
COMMENT

HUMAN SHIELDS, HOMICIDES, AND
HOUSE FIRES: HOW A DOMESTIC LAW
ANALOGY CAN GUIDE INTERNATIONAL
LAW REGARDING HUMAN SHIELD
TACTICS IN ARMED CONFLICT

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INTRODUCTION

The prevalence of “concealment warfare” and “human shields” makes armed conflicts different today from ever before.¹ Yet, debate about the legal and moral justifications for states’ targeting decisions in such conflicts frequently remains rooted in laws and norms that were not designed to address these modern tactics.² Comparisons between international and domestic law often illustrate how current international law may not align with popular conceptions of justice.³

Consider Professor Alan Dershowitz’s editorial about the 2006 conflict between Hezbollah and Israel.⁴ Dershowitz observes that in the United States, “[a] bank robber who takes a teller hostage and fires at police from behind his human shield is guilty of murder if [the police], in an effort to stop the robber from shooting, accidentally kill the hostage.”⁵ Dershowitz then compares Hezbollah

1. See, e.g., EDMUND CAIRNS, *A SAFER FUTURE: REDUCING THE HUMAN COST OF WAR* 5–6 (1997) (arguing that while modern wars involve new actors and complex relationships between parties, policy-makers must not lose sight of their goal of creating a world where change can be pursued “without a resort to major armed conflict”); see also *id.* (observing that modern conflicts often include the participation of states, guerilla forces, organized crime groups, and even businesses); Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT’L L.J. 145, 150–51, 183–84 (2000) (noting the legal challenges presented by states’ varying degrees of involvement with terrorist organizations).

2. Cf. Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 90 (1989) (“Many proposed military actions were considered and rejected during recent years on legal grounds But the law must not be allowed improperly to interfere with legitimate national security measures.”).

3. See *infra* Part II (suggesting that the domestic legal treatment of certain bank robber and haystack fire scenarios should influence the international legal response to the use of human shields). The word “justice” has many different meanings. It is used in this paper to refer to the concept of fairness and impartiality towards all parties affected by a given incident. For an overview of different ways that the concept of “justice” is applied, see *The Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/contents.html> (last visited Nov. 18, 2007).

4. Alan M. Dershowitz, *Arithmetic of Pain*, WALL ST. J., July 19, 2006, at A12.

5. *Id.* Although the exact type of criminal liability (*i.e.*, first degree murder, second degree murder, voluntary manslaughter, or involuntary manslaughter) varies based on jurisdiction and statutory interpretation, this basic principle is reflected in

militants who fired at civilian targets from areas populated by other civilians to the hypothetical bank robber.⁶ The international actor who hides behind human shields, like the robber, creates a situation that imperils innocent lives.⁷ And the robber, like the actor who uses human shields, forces the police to weigh the value of one set of innocent lives against their goals of protecting other innocent lives and preserving order.⁸ Further, the police officer, like a responding military, is forced to make a hurried and likely imprecise judgment about what damages may result from taking action to stop the criminal.⁹

International law is not silent on what responses are justified when a state is attacked by an opponent who launches attacks while hiding among civilians.¹⁰ Rather, international law offers ambiguous and potentially contradictory guidance to states faced with this situation by broadly authorizing the use of force in self-defense while also declaring such uses of force illegal in certain situations where actors utilize human shield tactics.¹¹ Debates among legal scholars,

criminal law throughout the United States. *But see infra* note 83 (noting that the imposition of criminal liability in such situations is viewed negatively by some because it may disregard the actor's *mens rea*). *See generally* WAYNE R. LAFAVE, CRIMINAL LAW §§ 7.4–7.5, 7.7 (3d ed. 2000).

6. Dershowitz, *supra* note 4.

7. *See* Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?*, 16 EMORY INT'L L. REV. 445, 456 (2002) [hereinafter Gross, *Human Shields*] (observing that when belligerents use human shields, they “expose civilians to the ramifications of the conflict,” and that “[h]owever extensive the efforts on the part of the state, they cannot . . . confin[e] the injury solely to the terrorist”).

8. *See* Dershowitz, *supra* note 4 (contending that “[a] democracy is entitled to prefer the lives of its own innocents over the lives of the civilians of an aggressor, especially if the latter group contains many who are complicit in terrorism”).

9. *See, e.g.*, Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F.L. REV. 1, 19–22 (2005) (stating that the use of human shields by the Vietcong army caused the United States to refrain from attacking certain military outposts, which then led to a U.S. military disadvantage); *infra* text accompanying notes 41–45 (discussing the civilian and Israeli military deaths that resulted when the Israeli Defense Force was forced to respond to the human shield tactics employed by Palestinian militants).

10. *See* Emanuel Gross, *The Laws of War Waged Between Democratic States and Terrorist Organizations: Real or Illusive?*, 15 FLA. J. INT'L L. 389, 408 (2003) (identifying the Hague Conventions, Geneva Conventions, and Protocols Additional to the Fourth Geneva Convention as prominent sources of international law regarding civilian casualties).

11. *Compare* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (“1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. . . . 2. The civilian population as such, as well as individual civilians, shall not be the object of attack.”), *with* U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or

statesmen, and the press often focus on which set of rules should apply in a given scenario, but this framework assumes that current international law is adequate to produce just results in the face of human shield tactics.¹² Given the lack of consensus on an appropriate legal framework for dealing with new strategies (both within and between states),¹³ this Comment posits that the existing framework is inadequate.

Addressing the just war principles that motivate international law is an important step in developing new rules.¹⁴ Documents such as the Hague Conventions,¹⁵ the Geneva Conventions,¹⁶ and the U.N.

collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”). Of course, nations conducting defensive attacks would not characterize their attacks as ones on civilians. However, human shield tactics blur the line between a military and civilian target and allow human shield users to claim that a given defensive action is an illegal attack on a civilian object. See *infra* note 114 (explaining how the provisions of Protocol I work in conjunction to make attacks on actors using human shields in civilian areas illegal in most situations).

12. See, e.g., Leah M. Campbell, Comment, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067, 1071–72, 1074, 1094–95 (2000) (working exclusively within the framework of current laws of armed conflict despite admitting their shortcomings); Kenneth Anderson et al., *A Public Call for International Attention to Legal Obligations of Defending Forces as Well as Attacking Forces To Protect Civilians in Armed Conflict*, CRIMES OF WAR PROJECT, Mar. 19, 2003, <http://www.crimesofwar.org/special/Iraq/news-iraq3.html> (questioning whether certain contemporary interpretations of the laws of war concerning human shields undermine the laws’ original purpose).

13. Compare Erin Guruli, *The Terrorism Era: Should the International Community Redefine its Legal Standards on Use of Force in Self-Defense?*, 12 WILLAMETTE J. INT’L L. & DISP. RESOL. 100, 123 (2004) (noting that as warfare continues to change, international law becomes less influential and should be altered), and Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern Warfare*, 39 INT’L LAW. 733, 733–34 (2005) (contending that even the long-standing Principle of Distinction must be supplemented in order to create just laws of armed conflict), with J. Nicholas Kendall, *Israel Counter-Terrorism: “Targeted Killings” Under International Law*, 80 N.C. L. REV. 1069, 1069–70 (2003) (arguing completely within the framework of current international law that Israel’s practice of “targeted killings” is legal).

14. See JAMES TURNER JOHNSON, MORALITY & CONTEMPORARY WARFARE 23 (1999) [hereinafter JOHNSON, MORALITY] (noting that just war theory has “[d]eveloped over history as a result of contributions from both secular and religious sources, reflecting the practice of statecraft and war as well as moral and political theory”). However, the current debate over how to interpret and apply international law is dominated by considerations of states’ interests. See Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State’s Duty to Protect its Citizens*, 15 TEMP. INT’L & COMP. L.J. 195, 202–05 (2001) [hereinafter Gross, *Thwarting Terrorist Acts*] (discussing how state-specific interests in combating terrorism motivated Israel, the United States, and Britain not to sign Protocol I).

15. First Peace Conference at The Hague, July 29, 1899, T.S. No. 392; Second Peace Conference at The Hague, Oct. 18, 1907, T.S. No. 536.

16. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

Charter¹⁷ reflect moral principles upon which there is a general consensus.¹⁸ These principles can then form the basis for a consensus about what responses are justified when a state is attacked by fighters who use civilians as shields.¹⁹ In other words, this Comment answers the question of what should be legal, by first addressing what is just.²⁰

“The horrible events and actions confronted in war must be divided between those evil in all respects and those that can be set into a relationship of priorities along with other relative evils.”²¹ This Comment argues that international law regarding concealment warfare must preserve a strong right of self-defense against parties who use such tactics, despite the potential for some incidental damage.²² The proposals herein attempt to strike a balance, however, between this necessity for self-defense and the various broadly accepted humanitarian concerns.²³

Part I examines the new strategies being used in armed conflict, the moral and legal dilemmas posed by these strategies, and state responses to them, concluding that international law has not kept pace with the realities of modern armed conflicts.²⁴ Part II advances analogies between domestic criminal and tort law and international

17. U.N. Charter.

18. See JOHNSON, MORALITY, *supra* note 14, at 28–30 tbls.3 & 4, 197–98 (outlining the moral principles justifying the resort to war and their reflection in international humanitarian law).

19. See *infra* note 155 and accompanying text (noting that the just war tradition is based upon actual problems encountered during war over the course of history and, as such, serves as a useful basis for certain international legal standards).

20. See JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 3 (Erin Kelly ed., 2001) (positing that one of the principle roles of political philosophy is to “identify reasonable and rational ends” and to show how “those ends can cohere within a well-articulated conception of a just and reasonable society”).

21. JOHNSON, MORALITY, *supra* note 14, at 18.

22. For definitions of “*jus in bello*” and “*jus ad bellum*,” see *infra* note 26. Though the right to engage in self-defense is a *jus ad bellum* concept, that right necessarily must be preserved through prudent interpretation of *jus in bello* concepts. An excessively restrictive application of *jus in bello* principles severely impedes upon states’ ability to exercise the right to self-defense. See *infra* notes 131–32 and accompanying text (indicating that self-defense correlates with *jus ad bellum* principles because, as a doctrine, it purports to justify the use of force in a given scenario); cf. Michael Y. Kieval, Note, *Be Reasonable! Thoughts on the Effectiveness of State Criticism in Enforcing International Law*, 26 MICH. J. INT’L L. 869, 887–90 (2005) (suggesting that expecting strict adherence to international law is unfairly restrictive in the face of a threat and that a country can respect the goals of international law without adhering to its prescriptions in *all* situations).

23. See MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 22 (1977) [hereinafter WALZER, JUST AND UNJUST WARS] (recognizing that the “moral reality of war” is “relatively stable” because it reflects a shared “understanding of states and soldiers, the protagonists of war, and of combat, [war’s] central experience”).

24. See CAIRNS, *supra* note 1, at 5–6 (arguing that despite the involvement of actors that blur the line between government, businesses and organized crime, policy-makers should still aim to “make conflict peaceful”).

law regarding human shield situations, with the goal of finding legal “tools” that can be adapted for use in the international forum.²⁵ Part III discusses just war theory in general, lays out specific concepts associated with *jus in bello* principles,²⁶ and explores how just war concepts are reflected in international law.²⁷ Part IV proposes new international laws regarding acceptable military responses to “human shield” tactics.²⁸ Part IV also discusses the benefits of the new laws, concluding that there can and should be a consensus that the proposed laws are justified.²⁹

I. MODERN CONFLICTS AND INTERNATIONAL LAW’S SHORTCOMINGS

A. *Modern Conflicts Involve Tactics that Make Non-Combatant Discrimination Difficult*

The tactics used in modern conflicts have altered the consequences of war and increased civilian casualties.³⁰ The rising rate of civilian deaths can be attributed to some factors that are not the focus of this paper,³¹ but they can also be attributed to the increased use of illegal and perfidious tactics by some state and non-state actors, such as the use of civilians as human shields.³² Of course, not all combatants who

25. See Dershowitz, *supra* note 4 (lamenting the absence of widespread condemnation for fighters who fight from and take shelter within a civilian population, and suggesting that U.S. domestic law serve as an international standard under which these fighters are held criminally liable for their actions).

26. “*Jus in bello*” refers to “right conduct in the midst of battle,” and translates as “justice in war.” STANFORD ENCYCLOPEDIA ON PHILOSOPHY *War* (Edward N. Zalta ed., 2005), <http://plato.stanford.edu/entries/war/> [hereinafter STANFORD ENCYCLOPEDIA, *War*]. “*Jus ad bellum*” are principles that govern “[w]hat constitutes a just or unjust resort to armed force.” *Id.*

27. See JOHNSON, MORALITY, *supra* note 14, at 28–30 tbls.3 & 4 (indicating that the “classical statements” of *jus in bello* principles include lists of people immune from attack, “Geneva Law,” and limitations on the weapons used in fighting).

