the attack to minimize civilian exposure.”); Schmitt & Widmar, *supra* note 58, at 400 (“[A] general obligation, known as the requirement to take precautions in attack, is operationalized in a number of specific rules.”).

164. AP 1, *supra* note 6, art. 57(2)(a)(iii); DOD LAW OF WAR MANUAL, *supra* note 11, at 198–99, § 5.4.2 (“Combatants must refrain from attacks in which the expected loss of life or injury to civilians, and damage to civilian objects incidental to the attack, would be excessive in relation to the concrete and direct military advantage expected to be gained.”); SASSÖLI, *supra* note 3, at 30–31, ¶ 3.40

[A]n attack that uses lawful means and methods of warfare directed against a legitimate target nonetheless is unlawful if it ‘may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’ by the attacking party.

Corn & Corn, *supra* note 61, at 348 (“Indiscriminate attacks—attacks on a lawful object that are anticipated to produce collateral damage or incidental injury that is excessive in relation to the legitimate anticipated value of the attacks—are also prohibited by the LOAC.”); *see also* DINSTEIN, *supra* note 1, at 150; GREEN, *supra* note 17, at 351.

165. DOD LAW OF WAR MANUAL, *supra* note 11, at 285, § 5.16.5 (“The party that employs human shields in an attempt to shield military objectives from attack assumes responsibility for their injury, although the attacker may share this responsibility if it fails to take feasible precautions.”).

166. DINSTEIN, *supra* note 1, at 185–86 (“It has traditionally been perceived that, should civilian casualties ensue from an illegal attempt to shield combatants or a military objective, the ultimate responsibility lies with the Belligerent Party placing civilians at risk. A Belligerent Party is not vested by LOIAC with the power to block an otherwise lawful attack against combatants or military objectives by deliberately placing civilians in harm’s way.”); *see also* Rubinstein & Roznai, *supra* note 34, at 98.

167. Rubinstein & Roznai, *supra* note 34, at 98; DINSTEIN, *supra* note 1, at 185–86.

possible mechanisms to discredit this practice and, where feasible, to impose criminal responsibility on those who employ it. The U.S. Congress enacted legislation to impose economic sanctions on those responsible for the use of human shields in the 2018 Sanctioning the Use of Civilians as Defenseless Shields Act.¹⁶⁸ Similarly, NATO member States have been encouraged to explore domestic legal mechanisms for sanctioning this practice.¹⁶⁹ Moreover, armed forces engaged in hostilities against enemies that employ this tactic seem to appreciate more than ever the importance of disclosing operational information to expose their enemy's employment of this unlawful activity.¹⁷⁰

Analogizing the concept of innocent instrumentality to situations involving a concerted effort to produce civilian casualties will contribute to this condemnation by characterizing this tactic for what it truly is—a deliberate attack on civilians. Further, it will offset the tendency to conflate direct cause and legal responsibility for civilian casualties, recognizing that legal responsibility may properly be attributed to the indirect cause of harm in certain circumstances. By providing a rational explanation for why the party that exploited civilians should be treated as the party responsible for the attack causing the harm, this approach will clarify the focus of LOAC compliance

168. Sanctioning the Use of Civilians as Defenseless Shields Act, Pub. L. No. 115-348, 132 Stat. 5055 (2018) (codified at 50 U.S.C. § 1701 note (2018)).

169. Mark Dubowitz & Orde Kittrie, *Get Serious About Human Shields*, WALL STREET JOURNAL (Aug. 22, 2018), <https://www.wsj.com/articles/get-serious-about-human-shields-1534977827> (“Sanctions for using human shields could lead to prosecution in European courts and counter false claims that Western democracies are to blame for harm to these civilians.”).

170. Military Advocate General's Corps, Israel Defense Forces, Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge' – Update No. 6, at 6 (Aug. 15, 2018), https://www.idf.il/media/40288/examination_and_investigation_of_exceptional_incidents_from_operation_protective_edge.pdf

Accordingly, a central aspect of the assessment teams' activities was to identify the specific incidents in relation to which it was alleged . . . that civilians were harmed, and to cross reference them with the positions and actions of IDF forces operating in the area, in an attempt to achieve a full and complete factual understanding of the events, to the extent possible. In furtherance of their objective, numerous reports and publications by various NGOs and international organizations were comprehensively analyzed, and the details therein were assessed against the information in the IDF's possession. The factual picture that was presented to the MAG Corps by the FFA Mechanism, both with respect to the overall conduct of the fighting, as well as with respect to specific incidents that occurred in its course, was the product of a consolidation of all of the internal and external data collected with respect to these incidents.

and non-compliance more effectively than the generalized condemnation of human shielding.

In practice, an assertion of this theory of legal responsibility will not only highlight the unlawful conduct of the defending force, but it will also prioritize LOAC compliance by the attacking force. This is because the attribution of harm to the defending force will be contingent on clearly establishing the legality of an attack anticipated to cause civilian casualties. As a result, the attacking force will have an interest in providing information that both establishes the unlawful exploitation of civilians by the enemy as well as the basis for its assessment of attack legality. Thus, the “legitimacy narrative” of the military operation will be enhanced because the focus of that narrative will not be the effects of an attack, but the efforts by one party to comply with the law to offset the efforts of another party to violate the law.

Utilizing the innocent instrumentality doctrine may also contribute to criminal accountability for the infliction of harm to civilians. By treating such exploitation as a deliberate attack on civilians, the gravity of the LOAC violation would produce a more compelling interest in pursuing criminal accountability efforts than the conduct offense of human shielding. Where a defendant employs human shields for only a shielding effect, condemnation for that offense is logical. However, where the evidence supports the conclusion that the civilian exploitation tactic was intended to compel an opponent to launch an attack that produces civilian casualties, the individual making that decision should be accountable not only for a conduct crime, but for a crime that focuses on the unlawful result of the misconduct.¹⁷¹ That intended result is the infliction of death or injury to the individuals used as human shields.¹⁷² Accordingly, the individuals making that decision should face trial and punishment for a deliberate attack on civilians or other protected persons.

Both the exploitation of protected persons and the conduct of an opponent baited into launching an attack that will cause death or injury to those persons is deserving of the most forceful condemnation. The innocent instrumentality concept provides the foundation for that condemnation and should be leveraged to full effect.

171. Rubinstein & Roznai, *supra* note 34, at 98.

172. *Id.* at 109.