28. See *infra* Part IV.A.

29. See *infra* Parts IV.B–E.

30. In World War I, civilians accounted for an estimated fifteen percent of deaths; in World War II, civilians made up an estimated sixty-five percent of deaths; and in conflicts today, the number is estimated above eighty-four percent. CAIRNS, *supra* note 1, at 17.

31. See Claude Bruderlein, *The End of Innocence: Humanitarian Protection in the Twenty-First Century*, in INT’L PEACE ACAD., CIVILIANS IN WAR 221, 222 (Simon Chesterman ed., 2001) (attributing increased danger to civilians in part to the proliferation of small arms and land mines); see also Swiney, *supra* note 13, at 750–52 (arguing that the increased presence of “dual-use targets” that serve both civilian and military goals has made it more difficult for actors to distinguish between appropriate and inappropriate targets).

32. The rise of “concealment warfare” and the use of human shields are widely regarded to have begun during the Vietnam War. Reynolds, *supra* note 9, at 4, 17, 19–20. For a definition of “perfidy,” see Protocol I, *supra* note 11, art. 37, which states:

resort to concealment warfare have the same objectives, use the same methods, and present the exact same issues of distinction in armed conflicts.³³ This Comment focuses specifically on belligerents who fail to keep their military personnel and equipment separate from civilians, reject the idea of noncombatant immunity, and/or exploit the principle of civilian immunity by baiting opposing forces into attacks of ambiguous legality.³⁴ A few examples of these tactics are demonstrative of the need for greater clarity in international law.

When the Allied forces of the United States and the North Atlantic Treaty Organization attempted to end Slobodan Milosevic's ethnic cleansing campaign in Yugoslavia, Serbian forces employed several deceptive and illegal tactics.³⁵ Serbian troops hid in civilian structures, walked among civilians, and placed military equipment near civilians.³⁶ In their attempts to defeat the Serbian military, the Allied forces were, in effect, forced to choose between allowing the Serbian atrocities to continue and stopping the atrocities at the

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy: (a) The feigning of an intent to negotiate under a flag of truce or of a surrender; (b) The feigning of an incapacitation by wounds or sickness; (c) The feigning of civilian, non-combatant status; and (d) The feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

The definition of "human shields" is not totally consistent among States and Intergovernmental organizations, but the Statute of the International Criminal Court says the war crime of using human shields encompasses "utilizing the presence of a civilian or other protected person to render certain points, areas, or military forces immune from military operations." Rome Statute of the International Criminal Court, art. 8, para. 2, (b)(xxiii). It is unclear whether this definition amounts to perfidy under Protocol I, but given the harm this tactic presents to civilians who rely on their surroundings being immune from attack, there is a strong argument that such tactics are "perfidious."³⁷ See Louis Rene Beres, *Israel, Lebanon, and Hizbullah: A Jurisprudential Assessment*, 14 ARIZ. J. INT'L & COMP. L. 141, 146-49 (1997) (arguing that using human shields falls within the definition of perfidy under various provisions of international law).

33. See Bruce D. Jones & Charles K. Cater, *From Chaos to Coherence? Toward a Regime for Protecting Civilians in War*, in INT'L PEACE ACAD., *supra* note 31, at 239 (noting that the specific objectives of a belligerent non-state actor can make that actor more or less prone to respecting noncombatant immunity). If a group is seeking political inclusion, then that group will often be more responsive to humanitarian concerns. *Id.* Many non-state belligerents engage in political activities and provide social services. *Id.* Conversely, a group seeking secession would be more prone to attacking civilians. *Id.*

34. See generally Reynolds, *supra* note 9, at 2-3 (expressing concern over the growing number of incidents where adversaries use the laws of armed conflict to gain a "strategic advantage," rather than as a means for ensuring a more just war).

35. Reynolds, *supra* note 9, at 35-40.

36. *Id.* at 36-37 (citing U.S. DEP'T OF DEFENSE, REPORT TO CONGRESS: KOSOVO/OPERATION ALLIED FORCE AFTER-ACTION REPORT 60-63 (2000)).

expense of civilian lives.³⁷ Amazingly, though, when some members of the international community debated the conflict, scrutiny focused on the Allied forces' targeting decisions.³⁸ This is not to say that Allied forces did not make mistakes or violate international law—they may have.³⁹ Rather, this incident illustrates that current interpretations of international law by some members of the international community scrutinize the actor forced to make that difficult decision just as much as (if not more than) the actor who created the scenario by actions that were, in themselves, violations of international law.⁴⁰

Another example of the consequences of human shield tactics is the action of the Israel Defense Forces ("IDF") in the Jenin refugee camp on the West Bank.⁴¹ Israel had credible and *correct* intelligence that the Jenin camp was serving as a base for militants who had killed Israeli civilians in suicide bombings in March of 2003.⁴² Aware of civilians' presence, the IDF performed a ground operation (as opposed to bombing) designed to prevent further attacks on Israeli citizens.⁴³ During the ensuing conflict, Palestinian fighters booby-trapped civilian homes and fired at Israeli forces while standing

37. *Id.*

38. *Id.* at 38 (citing HUMAN RIGHTS WATCH, CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN (2000), http://www.hrw.org/reports/2000/nato/Natbm200-01.htm#P217_53015).

39. See HUMAN RIGHTS WATCH, THE CRISIS IN KOSOVO: CASE STUDIES OF CIVILIAN DEATHS (2000), http://www.hrw.org/reports/2000/nato/Natbm200-01.htm#P295_79629 (decrying the use of cluster bombs near civilians because their effects are not easily controlled).

40. See *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, The Applicable Law, ¶ 549 (Jan. 14, 2000), available at <http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm> ("[T]he presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity."). Note also that attempted genocide and use of human shields, both of which the Serbian forces were accused, are violations of international law. See Protocol I, *supra* note 11, art. 58 (requiring parties to keep separate military facilities and civilian populations); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (declaring genocide as a crime under international law).

41. See generally Gross, *Human Shields*, *supra* note 7, at 499–502, and Kieval, *supra* note 22, at 889–892, for discussions about the IDF/Palestinian conflict.

42. See Gross, *Human Shields*, *supra* note 7, at 499–500 (quoting an internal Fatah report, which expressed pride in the Jenin camp having achieved recognition as a "hornet's nest" and as "the capital of the suicides").

43. See *id.* at 500 (noting that the IDF also issued a warning for residents to leave their homes upon their arrival in Jenin); see also Kieval, *supra* note 22, at 890–91 (comparing Israel's choice to invade the camp on the ground with Russia's choice to attack Grozny from the air, and approving of Israel's attempt to fight as discriminately as possible, given the situation).

behind innocent civilians.⁴⁴ In its attempt to use the least destructive means necessary to capture those responsible for previous attacks, the IDF suffered many casualties that an air attack could have avoided.⁴⁵ But when the dust settled, only the Israeli forces were on trial—accused of committing a “massacre.”⁴⁶

There is no shortage of additional examples of tactics that led to the exploitation of civilian populations and the misuse of international law to sway public opinion. Plain-clothed women have been used to lure soldiers into a firefight with insurgents,⁴⁷ civilians have been placed on top of bunkers that housed military leaders,⁴⁸ and false cries for help have been made in order to set soldiers up for ambushes.⁴⁹

B. Current International Law Can Give Advantages to Actors who Use Human Shields

International law, even when it is not enforced or ratified, is important because it influences states’ policies and behavior, as well as international perception.⁵⁰ Public perception can in turn make the

44. See Gross, *Human Shields*, *supra* note 7, at 500–01 (citing HCJ 3114/02 Barake v. Minister of Defence [2002] IsrSC 56(3) 11, 14–15); Kieval, *supra* note 22, at 890 (observing that the fighters based in Jenin even used a United Nations building as a “firing base”).

45. Gross, *Human Shields*, *supra* note 7, at 501. This exemplifies Michael Walzer’s suggestion that actors in a self-defense action must be willing to accept costs to themselves in order to protect civilian lives. See *infra* note 174 (explaining that in modern times an actor with good intentions can seek to minimize any evil effects of its actions by accepting additional costs to itself).

46. See Gross, *Human Shields*, *supra* note 7, at 501 (noting that numerous petitions were made to the Supreme Court of Israel arguing that atrocities had taken place in Jenin). But see Kieval, *supra* note 22, at 891 (wondering “what more could have been done” by Israel to protect civilians given the perfidious tactics used by its opponents).

47. See, e.g., Elizabeth Neuffer, *City Battles Will Boost Growing Civilian Toll*, BOSTON GLOBE, Apr. 7, 2003, at A25 (noting twelve civilian deaths as a result of one such attack).

48. For discussions of the well publicized Al Firdos bunker incident, see W. Chadwick Austin & Antony Barone Kolenc, *Who’s Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT’L L. 291, 326 (2006), and Reynolds, *supra* note 9, at 33–35.

49. See Samuel Vincent Jones, *Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence Between Contract Theory and the Scope of Civilian Immunity During Armed Conflict*, 16 DUKE J. COMP. & INT’L L. 249, 250–51 (2006) (relaying the story of how Iraqi insurgents waived white flags and pleaded for medical assistance only to detonate a car bomb and ambush the soldiers rushing to give assistance).

50. See Austin & Kolenc, *supra* note 48, at 293–94 (noting the rise of “law-fare,” in which non-state actors use intimidation and terror to exploit the laws of war for the purpose of influencing the policies of states that oppose them). While Israel and the United States have not signed Protocol I Additional to the Geneva Conventions of 1949, they still make efforts to comply with its fundamental aims. See *supra* notes 43–45 and accompanying text (observing measures taken by Israel to fight as discriminately as they thought was prudently possible in the circumstances); see also

legitimate use of force either more or less difficult, regardless of whether a given perception is justified.⁵¹ In other words, international law matters because it serves as the framework for academic, legal, and media analyses of the use of military force.⁵²

Consider the report by Human Rights Watch on Lebanese civilian casualties resulting from the conflict between Israel and Hezbollah in the Summer of 2006.⁵³ Regarding Israel's alleged failure to follow the principles of distinction and proportionality, the report extensively cites the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts.⁵⁴ Yet, the section ironically titled "The Applicable Law" never mentions Article 58 of Protocol I, which requires actors to remove their targets from civilian populations.⁵⁵

This one-sided analysis fails in at least two ways. First, it fails to consider an actor's culpability for creating a risk of harm to civilians by performing military operations—such as training soldiers or planning attacks—in an area populated by civilians.⁵⁶ This is an

Campbell, *supra* note 12, at 1074–75 (recognizing that "the law of the United States includes international law," and despite the United Nation's "frustrating impotence," that body still defines general standards for the use of force in international law).

51. See Austin & Kolenc, *supra* note 48, at 311 (identifying the possibility that actors can "exploit" the International Criminal Court by "filing questionable or fraudulent complaints for the Court to investigate" and by directing media attention to these complaints in order to enhance "international pressure" against the actor put on the defensive by the complaints); see also Beres, *supra* note 32, at 152–53 (positing that regardless of how it is interpreted by various bodies, international law cannot become a "suicide pact" that "preclude[s] essential uses of force").

52. See, e.g., Human Rights Watch, Israel/Occupied Palestinian Territories, <http://hrw.org/doc?t=mideast&c=isrlpa> (last visited Oct. 9, 2007) (presenting several reports, commentaries, and press releases that utilize international law to assess the propriety of many different uses of force in the Israel-Palestine conflict); see also Jones, *supra* note 49, at 298 (concluding that international law "leaves itself too vulnerable to socio-political influences").

53. HUMAN RIGHTS WATCH, FATAL STRIKES: ISRAEL'S INDISCRIMINATE ATTACKS IN LEBANON (2006), http://hrw.org/reports/2006/lebanon_0806/lebanon0806webcover.pdf.

54. *Id.* at 43–47.

55. *Id.*; see Protocol I, *supra* note 11, art. 58 (declaring that parties to a conflict must avoid operating in densely-populated areas; remove the civilian population from the location of an attack; and take any other necessary precautions to protect the civilian population from danger). Despite Israel not being a party to Protocol I, "all parties to an armed conflict whether States or non-State actors are bound by international humanitarian law." International Committee of the Red Cross, Who is Bound by the Geneva Conventions? (2007), <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5KZJAV>.

56. See Anderson, *supra* note 12 (observing that attackers' obligations under Protocol I can be made nearly impossible to fulfill if defending actors violate Article 57(1), and arguing that because of this, closer attention must be paid to defenders' violations of the laws of war); see also *infra* notes 96–106 and accompanying text (suggesting that international observers must focus on the unlawful conduct of

unrealistic view of Protocol I that arguably creates mutually binding, yet non-reciprocal obligations.⁵⁷ Article 57 of Protocol I places an affirmative duty on states to take certain precautions before an attack in order to avoid civilian casualties.⁵⁸ Article 51(7) does establish a duty for defending actors, declaring that

[t]he 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.⁵⁹

However, Article 51(8) adds that a failure by the defending actor to abide by the prohibitions of Article 51 does not alter an attacking state's obligations under Article 57.⁶⁰ In modern warfare, the effect of a defending 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.⁶¹ Commentators, courts, and NGOs should therefore scrutinize both attackers' and defenders' conduct; while doing so, they should recognize that attackers' ability to meet their obligations under Article 57 depends partially on defenders' actions.⁶²

militants that places civilian lives in danger, and not just on the conduct of responding militaries that cause civilian death).

57. See Anderson, *supra* note 12 (lamenting that NGOs and scholars focus mostly on attackers' violations of Protocol I, despite the obvious ways that attackers' ability to meet their obligations will vary based upon the defending actors' conduct); *Symposium: The Hague Peace Conferences: The Laws of War on Land*, 94 AM. J. INT'L L. 42, 53 (2000) ("I believe that these provisions of Protocol I for the protection of civilians have either codified or progressively developed customary international law in a way that has now become customary law and, consequently, are binding today upon all parties to international armed conflicts, including nonparties to the Protocol.")

58. See Protocol I, *supra* note 11, art. 57 (declaring that attacking forces "shall . . . [t]ake all feasible precautions" so as "to spare the civilian population, civilians and civilian objects").

59. *Id.* art. 51, para. 7.

60. See *id.* art. 51, para. 8 ("Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.")

61. See Anderson, *supra* note 12 (approving of the United States' policy in Iraq of treating the use of human shields to protect military targets as a war crime).

62. *Id.*

Second, the above-mentioned analysis unfairly undermines the right to self-defense.⁶³ If military measures calculated to end a well-documented threat of rocket fire are prohibited by virtue of where the original attacks originate, then the right of self-defense has been, in effect, nullified.⁶⁴ To avoid this result, anyone analyzing such a scenario should give due consideration to the attacker's necessity before condemning the attack as violating Article 57 of Protocol I.⁶⁵

The examples in Part I.A further illustrate that when states are faced with concealment tactics, they are sometimes forced to respond with tactics of their own that previously may have been unacceptable, such as anticipatory self-defense, "targeted killings," or striking where they know civilians are present.⁶⁶ When all of the parties in a conflict generally observe their duty to keep military facilities and personnel at a distance from the civilian population, it is right to expect a war with minimal collateral damage.⁶⁷ However, since insurgencies and terrorist groups, unlike states, do not have their own civilian population, they are able to risk civilian lives without facing many of

63. See *infra* notes 185–189 and accompanying text (noting that the U.N. Charter's general prohibition on the use of force is slightly tempered by Article 51, which allows for collective self-defense).

64. Conflicting reports on the same institution's website about the same incident illustrate this problem. Compare Sarah Leah Whitson, Hezbollah Needs to Answer, <http://hrw.org/english/docs/2006/10/05/lebanol4336.htm> (last visited Oct. 9, 2007) ("Human Rights Watch's research found that on a number of occasions Hezbollah unjustifiably endangered Lebanese civilians by storing weapons in civilian homes, firing rockets from populated areas, and allowing its fighters to operate from civilian homes. Hezbollah also used children as active combatants, another violation of the law."), with HUMAN RIGHTS WATCH, ISRAEL/LEBANON: END INDISCRIMINATE STRIKES ON CIVILIANS (2006), <http://hrw.org/english/docs/2006/08/02/lebanol13902.htm> (urging "Israel to immediately end indiscriminate attacks and distinguish at all times between civilians and combatants"). Simply calling on both sides to stop their attacks is an unrealistic solution. See *supra* note 21 and accompanying text (observing a necessary choice between greater and lesser evils in a self-defense context). These analytical problems are not being introduced to judge where Israel and Hezbollah did or did not conduct themselves justly during their most recent conflict, but rather to show the potential contradictions of international law regarding a human shield scenario.

65. See *infra* text accompanying notes 89–95 (arguing that a failure to consider the attacker's necessity is inconsistent with some widely-held conceptions of justice).

66. See Gross, *Human Shields*, *supra* note 7, at 524 ("[I]n exceptional cases complying with the test of proportionality, it is possible to neutralize the moral flaw attaching to [an attack on an appropriate target at the cost of lives surrounding that target.]); Kendall, *supra* note 13, at 1086–88 (concluding that in light of the persistent threat posed by leaders of terrorist groups, and the strategic advantages to be gained, "targeted killings" should be construed as legal acts of self-defense under Article 51 of the U.N. Charter).

67. Cf. Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"*, FLETCHER F. OF WORLD AFF., Winter/Spring 2003, at 55, 67 (observing that "[t]errorism is . . . a wholesale rejection" of the principles of proportionality and distinction).

the consequences that states would encounter.⁶⁸ Also, many non-state actors are able to arm and strike quickly, meaning that if states want to protect their own civilians, they may have to strike with such haste that they are unable to be as precise in their targeting as was previously expected.⁶⁹

For example, Israel has engaged in “anticipatory self-defense” against Hezbollah fighters.⁷⁰ While many interpretations of international law hold that such military action is wrong, those interpretations often fail to fully account for the threat posed by the non-state actors who are threatening civilian lives in the first place.⁷¹ There is a strong argument that such an anticipatory action could save civilian lives by allowing the state to attack militants when they are furthest from civilians, and by preventing future attacks on civilians that intelligence and/or history show are nearly certain.⁷²

Since international law on this matter is based in, among other things, considerations of proportionality, it is time to question the calculations currently embodied therein.⁷³ The law of war should not place states who try to follow their aims at a disadvantage.⁷⁴ But because current international law does not fully consider human

68. Conversely, when states aim to protect those same civilian lives, they often pay for doing so with the lives of their own soldiers. See Gross, *Human Shields*, *supra* note 7, at 459–60 (observing that a state’s soldiers may be called upon to abstain from defending themselves, and thus to die, in order to avoid harming enemy civilians with whom terrorists are hiding).

69. Cf. A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 73 (1996) (noting how time constraints make it difficult for militaries to evacuate civilians from areas they plan to attack).

70. See Beres, *supra* note 32, at 141 (detailing Israel’s operation “Grapes of Wrath,” which was a response to rocket bombardments from Hezbollah fighters in southern Lebanon). According to some theorists, the threat of an imminent attack justifies an act of “anticipatory self-defense” the same way that an attack justifies customary self-defense measures. *Id.* at 149–50. Israel considered the “Grapes of Wrath” operation to be anticipatory self-defense because they had obtained intelligence regarding impending Hezbollah rocket attacks. *Id.* at 143–44.

71. See Mirko Bagaric & John Morss, *In Search of Coherent Jurisprudence for International Criminal Law: Correlating Universal Human Responsibilities with Universal Human Rights*, 29 *SUFFOLK TRANSNAT’L L. REV.* 157, 176–77, 191 (2006) (arguing for a “zero tolerance” policy for civilian deaths, but ignoring the possibility that those attacks are justified by offering the rationale that “terrorism does not currently seem to be an international crime”).

72. See Guruli, *supra* note 13, at 119–20 (observing that when the U.N. Charter was drafted, judging whether an “imminent threat” justified anticipatory self-defense was easier because states could observe hostile troop movements, but now a new formulation of the anticipatory self-defense doctrine is needed to protect the right of self-defense and to ensure that the doctrine “does not become a license for major powers to open wars against whomever they desire”).

73. Cf. *supra* notes 66–67 (observing varying expectations of proportionality under differing circumstances, especially in novel situations).

74. See *infra* Part II (drawing analogies between domestic law and international just war principles).

shield tactics, it is subjected to interpretations that pervert its original aims and rationales.⁷⁵

II. DOMESTIC ANALOGIES: HOW DOMESTIC LAW ADDRESSES SITUATIONS ANALOGOUS TO THE USE OF HUMAN SHIELDS

A. *The Bank Robber–Human Shield Analogy*

Criminal law in the United States draws lines between behaviors that society has deemed acceptable and those it has deemed unacceptable.⁷⁶ This goal is similar to the pursuit in the international arena of just rules to govern the use of force.⁷⁷ The reasons why certain acts are deemed legal or illegal in a given country can therefore explain why analogous acts in the context of armed conflict should be prohibited.⁷⁸ Accordingly, criminal laws that attribute culpability in situations analogous to the use of human shields serve

75. See Austin & Kolenc, *supra* note 48, at 330 (expressing concern that political pressure on the prosecutor of the International Criminal Court (“ICC”), as well as frauds such as placing civilians near “high-priority targets” to create civilian casualties from attacks, could allow certain parties to exploit the ICC); cf. Rona, *supra* note 67, at 70 (“The Geneva Conventions and their Additional Protocols did not anticipate September 11 or al-Qaeda.”).

76. See, e.g., Kent Greenawalt, *Punishment*, in FOUNDATIONS OF CRIMINAL LAW 45 (Leo Katz, Michael S. Moore & Stephen J. Morse eds., 1999) (expressing the common belief that criminal punishment is an expression of “condemnation of . . . persons who are capable of choice and who have breached established standards of behavior”).

77. The unjustified use of force is a behavior that has been widely declared unacceptable. See, e.g., U.N. Charter art. 2, para. 4 (“All [m]embers shall refrain . . . from the threat or use of force against . . . any other state . . .”). See generally Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 51 (2002) (realizing that “the desire to minimize the transboundary use of military force is central to contemporary world order”).

78. There is, however, a contingent of scholars who object to using domestic analogies. See, e.g., YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 181 (4th ed. 2005) (suggesting that possible future developments in international law may, over time, render such analogies inapposite); Kenneth Anderson, Kenneth Anderson’s Law of War and Just War Theory Blog: Charles Dunlap on Why Using the Military in Law Enforcement is a Bad Idea, <http://kennethandersonlawofwar.blogspot.com/2006/09/charles-dunlap-on-why-using-military-in.html> (Sept. 30, 2006, 18:05 EDT) (discussing the practical and theoretical implications of involving the military in law enforcement roles and hinting that differences between the two are significant and limit the strength of international-domestic analogies). Anderson argues, *inter alia*, that in a settled society, imposing law upon a state’s citizens by force is an option only for police, but in a just war, both sides are permitted to use force. *Id.* This difference matters because the law of war should not take sides, like domestic law does. *Id.* So, while criminal law endorses police behavior so long as it comports with a predetermined legal standard, international law requires quick determinations of proportionality that cannot be equated to criminal law because of their supposed neutrality. *Id.* Dinstein objects to equating a person’s right to self-defense with a state’s right of self-defense, arguing that the former is likely grounded in natural law, but the latter is a prerogative that can be curtailed. DINSTEIN, *supra*, at 181.

as useful references in determining the appropriate language for international laws regarding human shield tactics.⁷⁹

Recall Alan Dershowitz's bank robbery analogy discussed in the Introduction.⁸⁰ The robber in Dershowitz's analogy would be liable for murder on the basis of a legal principle that is codified in many state laws, as well as the Model Penal Code ("MPC").⁸¹ The relevant passage in the MPC states:

[C]riminal homicide constitutes murder when: . . . (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of . . . robbery . . . arson, burglary, kidnapping, or felonious escape.⁸²

At first, imposing liability for a murder one did not physically commit might seem counterintuitive.⁸³ But this principle has been

79. See *infra* Part II (comparing international and domestic law and suggesting that current international law might not align with popular conceptions of justice). Notwithstanding critiques, domestic analogies can potentially make a meaningful contribution to the discussion of international law and human shield tactics in light of contradictions in international law. Cf. *supra* notes 10–11 and accompanying text (observing contradictions in international law regarding the appropriate response when a state is attacked by an opponent who launches attacks while hiding among civilians). But see DINSTEIN, *supra* note 78, at 181 (discussing objections to the application of an analogy between domestic self-defense principles and international law).

80. See *supra* notes 4–9 and accompanying text.

81. See *infra* note 91 (reporting various courts' applications of state felony murder statutes).

82. MODEL PENAL CODE § 210.2 (1962). The Model Penal Code reflects a variety of ideas, trends and practices in criminal law and thus provides a broad point for comparison with international law. The introductory note for Sections 210.0–210.6 elaborates on the rule, stating that

210.2(1)(b) establishes a presumption that the requisite recklessness and indifference to the value of human life exist when a homicide is committed during the course of certain enumerated felonies. This presumption has the effect of abandoning the strict liability aspects of the traditional felony-murder doctrine but at the same time recognizing the probative significance of the concurrence of homicide and a violent felony.

MODEL PENAL CODE § 210 introductory note for Sections 210.0–210.6 (1962).

83. The main scholarly critique of such an imposition of liability is that, unlike with other types of criminal liability, the law seems to ignore the *mens rea* of the actor, thus imposing a type of strict liability for a crime that carries very grave penalties. See, e.g., Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 60 (2004) (cataloguing a long list of scholarly critiques of the felony murder rule and addressing the accuracy of commonly-held assumptions about the doctrine's origins). This critique is quelled by the introductory note accompanying the MPC's section on murder. See MODEL PENAL CODE § 210 introductory note for Sections 210.0–210.6 (explaining how the MPC abandons strict liability aspects of the felony-murder doctrine in favor of a presumption of recklessness and indifference to the value of human life). This critique has not been persuasive enough to stop many states from adopting felony-murder laws. See, e.g., N.J. STAT. § 2C:11–3(a)(3) (2002) (defining felony murder in New Jersey); Kimberly Kessler Ferzan, Correspondence, *Murder After the Merger: A Commentary on Finkelstein*, 9 BUFF. CRIM. L. REV. 561, 561

broadly—though not totally—accepted in the United States because society sees the felonious creator of the dangerous situation as more blameworthy than the officer who pulls the trigger while trying to thwart the criminal activity.⁸⁴

Culpability in criminal law is based not only on the actions and state of mind of the offender, but also on causation. Though different penal codes use varying tests of causation, the MPC generally uses a “harm within the risk” test, which holds actors liable where the harm inflicted is within the risk posed by a bad action, such as using a hostage as a human shield.⁸⁵ The risk created by hiding behind a human shield is precisely that some harm will come to the (presumably) innocent party who was unwillingly used as shield.⁸⁶ The risk of harm to innocent civilians also motivates the international laws that require military facilities to be placed away from civilians.⁸⁷

In *New Jersey v. Kress*,⁸⁸ a police officer inadvertently shot a hostage who was being used as a human shield by a bank robber attempting to exit the bank.⁸⁹ The court held that the indictment of the robber for murder was proper under the New Jersey felony murder statute because the words in the statute—“or if the death of anyone ensues from the committing or attempting to commit [robbery or any unlawful act against the peace]”⁹⁰—encompassed the defendant’s act of deliberately placing the victim in a position of “deadly peril” of death from an outside force.⁹¹ The police officer likely recognized

(2005) (“Despite widespread criticism, the [felony murder] rule remains firmly entrenched in many states’ criminal statutes.”).

84. See generally Michael S. Moore, *Act and Crime*, in FOUNDATIONS OF CRIMINAL LAW, *supra* note 76, at 168, 177–78 (surveying the features of the foreseeability, “harm within the risk”, aspect causation, and substantial causation tests and noting their use in criminal and tort law despite the fact that they are not tests of causation in an academic sense).

85. MODEL PENAL CODE § 2.03(2)–(3).

86. See, e.g., *Pizano v. Superior Court of Tulare County*, 577 P.2d 659, 667 (Cal. 1978) (“The felon foresees [the possibility of harm to an unwilling human shield because] . . . if one of the purposes of using a hostage as a shield is to deter hostile fire, the other is to absorb it.”).

87. See Protocol I, *supra* note 11, art. 58 (mandating the separation of the civilian population and military facilities).

88. 253 A.2d 481 (N.J. Super. Ct. Law Div. 1969).

89. *Id.* at 483.

90. N.J. STAT. § 2A:113–1(a)(3) (2002), cited in *Kress*, 253 A.2d at 519.

91. *Kress*, 253 A.2d at 485–486; see *Wilson v. State*, 68 S.W.2d 100, 102 (Ark. 1934) (“Appellant’s action in forcing [the victim] to a place which was known by him to be perilous was just as much the cause of his death as if [Appellant himself] fired the fatal shot. This action was murder at common law and . . . under the [Arkansas murder] statute.”); *Pizano*, 577 P.2d at 667 (“[The victim’s] life was taken on account of [defendants’] . . . lawless act, and they are responsible for his murder, whether it was occasioned by their own volition or by the shots of their adversaries; and their act was the proximate cause of [the victim’s death].”).

that shots fired at a criminal hiding behind a human shield might hit that innocent person, but the court paid no attention to this fact because the officer's awareness still would not absolve the defendant of culpability for creating the deadly situation.⁹²

Under other common—though slightly different—tests of causation, the robber would also be held responsible for the victim's death.⁹³ For example, a California court upheld a defendant's murder conviction because using the victim as a human shield "*proximately caused*" the victim's death even though a neighbor fired the shot.⁹⁴ Similarly, an Arkansas court ruled that a defendant who used a human shield can be said to have "*directly caused*" the victim's death because that death "result[ed] naturally" from the defendant's conduct.⁹⁵

The international forum, where theories of "mechanistic causation" often take precedence, does not always follow this logic.⁹⁶ These theories place blame with the party whose act was closer in time and/or space to the civilian deaths without explicitly requiring the contemplation of other causal factors.⁹⁷ Unfortunately, codifications of the principle of non-combatant distinction⁹⁸ are sometimes interpreted such that individual military actions are viewed in a vacuum.⁹⁹ A state's reasons for staging an attack that results in incidental damage may not even be considered by those decreeing that the state violated international law.¹⁰⁰ For example, in

92. See *Kress*, 253 A.2d at 486 (imputing liability solely for creating the deadly situation).

93. For a list of the tests of causation used in criminal law, see Moore, *supra* note 84, at 175–78.

94. *Pizano*, 577 P.2d at 665 (“[I]f the trier of fact concludes that . . . [the] death [of one of the robbers] *proximately resulted* from acts of petitioner’s accomplices done with conscious disregard for human life, the natural consequences of which were dangerous to life, then petitioner may be convicted of . . . murder.” (quoting Taylor v. Superior Court, 477 P.2d 131, 134 (Cal. 1970)) (emphasis added).

95. *Wilson*, 68 S.W.2d at 102.

96. See *infra* text accompanying note 153 (discussing Article 52 of Protocol I and the prohibition of attacks on non-military targets).

97. See Protocol I, *supra* note 11, arts. 50–52 (proclaiming that the presence of non-civilians does not deprive an area of its civilian nature, but failing to address causal factors in civilian deaths, such as the use of human shields, which might warrant shifting culpability to the actor who used human shields).

98. See *infra* Part III.B (discussing embodiments of just war theory in international law).

99. Not everyone interprets international law in this manner, but the fact that international law’s language creates the potential for this interpretation wrongly contributes legitimacy to those who decry countries for taking justified defense actions. See Gross, *Thwarting Terrorist Acts*, *supra* note 14, at 205–06 (expressing concern that by declaring that the presence of non-civilians does not deprive an area of its civilian nature, terrorists might be granted unfair advantages).

100. See Beres, *supra* note 32, at 143–45 (recounting how mapping errors in operation “Grapes of Wrath” allegedly caused the shelling of civilian refugees and

1996, following repeated Hezbollah rocket attacks from the north and a responsive Israeli self-defense action that struck a site housing Lebanese civilians, the U.N. found that Israeli forces had attacked the civilians deliberately.¹⁰¹ This finding ignored (1) the Israeli intelligence showing that bombers were in the area struck; (2) the fact that the U.N.'s map was inaccurate, thus compromising the accuracy of Israeli targeting systems; and most importantly, (3) the illegal proximity of the aggressors to the protected site.¹⁰²

The U.N.'s analysis above differs from U.S. criminal law which, through tests of causation, considers which party originally created the deadly situation.¹⁰³ In the robbery cases discussed above, the murder statutes required the courts' analyses to include determinations of who created the deadly situation and of the necessity of the police action.¹⁰⁴ However, if domestic courts followed the U.N.'s approach as described above, the analysis would begin (temporally) when the police officer fired his weapon and *after* the robber created the hazard.¹⁰⁵ This discrepancy seems even more anomalous when one considers that international law regarding legal justifications for using force, like criminal law, requires analysis of the context in which an act is taken.¹⁰⁶

The "harm within the risk" test is appropriate to apply in the international human shield context because, like the principle of distinction, it is intended to determine culpability justly in the event of injury to bystanders.¹⁰⁷ Given the difficult decisions forced upon the state that must choose how to respond, it is unjust to hold states accountable for *reasonable* measures taken to protect their citizens when the only other option is to sacrifice security, sovereignty, or

noting the Israeli ambassador's objection that the suggestion of a deliberate attack on civilians was absurd).

101. *Id.* at 143–44.

102. *Id.* at 143–45.

103. *See supra* notes 88–95 and accompanying text (indicating examples in the domestic criminal framework for assessing causation where an actor creates a deadly situation).

104. *See supra* notes 91–95 and accompanying text (addressing the imputation of liability solely on the basis of creating a deadly situation).

105. *Cf.* H.L.A. Hart & A.M. Honore, *Causation in the Law*, in FOUNDATIONS OF CRIMINAL LAW, *supra* note 76, at 179, 186 (finding that where one actor's actions create a "necessity" to act for another actor, the law must make judgments about "the importance of the respective interests sacrificed and preserved").

106. An essential part of the robber analogy is that the robber, before being fired upon, has already committed at least one crime. *Cf. infra* Part III.B (discussing the international crime of aggression and when the use of force is justified).

107. *See* MODEL PENAL CODE § 210 introductory note for Sections 210.0–210.6 (1962) (explaining that Section 210.2 of the Model Penal Code was designed to recognize "the probative significance of the concurrence of homicide and a violent felony").

both.¹⁰⁸ The “harm within the risk” doctrine would help international law apportion culpability more justly by shifting responsibility for the deaths of human shields away from states compelled to exercise their right of self-defense, and towards actors who initially create the danger to civilians.¹⁰⁹

B. The Haystack Fire–Human Shield Analogy

Tort law also provides a useful analogy when considering what actions would be just responses to an international actor who uses human shields.¹¹⁰ Tort law, like criminal law, draws lines between acceptable and unacceptable behavior.¹¹¹ Tort law’s focus on distribution of losses is motivated by both moral and economic considerations; this Comment focuses primarily on the moral issues.¹¹²

Two features of tort law are particularly analogous to the international human shield problem. First, in order to discourage dangerous behavior, tort law creates “duties” that are owed to other parties in the name of justice.¹¹³ Duties also exist in international law, but the duties in the international context sometimes conflict and therefore put actors in a position where they may have to violate at least one duty to fulfill another. For example, Articles 51 and 58 of

108. See DINSTEIN, *supra* note 78, at 178 (explaining that under Article 51 of the U.N. Charter, a self-defense action necessarily utilizes legal force against users of illegal force); WALZER, JUST AND UNJUST WARS, *supra* note 23, at 53–54 (arguing that because states “contract” with citizens to provide certain rights, the state should be able to protect these rights when they are collectively threatened, just as an individual would defend such rights if they were challenged on a personal level). Some scholars even consider self-defense a moral obligation. *E.g.*, DINSTEIN, *supra* note 78, at 178–79 (examining conceptions of self-defense as a right, as opposed to a duty).

109. See *infra* Part IV.A (proposing principles for a new standard of international law).

110. See *infra* Part IV.B (explaining the reasons for examining domestic analogies to the human shield problem).

111. Many different conceptions of justice justify the principles of tort law. See IZHAK ENGLARD, THE PHILOSOPHY OF TORT LAW 7–9 (1993) (noting the frequency of utilitarian justifications of tort law, but questioning whether those perspectives contradict the idea of moral responsibility); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 134–36, 145–203 (1995) (justifying tort law from a corrective justice perspective because tort law clarifies the nature of “direct connections” between parties); Gregory C. Keating, *A Social Conception of the Tort Law of Accidents*, in PHILOSOPHY AND THE LAW OF TORTS 22, 22–23 (Gerald J. Postema ed., 2001) (advancing a justification for tort law based in social contract theory).

112. See ENGLARD, *supra* note 111, at 7–9 (noticing that since tort law imposes a semi-utilitarian model of using economic liabilities to shape behavior, economic concerns are frequently intertwined with moral ones, and questioning the propriety of mixing these considerations).

113. See, *e.g.*, MARGARET BRAZIER, STREET ON TORTS 171–72 (1993) (summarizing various historical tort law duties of care).

Protocol I establish two “duties,” but fail to explain their relationship in a way that makes establishing liability difficult when both duties have been violated in a conflict.¹¹⁴ Second, in deciding how losses should be distributed, tort law deters behavior that is unnecessarily destructive while still allowing for other behavior that is destructive but justified by a greater need.¹¹⁵ This principle, while embraced by just war theory, is not clearly reflected in current international law when it comes to human shield tactics.¹¹⁶

Consider the classic English case of *Vaughan v. Menlove*.¹¹⁷ In that case, the defendant was warned that a haystack he built was likely to catch fire because of its shoddy construction.¹¹⁸ The haystack did catch fire and the flames blew onto a neighbor’s cottages that then burned down.¹¹⁹ The court held the defendant liable because he had

114. See Protocol I, *supra* note 11, art. 44, para. 3 (“In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.”). Compare Protocol I, *supra* note 11, art. 51, para. 2 (establishing the illegality of firing upon civilian targets), and Protocol I, *supra* note 11, art. 58 (requiring the separation of civilian and military objects), with U.N. Charter art. 51 (explaining that the right of self-defense should not be impaired in the face of an “armed attack”). Article 51 of Protocol I prohibits intentionally firing upon civilian targets, but if the actor who harms civilians can show that it had a military objective, then their attack does not illegally target civilians. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES 34-35 (Int’l Comm. of the Red Cross, 2005) Committee (explaining that civilian areas lose their protected status to the extent that they are used in a manner that makes them valid military objectives). The problem is that human shield tactics create doubt as to the character of a target, and in situations where a target’s nature is in doubt, attacks on that area are prohibited notwithstanding the fact that a threat to security may still be emanating from that area. See Protocol I, *supra* note 11, art. 52, para. 3; see also HENCKAERTS & DOSWALD-BECK, *supra* note 114, at 34-36 (reporting that the U.S. has objected to this policy because it “ignore[s] the realities of war in demanding a degree of certainty that seldom exists in combat.”). Thus while Article 51 may not directly prohibit attacks on areas where human shields are being used, it makes such attacks unlikely to be legal because the nature of those areas will be difficult to ascertain. See *supra* notes 47-49 (relaying instances where human shield tactics have made military objectives look like civilian ones).

115. See, e.g., BRAZIER, *supra* note 113, at 86-87 (discussing self-defense, defense of others, and defense of property in tort law, all of which allow for certain destructive behaviors in order to prevent other harms).

116. The Doctrine of Double Effect (“DDE”) is a means for making this type of calculation. See *infra* notes 172-174 and accompanying text (addressing the conundrum of collateral damage). However, current international law reflects the DDE as applied to state actors and older tactics. See *infra* Part III.B (surveying embodiments of just war theory in international law). As new actors and tactics present greater threats, the calculus reflected in international law must change. See Travalio, *supra* note 1, at 191 (lamenting international law’s lack of a “firm basis” for use of force against terrorists); *supra* Part I.B (exploring how current international law can actually give advantages to actors who use human shields).

117. 3 Bing. (N.C.) 467, 132 Eng. Rep. 490 (C.P. 1837).

118. *Id.* at 468, 132 Eng. Rep. at 491.

119. *Id.* at 469, 132 Eng. Rep. at 491.

a responsibility to use his property in a way that would not injure others.¹²⁰ The court's reasoning rested partially on the fact that the defendant created a situation where damages were reasonably foreseeable.¹²¹

This situation is not as far removed from the discussion of human shield tactics as one might initially think. After all, the court held that the defendant's right to use his property ceases at the point where he puts someone else (or someone else's property) in harm's way.¹²² This rationale is similar to the proclamation of Article 58 of Protocol I that combatants must keep their military targets away from civilians when launching an attack.¹²³ Like a fire resulting from a shoddily-built haystack, attacks on military targets are foreseeable during the course of armed conflict, so the people in control of those targets must keep their military facilities away from areas where injuries to civilians are likely.¹²⁴ Failure to take this duty into account in the tort scenario results in liability because of the popular conception that losses should not lie with someone who was acting within his or her rights and did not create the hazardous situation.¹²⁵ This position can once again be traced to tort law's tendency to equate many types of indirect causation with responsibility.¹²⁶

120. *Id.* at 476, 132 Eng. Rep. at 493 (Park, J.).

121. *Id.* at 474, 132 Eng. Rep. at 493 (Tindal, C.J.). The defendant received warnings regarding the likelihood of damages and still took no action to protect his neighbor's property, much like the fighters in the Jenin refugee camp took no action to remove themselves or civilians from a dangerous area despite receiving warning of pending self-defense actions. See Gross, *Human Shields*, *supra* note 7, at 500 (characterizing the Jenin refugee camp as a "hornet's nest" rife with "fighting men" prepared for any amount of sacrifice, including the lives of Palestinian civilians).

122. *Vaughan*, 3 Bing. (N.C.) at 476, 132 Eng. Rep. at 493 (Park, J.).

123. Protocol I, *supra* note 11, art. 58. Remember that all actors in a conflict are bound by international humanitarian law, including provisions designed to protect civilians. See International Committee of the Red Cross, *supra* note 55; see HENCKAERTS & DOSWALD-BECK, *supra* note 114, at 71-73 (explaining the parameters of an attacker's duty to avoid locating military objectives near civilians).

124. See ROGERS, *supra* note 69, at 28 (observing the increasing strategic importance of attacking not only enemy troops, but also enemy military equipment and facilities, and noting how this practice has been accepted since the early twentieth century); Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 10-17 (cataloging the frequency of reprisals and self-defense actions in the Palestinian-Israeli conflict).

125. See Keating, *supra* note 111, at 27 (arguing, under social contract theory, that tort law distributes losses this way because free citizens implicitly agree that security is of similar importance as freedom); Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND THE LAW OF TORTS*, *supra* note 112, at 214, 224 (Gerald J. Postema ed., 2001) (considering that under corrective justice theory, tort damages are imposed as a means of assigning ownership of risks to the party most deserving).

126. See *supra* note 84 and accompanying text (surveying different tests of causation used to find individuals liable for damages they did not directly cause).

Yet in the international context, there is often swift condemnation when civilian casualties result from an attack that is directed at a military target (personnel or facilities) located near or within an area populated by civilians.¹²⁷ This position misses the fact that, if a military action was justified as a self-defense measure, that attack was most likely foreseeable.¹²⁸ This foreseeability is important because if an actor can foresee (or provokes) an attack, that actor must take care to remove their military operations away from civilians. Yet, international law's conflicting duties allow some to interpret such self-defense measures as *per se* violations of the principle of distinction.¹²⁹ As stated above, there is both a duty to avoid placing military targets near civilians and also a duty not to fire near civilians.¹³⁰ Since these often-conflicting duties provide little guidance as to which party is to blame in a human shield scenario, clarification is needed.¹³¹

An examination of the tort defenses of self-defense and defense of property helps explain why it is more just to clarify the conflicting duties as follows: placing civilians in harm's way is the basis for culpability in a human shield scenario where the military response is

127. See Austin & Kolenc, *supra* note 48, at 328–29 (expressing concern at how political pressures from non-governmental organizations, and not the ICC's own initiative, prompted investigation of NATO's tactics in Kosovo, and worrying that political motives could bias such investigations); HUMAN RIGHTS WATCH, FATAL STRIKES: ISRAEL'S INDISCRIMINATE ATTACKS IN LEBANON: ATTACKS ON CIVILIAN HOMES (2006), http://hrw.org/reports/2006/Lebanon0806/5.htm#_Toc142299223 (surveying several Israeli military options in Lebanon, but only personally taking interviews from villagers—and not Israeli military intelligence officials—regarding the presence of military personnel and equipment);. This is not meant to suggest that the Human Rights Watch reports are incorrect, but rather to illustrate how the more politically powerful party to a conflict is often judged from a less than impartial viewpoint.

128. See *supra* note 124 and accompanying text (discussing how military facilities need to be built away from major civilian populations because attacks on both enemy troops and military facilities have become widely accepted, and as a result, foreseeable).

129. See, e.g., Reynolds, *supra* note 9, at 82–83 (explaining how Amnesty International interpreted Article 52(2) of Protocol I very narrowly to decry an attack on a Serbian television station that was disseminating propaganda, despite the fact that the humanitarian International Committee of the Red Cross specifically considered the station to be a legitimate military target); see also *infra* note 211 (explaining how the non-reciprocal nature of international law can lay blame upon states whose actions were justified but for the human shield tactics of another party to the conflict).

130. See *supra* note 114 and accompanying text (delineating the two duties that Articles 51(2) and 58 of Protocol I establish: a duty to refrain from firing upon civilian targets, and a duty to separate civilian and military objects).

131. See *id.* (declaring that Protocol I fails to explain how liability is established when the duties created in Articles 51 and 58 are violated).

justified and is not *unnecessarily* destructive.¹³² Domestic law allows one to perform acts that would usually be prohibited when those acts are necessary to prevent a greater harm to oneself.¹³³ However, acts performed in self-defense or defense of property are only permitted where two conditions are met. First, the decision that a self-defense action is needed must be reasonable.¹³⁴ Second, that act must be reasonably designed to effectively end the threat and cannot be more destructive than is reasonably believed to be necessary to extinguish the threat.¹³⁵ If a person's actions meet these requirements, then that person is neither liable to the person who presented the threat, nor anyone who was incidentally harmed.¹³⁶ For example, in the classic case of *Morris v. Platt*¹³⁷ the defendant fired a gun in self-defense as he was being assailed with various weapons and his shots accidentally struck the plaintiff, who was an innocent bystander. The court held that there is no cause of action for an innocent bystander who is accidentally harmed by a person who is using force reasonably intended to defend against a third party's attack.¹³⁸

The self-defense rule in torts is supported by many of the same principles of justice that motivated the U.N. Charter to include a

132. For a summary of these tort defenses, see BRAZIER, *supra* note 113, at 86–88. Sovereignty and independence are widely valued, and the only way to preserve these ideals on an individual level is to allow states to defend themselves effectively. See WALZER, JUST AND UNJUST WARS, *supra* note 23, at 53 (“When states are attacked, it is their members who are challenged, not only in their lives, but also in the sum of things they value most, including the political association they have made.”). This same principle is embodied in torts, but the rights are on an individual level. See, e.g., RESTATEMENT (SECOND) OF TORTS § 65 (1965) (establishing that “an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm”).

133. See, e.g., *Brown v. United States*, 256 U.S. 335, 343 (1921) (holding that a defendant who shot an attacker should be immune from prosecution if he reasonably believed he was fighting for his life).

134. See RESTATEMENT (SECOND) OF TORTS § 65 (1965) (stating that an actor is permitted to use deadly force “when he reasonably believes that the other is about to inflict upon him . . . bodily harm . . . [and] is thereby put in peril of death or serious bodily harm . . .”). In the international context, this would correlate with *jus ad bellum* principles, as it purports to justify the use of force in a given scenario. See *supra* note 26 (defining *jus ad bellum*). Admittedly, this element of the right to self-defense is somewhat outside the scope of this Comment, but relevant to the extent that without meeting the requirement of just cause, there can be no discussion of what type of force is permissible. See *infra* notes 188–189 and accompanying text (discussing some of the threshold requirements for determining what constitutes “just cause” for military self-defense action).

135. See RESTATEMENT (SECOND) OF TORTS § 65 cmt. on subsection (1).

136. See, e.g., *id.* § 75 (declaring that a self-defense act “subjects the actor to liability to a third person for any harm unintentionally done to him only if the actor realizes or should realize that his act creates an *unreasonable risk* of causing such harm”) (emphasis added).

137. 32 Conn. 75 (1864).

138. *Id.* at 11.

right to self-defense for states.¹³⁹ Popular conceptions of justice, as well as state practices, suggest that freedom from aggression is an inherent right.¹⁴⁰ However, there is no specific right to be free from incidental damage where a state is exercising self-defense against actors who use human shields.¹⁴¹ Analysis should focus on the defending actor's necessity and the means used because examining only the harm sustained by the bystander(s) will not shed light on whether the attack itself was acceptable.¹⁴²

In international law, unlike tort and criminal law, self-defense can be forced to take a back seat to the principle of distinction, even when the action is arguably necessary in light of the circumstances.¹⁴³ Admittedly, measuring and compensating for damages for past losses in tort law is simpler than in international conflicts.¹⁴⁴ But for

139. See DINSTEIN, *supra* note 78, at 176 ("The legal notion of self-defence has its roots in inter-personal relations, and is sanctified in domestic legal systems since time immemorial.").

140. See STANFORD ENCYCLOPEDIA, *War*, *supra* note 26 (attributing the development of states' right to defend against aggression to theorists such as Aristotle, Augustine, Grotius, Locke, and Walzer, and also to international law such as the Hague Conventions, Geneva Conventions, and Nuremberg tribunals); cf. JOHN STUART MILL, *ON LIBERTY* 73–74 (Elizabeth Rapaport ed., 1978) (1859) (arguing that society has a right to protect itself, but not to protect individuals from harming themselves).

141. This concept is embraced in tort law, just war theory, and (arguably) international law. See *Morris*, 32 Conn. at 11 (refusing to adopt a rule that would allow an innocent by-stander to recover damages for harm caused by a third party acting in lawful self-defense); Bagaric & Morss, *supra* note 71, at 175 (lamenting that innocent deaths may be justified by the DDE). See generally Kenneth Anderson, *Who Owns the Rules of War?*, N.Y. TIMES, Apr. 13, 2003, § 6 (Magazine), at 38 (acknowledging both the benefits and risks that Protocol I presents to civilians).

142. This analysis requires determinations of both just cause and proportionality, which can only be accomplished through examining all relevant factors. See *infra* notes 171–173 and accompanying text (discussing distinction, proportionality, and the DDE).

143. See DINSTEIN, *supra* note 78, at 246–47 (discussing how varying definitions of necessity can significantly broaden or narrow the right to self-defense); *Israel and Hizbollah Committed Major violations During the Recent Conflict: UN Experts*, UN NEWS CENTRE, Oct. 4, 2006, <http://www.un.org/apps/news/story.asp?NewsID=20134&Cr=middle&Cr1=east> (reporting that the UN's Human Rights Council decried attacks from both Israel and Hezbollah that killed civilians, and relaying the message of an Israeli Ambassador who questioned why the report did not discuss culpability for the uninstigated rocket attacks that began the conflict and may have made distinction more difficult); *supra* notes 41–46 and accompanying text (noting a lack of consideration of Israel's necessity by those decriing its military actions). Note that this examples is not being used to judge the legality of these specific uses of force, but to demonstrate the tension that can arise between right of self-defense and the principal of distinction.

144. Like tort law, international law should strive to be both reactive (in condemning illegal acts) and proactive (in deterring future violations of law). See ENGLAND, *supra* note 111, at 36–37, 43–44 (describing the goals of the economic analysis common to American tort law as attempts to both solve "concrete issues of liability" and use liability rules to deter future negligent behavior); Campbell, *supra* note 12, at 1093–94 (worried that determining the true threat posed by the 1998 bombing of the American embassies in Kenya and Tanzania is not fairly captured

conflicts involving concealment warfare, the rules should be structured with the goal of guiding behavior before countries act in self-defense, and not just passing judgment after the fact.¹⁴⁵ Rules that more effectively ensure the right to reasonable and necessary self-defense actions in the human shield context can help make international law more just, and discourage perfidious tactics whose continued use will only lead to more deaths in the future.¹⁴⁶

III. JUST WAR THEORY AND INTERNATIONAL LAW

A. *A Starting Point for New Law*¹⁴⁷

Some scholars argue that current international law favors strong actors over weaker ones,¹⁴⁸ while others have posited the exact opposite—that stronger state actors are now disadvantaged under international law in light of newer tactics.¹⁴⁹ These conflicting arguments illustrate two points central to this Comment: (1) debate

through condemnations of those attacks because those attacks—beyond killing hundreds—also indicate a likelihood of future strikes against similar targets).

145. See William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421, 477–78 (1989) (recognizing that at times, preventative defense measures are the most effective means of combating terrorism, and that moral and practical dilemmas posed by such actions can be quelled through compliance with specific limits); Travalio, *supra* note 1, at 190–91 (calling for nations “opposed to international terrorism” to “explicitly articulate the bases, with appropriate limitations, under which military force can be used to combat international terrorism”).

146. See Stefan Gosepath, *The Scope of Global Justice*, in GLOBAL JUSTICE 145, 148 (Thomas W. Pogge ed., 2001) (explaining that codification of general principles helps to strengthen parties’ rights by memorializing an agreement on certain entitlements, like self-defense); Kieval, *supra* note 22, at 898 (“Let us give States the tools they need to quash the terrorist threat and protect their own citizens, while giving them meaningful, realistic guidance to protect those civilians who might otherwise suffer as a result of those defensive actions.”).

147. John Rawls’ concept of the “original position” is valuable in trying to assess the justice of current iterations of international law of war. RAWLS, *supra* note 20, at 14–18. The “original position” is a hypothetical bargaining position in which the parties that are considering a set of rules do not know their position in society. *Id.* at 15. Rawls argues that social consensus is important to the legitimacy of any rules, and more importantly, indicative that the rules agreed upon are themselves just because (presumably) people would not agree to unjust rules. *Id.* at 14. The argument then follows, that since the bargaining parties do not know their position in the world, they will only argue for just rules and not ones that benefit one party at the expense of another. *Id.* at 15. This argument is a strong justification for looking not only at specific incidents of human shield tactics, but also analyzing those tactics in the abstract by comparing them against legal measures that have been taken to stop dangerous acts in different contexts. *Id.*

148. See Swiney, *supra* note 13, at 733 (“Distinction rests on an outdated view of the world, and asks the impossible of the weak and little of the powerful.”).

149. See Reynolds, *supra* note 9, at 107 (“The rules of war created on the basis of ideals adopted by western society have become central to adversaries employing concealment warfare methods.”).

about how to handle the new tactics in international law is more focused on what particular groups have to gain and lose than on what is just in the abstract; and (2) international law is not clear in addressing how human shield tactics should be handled.¹⁵⁰

Many principles of just war theory transcend national boundaries and therefore can form a starting point for the debate about acceptable military tactics in the human shield situation because they provide common ground for concerned parties.¹⁵¹ Indeed, just war theory is motivated by many different philosophies (as opposed to state policies), such as distributive, retributive, and restorative justice.¹⁵² By examining similar legal principles in analogous situations, such as certain scenarios that arise in domestic tort and criminal law,¹⁵³ these basic notions of justice can be codified in international law to provide useful guidance regarding human shield tactics.¹⁵⁴

150. When foreign policies are justified solely in terms of state interests, and not in terms of international aims, the international community likely will view them as less legitimate, thus potentially negating the merits of those policies. See Gross, *Thwarting Terrorist Acts*, *supra* note 14, at 196 (lamenting that Israel's 2000 military policy "aimed at neutralizing the terrorist organizations" was characterized by some as "Israel's elimination policy," thus biasing judgment on whether its actions were in fact necessary and just); see also Arunabha Bhoomik, *Democratic Responses to Terrorism: A Comparative Study of the United States, Israel, and India* 33 DENV. J. INT'L L. & POL'Y 285, 337-38 (expressing concern that Indian legislation which establishes a policy for designating groups as "terrorist organizations" could be used not only as a means for fighting terrorism, but also to imprison political enemies who have not acted illegally).

151. See *supra* notes 18-20 and accompanying text (noting that the objective of political philosophy is to achieve a just society through rational ends and that just war principles, originating from actual problems encountered during war, may serve as a basis for international legal standards); see also Christopher Lynch, *Making War: The Triumph of Just-War Theory*, THE WEEKLY STANDARD, Nov. 3, 2003, at 31 ("Out of its origins in Augustine and Thomas, and the philosophers of natural law and international relations in early modernity, and theories of the last half century . . . just war theory has somehow become our common intellectual language about war.").

152. See JEAN BETHKE ELSHTAIN, JUST WAR AGAINST TERROR 129-30 (2003) (discussing how different philosophies, such as Christianity and the Truth and Reconciliation Commissions in South Africa, contribute to the ideas of just war theory). Elshtain posits that, for most Christians, justice includes retributive justice, which is focused on restraining evildoers; distributive justice, which strives to create "equitable circumstances"; and restorative justice, which should help groups cope with an unjust past. *Id.* Though characterizations of just war tradition in Islam vary greatly, Elshtain quotes one prominent Islamic scholar as saying "when it comes to the conduct of war, one finds only small differences between Islam and other monotheistic religions or the international laws of war. Islam recognizes moral constraints on military conduct . . ." *Id.* at 132-33.

153. See *supra* Part II (demonstrating the utility of various domestic law principles for clarifying international law). But see *supra* note 78 (describing arguments against relying on a domestic analogy when analyzing international law).

154. See *infra* Part IV.A (discussing the current principles of culpability in human shield scenarios).

B. Embodiments of Just War Theory in International Law

“Just war tradition represents above all a fund of *practical* moral wisdom, based not in abstract speculation or theorization but in reflection on actual problems encountered in war as these have presented themselves in different historical circumstances.”¹⁵⁵

The most prominent international laws of war are a reflection of just war theory.¹⁵⁶ The world looks to documents such as the U.N. Charter and the Geneva Conventions because states have mostly agreed, at least implicitly, that these laws reflect common moral principles.¹⁵⁷ So, when international laws¹⁵⁸ are ambiguous regarding a new practice in combat, it is necessary to look not just at the text of international laws, but also the rationales behind them.¹⁵⁹ These rationales can then be used as a premise for principles of law that address appropriate responses to new tactics in combat.¹⁶⁰

155. JAMES TURNER JOHNSON, CAN MODERN WAR BE JUST? 15 (1984) [hereinafter JOHNSON, MODERN WAR].

156. See *id.* at 14, 21 (recognizing sources of law ranging from U.S. Civil War Military Orders to the Kellogg-Briand Pact to the U.N. Charter as being heavily influenced by the “just war tradition”).

157. See *id.* at 23, 66 (attributing significant influence in the “tradition of just war” to religious and secular sources and moral and political theory, and noting how the United Nations is creating new laws in an effort to restrict the use of force when it is not in the “service of justice”).

158. The sources of international law discussed in this Comment are most frequently classified as Laws of Armed Conflict, hence the use of the terms “combatant” and “belligerent” to refer to the adversaries participating in the conflicts within this Comment. See Reynolds, *supra* note 9, at 1–2 (describing international law regarding targeting decisions and collateral damage as international law of armed conflict). However, the law discussed can also accurately be characterized as International Humanitarian Law, or even International Humanitarian Law of Armed Conflict. See Rona, *supra* note 67, at 55–57 (observing that international humanitarian law applies only during armed conflict, but is not implicated by every armed conflict, and that even though Protocol I did not anticipate modern armed conflicts, it can still “accommodate” and evaluate actions in the fight against terrorism). Finally, some commentators also discuss International Criminal Law in relation to the topics addressed in this Comment because criminal law provides the method they see as most capable of prosecuting the non-state actors often involved in human shield scenarios. See Bagaric & Morss, *supra* note 71, at 161–62 (arguing that international law will be more coherent and better harmonize human rights and responsibilities if international criminal law is used to address offenses that involve “homicide and other offenses that unequivocally and significantly set back an agent’s vital interests”).

159. Not all scholars and politicians consider the laws of war to be ambiguous, but with so many different interpretations of the same documents, the disagreements themselves are illustrative of a need for greater clarity. See Travalio, *supra* note 1, at 147 (noting disagreements concerning when force can be used within a foreign state against a terrorist group, the limitations upon force in those circumstances, and what targets are appropriate).

160. Cf. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 3 (Erin Kelly ed., 2001) (arguing that justice should be pursued through the articulation of values sought from political and social institutions).

Distinction and proportionality of means form the core of *jus in bello* principles.¹⁶¹ Distinction (also sometimes known as discrimination) requires that militaries must recognize the difference between combatants and noncombatants, and only attack the former.¹⁶² Proportionality, on the other hand, holds that states may not use military means that are more destructive than necessary to accomplish their legitimate goals.¹⁶³

Article 51 of the 1977 Protocol Additional to the Geneva Convention is an iteration of *jus in bello* principles because it purports to establish the immunity of noncombatants.¹⁶⁴ It prohibits attacks “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.”¹⁶⁵ Further, Article 52(2) places a duty on states such that

[a]ttacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.¹⁶⁶

Article 58 is closely related and requires that states

(a) . . . endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) [a]void locating military objectives within or near densely populated areas; [and] (c) [t]ake the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.¹⁶⁷

The concepts of proportionality and noncombatant immunity, however, do not necessarily provide clear guidelines for conduct in war.¹⁶⁸ It is easy to simply declare that noncombatants are immune

161. See JOHNSON, MORALITY, *supra* note 14, at 29 tbl.3; STANFORD ENCYCLOPEDIA, War, *supra* note 26 (surveying the components of *jus in bello*, which also include a requirement to obey weapons prohibitions, standards for treatment of prisoners of war, and prohibitions on *mala in se* means and reprisals).

162. STANFORD ENCYCLOPEDIA, War, *supra* note 26.

163. *Id.*

164. JOHNSON, MORALITY, *supra* note 14, at 30 tbl.4 (listing “Geneva law” along with other provisions regarding “protected persons” as expressions of “Just War Criteria in Positive International Law”); ROGERS, *supra* note 69, at 17 (“Protocol I was negotiated . . . to the very concept of proportionality”).

165. Protocol I, *supra* note 11, art. 51, para. (5)(b).

166. *Id.* art. 52, para.(2).

167. *Id.* art. 58.

168. Professor Emanuel Gross points out,

from being targeted, but in practice, many justified self-defense measures have injured or killed civilians.¹⁶⁹ The challenge then is to figure out when and how much (if any) collateral damage is just, when a state must defend against an actor using human shield tactics.¹⁷⁰ Many past military actions resulting in civilian casualties have been justified specifically because the principle of proportionality (in its *jus in bello* context) recognizes that a *limited amount* of collateral damage may be acceptable, so long as the military action is not more destructive than necessary to accomplish a legitimate goal.¹⁷¹

To apply the abstract concepts of distinction and proportionality, scholars and policy makers have looked to the Doctrine of Double

[i]f we accept the interpretation of self-defense which permits a democratic state to defend itself against the terrorist threat by way of military action, numerous questions arise in relation to the rules of engagement. How will a democratic state conduct a war against an undefined enemy which is dispersed among the civilian population? Should the democratic state remain subject to the rules of war and avoid causing harm to population centers and thereby also avoid causing harm to the terrorists themselves? Or, does the goal of eradicating terrorism justify all means, including collateral injury to innocent civilians . . . ?

Gross, *Human Shields*, *supra* note 7, at 478 (citing Darrell Cole, *09.11.01: Death Before Dishonor or Dishonor Before Death? Christian Just War, Terrorism, and Supreme Emergency*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 81, 86 (2002)).

169. A problem with applying the rule against targeting innocent civilians is that knowledge of an actor's thoughts is necessary to determine whether the harm to civilians was *intended*, or just foreseeable. Cf. HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 84 (1979) [hereinafter HYMAN GROSS, THEORY OF CRIMINAL JUSTICE] (pointing out that intent in criminal law is not only a mental state, but also, under an "objective" standard is considered as a dimension of the act itself). In the international context, if a permissible result is subjectively intended, and an impermissible result is foreseeable, no authoritative source defines whether the impermissible result is considered intentional—though there are no shortage of opinions. Compare Gross, *Human Shields*, *supra* note 7, at 488 (arguing that in such a situation only the attacks on terrorists are intentional), with HUMAN RIGHTS WATCH, FATAL STRIKES: ISRAEL'S INDISCRIMINATE ATTACKS IN LEBANON: ATTACKS ON FLEEING CIVILIANS (2006), http://hrw.org/reports/2006/lebanon0806/5.htm#_Toc142299223 (characterizing attacks in which Israeli forces knew civilians were present as "at best, . . . reckless" and "at worst," deliberate). However, some scholars argue that making such a determination is not even desirable. Bagaric and Morss posit that "[t]he central flaw of [the doctrine of] double effect is the impossibility of creating a model capable of distinguishing between what is intended and what is merely foreseen which applies to all circumstances." Bagaric & Morss, *supra* note 71, at 175.

170. See *supra* note 168 and accompanying text (questioning whether the goal of eradicating terrorism justifies collateral injury to innocent civilians and noting that the concepts of proportionality and noncombatant immunity do not always provide clear answers).

171. See DINSTEIN, *supra* note 78, at 240 (proclaiming that when facing a non-isolated attack from another state, "despite the condition of proportionality, a war of self-defense may be carried out until it brings about the complete collapse of the enemy belligerent").

Effect (“DDE”)¹⁷²—which balances parties’ interests in defense and civilian immunity, while accounting for actors’ motives—as a means of performing the calculus necessary to determine when unintended, but foreseeable, civilian casualties are morally justified in the context of a self-defense action.¹⁷³

The DDE was originally applied to warfare between different kingdoms during the Middle Ages and then later was adapted for use in conflicts between states.¹⁷⁴ The bulk of violent conflicts today, however, no longer occur between two states, but instead occur between non-state actors and states.¹⁷⁵ This, *inter alia*, explains why current reflections of *jus in bello* principles in international law no longer provide adequate guidance to states.¹⁷⁶ Specifically, disagreements have arisen regarding whether civilians located near non-state aggressors should have absolute immunity from a state response in self-defense.¹⁷⁷

172. See STANFORD ENCYCLOPEDIA, *War*, *supra* note 26 (distilling Aquinas’s concept of the DDE into a mathematical formula). A classic statement of the DDE is that if an actor (“X”) considers an attack (“T”), which the actor believes will produce both good effects (“J”) and bad effects (“U”), “[t]he DDE permits X to perform T only if: 1) T is otherwise permissible; 2) X only intends J and not U; 3) U is not a means to J; and 4) the goodness of J is worth, or is proportionately greater than, the badness of U.” *Id.*

173. See WALZER, *JUST AND UNJUST WARS*, *supra* note 23, at 153 (listing the four classical conditions under which an act likely to have “evil consequences” is still permissible: (1) the act must be a “legitimate act of war”; (2) the direct effect, such as destroying military equipment, must be “morally acceptable”; (3) the actor must aim only for the “acceptable effect”; and (4) the “good effect” must be good enough to “compensate for allowing the evil effect”).

174. See *id.* at 152–55 (adapting the DDE from its development by “Catholic casuists in the Middle Ages” for use to analyze the bombardment of Korea, and concluding that in modern conflict a third condition should be added, requiring that “[t]he intention of the actor is good . . . the evil effect is not one of [the military’s] ends, . . . and . . . the military seeks to minimize [the evil involved], accepting costs to [it]self”).

175. See CAIRNS, *supra* note 1, at 5–6 (stating that there has been a “blurring of the definition of what is a fighting force”); Swiney, *supra* note 13, at 743 (concluding that in light of conflicts in Colombia, Israel, Iraq, Indonesia, Afghanistan, Chechnya, and other locations that “modern warfare is becoming asymmetrical”).

176. See Guruli, *supra* note 13, at 122–23 (quoting George W. Bush’s proclamation that “[t]he meaning of ‘armed attack’ may have appeared self explanatory to the drafters of the U.N. Charter . . . however, the world has witnessed the rise of a new and perhaps more sinister form of warfare”). See generally JEREMY BLACK, *WAR AND THE NEW DISORDER IN THE 21ST CENTURY* 26–118 (2004) (cataloguing the variety of new influences that are changing the dimensions of armed conflicts).

177. Compare Bagaric & Morss, *supra* note 71, at 176 (arguing that international law should be reformed so “there is no room for excuses under the guise of [the DDE]” and that “[t]here should be a zero tolerance policy to killing civilians”), with Gross, *Thwarting Terrorist Acts*, *supra* note 14, at 234 (“[O]n occasion, [civilian populations near terrorists] may be harmed as a result of being adjacent to the battleground. In such a case, there is no need to stop the fighting; however a certain amount of caution must be exercised . . .”). See generally WALZER, *JUST AND UNJUST WARS*, *supra* note 23, at 156 (recognizing that subsequent to the determination that

C. Ascertaining When the Use of Force is Justified

A major principle regarding war that has been embraced throughout recent history is that acts of aggression are both morally wrong and illegal.¹⁷⁸ Generally, aggression is defined by the “use of armed force . . . against the sovereignty, territorial integrity or political independence of another State.”¹⁷⁹ Once the line has been crossed and an aggressive act has been committed, a forceful response is justified.¹⁸⁰

Acts of aggression force states to choose whether certain rights (*e.g.*, sovereignty, security) are worth dying to protect.¹⁸¹ If one actor aggresses, the other one must then choose to either fight the war to the extent necessary to protect its interests, or allow an intrusion upon its rights.¹⁸² Because actors should not be forced into this dilemma, the law frequently considers instigators culpable not only for their own acts, but also potentially for damage ensuing indirectly from their acts.¹⁸³ Many popular political philosophies also embrace this model of attributing culpability and responsibility.¹⁸⁴

the use of force is morally acceptable, “due care” is still required to ensure that the attack is carried out within the boundaries that originally made it acceptable).

178. Definition of Aggression, G.A. Res. 3314, Annex, U.N. GOAR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974); WALZER, *JUST AND UNJUST WARS*, *supra* note 23, at 51 (proclaiming that aggression is a crime against states, and that fighting aggression is often the “morally preferred response”).

179. G.A. Res. 3314, *supra* note 178, art. 1; *see* DINSTEIN, *supra* note 78, at 125 (noticing that the General Assembly’s Definition of Aggression only defines aggression “in a generic way”).

180. This statement is an expression of *jus ad bellum* principles (albeit a simplified one), but this point is important to the extent that aggression can be defined not only by acts committed, but also by the fact that it necessitates a forceful response. *See, e.g.*, WALZER, *JUST AND UNJUST WARS*, *supra* note 23, at 52 (“Aggression opens the gates of hell.”). *But see* DINSTEIN, *supra* note 78, at 125 (arguing that the drafters of the Definition of Aggression were trying to convey the notion that “not every act of aggression constitutes a crime”).

181. *See* WALZER, *JUST AND UNJUST WARS*, *supra* note 23, at 52–53 (declaring that a state that chooses to “resist, whose soldiers risk their lives and die, does so because its leaders and people think that they should or that they have to fight back”).

182. *Cf.* DINSTEIN, *supra* note 78, at 120 (relaying the judgment of the International Military Tribunal in the Nuremberg trial, which held that “initiat[ing] a ‘war of aggression’” is the “supreme international crime” because it embodies the “accumulated evil” of the entire ensuing war).

183. *See* Beres, *supra* note 32, at 148–49 (attributing legal responsibility for the deaths of civilians to “those whose perfidious conduct brought about [the self-defense action]”); *cf.* Hart & Honore, *supra* note 105, at 179–80 (describing the importance of tracing the foreseeable consequences of events in attributing responsibility in the criminal law context).

184. *See, e.g.*, JOHN KEKES, *A CASE FOR CONSERVATISM* 70–71 (1998) (arguing that from a “conservative” perspective, an initial infliction of harm is “evil,” but that infliction of harm in response to the initial evil is not itself evil where that harm is a “deserved punishment” or was “the predictable consequence” of the initial evil). Christian Just War Theory also endorses this approach because harm brought by an unjust attack renders the attacker deserving of punishment, and thus justifies a war

The U.N. Charter's general prohibition on the use of force¹⁸⁵ is tempered by Article 51, which states, "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense¹⁸⁶ if an armed attack occurs against a Member of the United Nations"¹⁸⁷ In order to reach the question of what responses to an attacker who uses human shields should be available, it is first necessary to assume, *arguendo*, that the attacks discussed herein form a legal and moral basis for a state to respond with some kind of force.¹⁸⁸ When there is an agreement that an aggressive act was wrong, and that a response is justified, it would make little sense for international law to restrict the only potential means of prevailing.¹⁸⁹

against that attacker. See COLM MCKEOGH, *INNOCENT CIVILIANS* 53–54 (2002) (citing Aquinas's goal of preventing "wickedness"). Aquinas's writings also overlap with utilitarian theory because he argues that war is justified when it serves the greater good. *Id.* Augustine, another prominent early Christian Just War theorist, avoided this proposition. *Id.*

185. U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

186. The right to self-defense is codified in treaty law by Article 51 of the U.N. Charter; in customary international law, the right is grounded in determinations of a state's necessity. See Gross, *Thwarting Terrorist Acts*, *supra* note 14, at 210–13. This Comment does not pass judgment on which approach is more appropriate, but it is important to understand that certain self-defense measures, such as anticipatory self-defense or "targeted killings" can be justified by customary international law, while being prohibited by treaty law. *Id.* at 210–12. Further, many scholars believe that since aggression is a crime against international law, states besides the one aggressed upon are justified in enforcing international law against the aggressor. See, e.g., WALZER, *JUST AND UNJUST WARS*, *supra* note 23, at 61–63 ("Anyone, [even those not directly attacked], can come to the aid of a victim [and] use necessary force against an aggressor.").

187. U.N. Charter art. 51. Despite controversy about whether the "armed attack" requirement is met by a non-state actor, these provisions are an expression of *jus ad bellum* principles because they declare when a forceful military response is justified. JOHNSON, *MORALITY*, *supra* note 14, at 24 tbl.1; see Guruli *supra* note 13, at 104–05 (noting how in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), the International Court of Justice has interpreted the "armed attack" requirement of Article 51 of the U.N. Charter as requiring some form of state action whereas the United States and Israel have consistently asserted that a terrorist attack, with or without state support, is an "armed attack" under that provision); Kendall, *supra* note 13, at 1078–80 (observing that interpretations of Article 51's "armed attack requirement" can be classified into two major categories: "liberal" and "restrictive").

188. Most theorists agree that aggression is one of the only (if not *the* only) justified bases for a self-defense military action; thus, aggression is "the crime of war." See, e.g., WALZER, *JUST AND UNJUST WARS*, *supra* note 23, at 51, 62 ("Nothing [but aggression] warrants the use of force in international society—above all, not any difference of religion or politics."). However, not every illegal act against a state is an act of aggression. *Id.* at 62. And of course, not every actor who fails to separate military and civilian targets is an aggressor.

189. See Gross, *Human Shields*, *supra* note 7, at 508 ("[E]ven on the path to compromise and settlement, if the state is faced with clear danger to the lives of its citizens, it must continue to protect them by the *necessary* means.") (emphasis

IV. A PROPOSAL FOR NEW INTERNATIONAL LAW

A. *Incorporating the Lessons of the Domestic Analogies into International Law*

Since international law is the framework for analyzing the use of military force against human shield tactics, the consistency of international law with its own aims is essential to the preservation of just laws.¹⁹⁰ As explained, current international law *can* be interpreted to reach conclusions similar to those of criminal law and tort law.¹⁹¹ Unfortunately, it can also be interpreted to reach ones that are very different.¹⁹² The following principles would help to clarify parties' responsibilities and culpability in a human shield scenario:

- I. Acts of aggression performed by non-state actors justify a military response in the same manner that state acts of aggression do.¹⁹³
- II. Where a military action in self-defense is justified by an act of aggression, the defending actor is not culpable for incidental damages following from the self-defense action to the extent that
 - a. those damages are within the risk created by the aggressor's prior violation of the duty to separate its military targets from the civilian population;¹⁹⁴ and
 - b. the self-defense action is reasonably likely to be effective in its goal of preventing harm;¹⁹⁵ and
 - c. the incidental damages were not intended;¹⁹⁶ and

added); Sofaer, *supra* note 2, at 91 ("Narrow views of self-defense give terrorists and their state sponsors substantial advantages in their war against . . . democracies.").

190. See Jones, *supra* note 49, at 252 (proclaiming that inconsistency and incoherence in international law "significantly erodes well-established legal principles of distinction"); *supra* notes 50–52 (explaining that international law influences policy and has importance beyond its application in courts and tribunals).

191. See *supra* Part II (demonstrating that application of the distinctions between acceptable and unacceptable behavior as prescribed under criminal and tort law can lead to just results in the international law context).

192. See *supra* Part I.B (explaining the potential advantages that exist under current international law for aggressors who utilize human shields).

193. Provision I is intended to make it clear that both state and non-state acts of aggression satisfy the armed attack requirement of Article 51 of the U.N. Charter.

194. See *supra* notes 85–87 and accompanying text (explaining the use of the "harm within the risk" test in domestic criminal law); *infra* notes 212–220 and accompanying text (justifying the use of the "harm within the risk" test for armed conflicts).

195. The provisions of II(b)–(d) are intended to embody an updated version of the principle of proportionality that can provide more practical guidance in a human shield scenario than current laws. See *supra* Part III (discussing the principles of just war theory as embodied in current international law).

196. Provision II(c) also reflects the principle of distinction. See *supra* notes 168–171 and accompanying text (addressing problems with the principle of distinction as embodied in current international law). None of the challenges presented by human shield tactics can or should justify a reprisal where the specific goal is to

d. the self-defense actions are designed to cause as little incidental damage as possible without making an effective defense from aggression impossible.¹⁹⁷

B. Why a Domestic Analogy Is Justified

The laws presented above do not reflect completely new principles, but rather are a clarification and prioritization of existing laws.¹⁹⁸ The doctrines of distinction and proportionality reflect widely accepted notions of just conduct in war that have developed since their introduction in the Middle Ages.¹⁹⁹ However, for law to be effective, it must continually evolve so it can address new factual scenarios.²⁰⁰ Concepts such as different tests of causation borrowed from criminal and tort law and affirmative duties in the use of property borrowed from tort law should be utilized in developing new laws regarding human shield tactics; these guidelines help preserve the aims of international law, while providing a way to bring it up to speed with contemporary tactics in war.²⁰¹

injure civilians. See MICHAEL WALZER, ARGUING ABOUT WAR 61 (2004) (positing that “[t]he refusal to make ordinary people into targets, whatever their nationality or even their politics, is the only way to say no to terrorism,” and that self-defense actions are “legitimate responses to terrorism only when they are constrained by the same moral principles that rule out terrorism itself”).

197. Provision II(d) aims at updating the principle of proportionality to safeguard the right of self-defense from being preempted or compromised by the use of perfidious or otherwise illegal tactics. See *supra* Part I.A (demonstrating how perfidious tactics can prevent otherwise legitimate actions from complying with Articles 51 and 52 of Protocol I); *infra* Part IV.D (explaining the legal and moral significance of a failure to obey the dictates of Articles 37 and 58 of Protocol I).

198. See *supra* Parts I.B & III (outlining existing law under the U.N. Charter, Geneva Convention, and Protocol I).

199. See Swiney, *supra* note 13, at 733 (stating that the “Principle of Distinction is widely accepted and constitutes the core doctrine of the law of war”). But see *supra* notes 175–177 and accompanying text (arguing the changing nature of conflict and use of human shields in warfare require revisions to the principle of distinction as embodied in existing international law).

200. This truism stands regardless of whether one seeks a reform that empowers large and powerful state actors or smaller non-state ones. See Guruli, *supra* note 13, at 122–23 (suggesting that because of the increasing frequency of new tactics and terrorist attacks, “the international community faces the inevitable challenge of redefining its legal standards on use of force in self-defense”); Swiney, *supra* note 13, at 736 (attempting to align the principle of distinction with “the realities of asymmetrical warfare”).

201. See WALZER, JUST AND UNJUST WARS, *supra* note 23, at 54 (advancing the theory that since states’ rights are just a reflection of individuals’ collective rights, it “makes sense to say that territorial integrity and political sovereignty can be defended in exactly the same way as individual life and liberty”). But see *supra* note 78 (relaying some common objections to the domestic analogy).

The decision to incorporate two concepts from domestic law is justified because their aims are similar to that of international law.²⁰² The “harm within the risk” test is appropriate to apply in this situation because, just like the principle of distinction, it is intended to provide protection to bystanders.²⁰³ And the duty to use property only so as not to create an unreasonable risk of damage to others’ property is designed as a means of protecting the rights of parties who have little or no relation to the actions that are causing injury.²⁰⁴ Similarly, the duty to place military personnel and facilities away from civilians is meant to protect those who are not involved with the fighting.²⁰⁵ Admittedly, there are some different considerations in the international context, such as the difference in purposes between police and military, but the goals sought by these domestic principles and the corresponding international law are similar.²⁰⁶

Further, the domestic law discussed in this Comment is largely rooted in philosophical bases that recognize the right of freedom from aggression and the importance of autonomy.²⁰⁷ Unsurprisingly, analogous notions of justice motivate international law.²⁰⁸ So domestic and international law have comparable goals and

202. See *supra* notes 76–77, 111 and accompanying text (arguing the distinctions between acceptable and unacceptable behavior that are outlined in criminal and tort law are readily applicable to the use of human shields in armed conflict).

203. See JOHNSON, MODERN WAR, *supra* note 155, at 27–28 (tracing the idea of non-combatant immunity back to the Middle Ages and explaining its continually evolving moral significance); Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQ. L. 333, 348 (2002) (noting that under some justifications of the “harm within the risk” test “a victim’s rights . . . are rights against being placed at risk of harm”).

204. See, e.g., Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 44 (1915) (stating that the law protects certain interests, including “human life and bodily safety, the safety of property,” and “pecuniary condition”).

205. See, e.g., JOHNSON, MORALITY, *supra* note 14, at 36 (advancing the widely-accepted notion that the Geneva Conventions and Protocols Additional give legal effect to the moral requirements of proportionality and discrimination).

206. Compare RESTATEMENT (SECOND) OF TORTS § 281 cmt. b (1965) (stating that, broadly speaking, negligence law strives to protect recognized interests from being intruded upon), with Protocol I, *supra* note 11, pmbl. (affirming the provision’s purpose as further enforcing states’ duty to avoid intruding upon other states’ recognized interests in “sovereignty, territorial integrity or political independence”).

207. See HYMAN GROSS, THEORY OF CRIMINAL JUSTICE, *supra* note 169, at 13 (positing that criminal law is designed to protect from harm inflicted by others, such as murder or assault and battery, because society has come to a consensus on the “right to be free of such harm”); Keating, *supra* note 111, at 23 (viewing tort law as protecting the freedom from injury and death caused by others’ actions, while still allowing citizens to freely pursue personal goals to the extent that their actions do not infringe upon others’ rights).

208. See Bagaric & Morss, *supra* note 71, at 205–06 (advocating for the further development of international criminal law because criminal law is “concerned with safeguarding the most important human interests”); *supra* notes 108, 132 (discussing the connection between the domestic enforcement of rights on an individual level and international enforcement of similar rights in the global arena).

motivations, but somewhat different methods for trying to protect the right to be free from harms thrust upon people not willfully involved in the damage-causing scenario.²⁰⁹ Since international law is pursuing comparable goals to domestic law, contrasting and combining the methods employed in each context is one productive way to address shortcomings in international law that have resulted from the emergence of new tactics.²¹⁰

C. Causation's Role in Justly Distributing Culpability for Civilian Deaths

International law, at least on its face, analyzes causation in fashion that can result in both parties being culpable for a given harm to civilians, notwithstanding the fact that the human shield tactics were responsible for the civilians being in harms' way initially.²¹¹ Using a "harm within the risk" approach to human shield tactics would more effectively embody the goal of distinction, which is to protect unarmed civilians within the context of a war waged with a just cause.²¹² Belligerents use the human shield tactic because it is a successful means to gain advantages militarily and in the court of public opinion.²¹³ A "harm within the risk" test to determine

209. Some of the differences include tests of causation, consideration of individual incidents in isolation instead of in a larger context, and different means of imposing duties upon actors. See *supra* Part II (setting forth analogies between domestic criminal and tort law and international law regarding human shield situations). This statement does not refer to enforcement mechanisms in international and domestic law, which necessarily differ due to states' sovereignty and their practicality in different contexts. See Austin & Kolenc, *supra* note 48, at 313 ("[G]lobal courts such as the International Court of Justice . . . have little enforcement power. Domestic U.S. courts . . . possess the jurisdiction and power to carry out their decisions . . ."); Bagaric & Morss, *supra* note 71, at 205 (conceding that in some circumstances, international law must be subordinate to domestic law to avoid issues such as double jeopardy). Austin and Kolenc also suggest that states, such as the United States, are more likely to yield some sovereignty to a court with definite limits on its jurisdiction than a court like the ICC, which has a broad view of its own jurisdiction. Austin & Kolenc, *supra* note 48, at 312–13.

210. See Dershowitz, *supra* note 4 (using a domestic analogy to explore the application of international law).

211. See Henckaerts & Doswal-Beck, *supra* note 114, at 498–99 (noting that international humanitarian legal obligations are not dependent upon reciprocity). This is not to quarrel with the all parties' to a conflict obligations to obey the law, but rather to point out that human shield tactics may impair the defending party's ability to comply with international law because they make the determination of whether an area is a legal military target more difficult. See *supra* notes 41–46 (discussing a controversy over the legality of an Israeli invasion of Palestinian village where attacks had emanated from).

212. See ELSHTAIN, *supra* note 152, at 20 (stressing the moral significance of deliberately targeting civilians and positing that if the world cannot distinguish between killings intended to sow terror and those made while attempting to battle such tactics, "we live in a world of moral nihilism").

213. Dershowitz, *supra* note 4; see Kieval, *supra* note 22, at 890–91 (describing how Israel's decision to "not fire[] indiscriminately" and use ground forces instead of

culpability in such situations would have two large implications that should, in the long run, reduce civilian casualties.²¹⁴

First, placing blame with the party that made harm to civilians likely ensures the legitimacy of reasonably proportional attacks on belligerents who use human shield tactics, instead of leaving that determination open to widely varied interpretations.²¹⁵ This gives combatants who attempt to respect international law more latitude to target actors who use human shields and frees those actors from cumbersome and potentially arbitrary determinations of whether their actions will be accepted by the international community.²¹⁶ This development would then deprive human shield users of one of the tactic's biggest strategic advantages: the ability to attack where a counter-attack is of questionable legality, and therefore less likely to occur.²¹⁷

Second, a "harm within the risk" standard for determining culpability in a human shield scenario would help reduce the use of perfidious tactics without necessarily creating a greater risk of harm to civilians because the principles of distinction and proportionality remain intact, though updated.²¹⁸ Combatants would still not be

airplanes because the enemy had chosen to hide among civilians led to twenty-three soldiers' deaths); Reynolds, *supra* note 9, at 78 ("Principles of decency, morality, and humanity reflected in [the Laws of Armed Conflict] to protect the civilian population present attractive centers of gravity to exploit where concealment warfare is effectively employed.").

214. See *infra* notes 215–223 and accompanying text (explaining the applicability of the "harm within the risk" analysis to the principles of proportionality and distinction and the DDE to ensure blame is placed on the appropriate party and perfidious tactics are punished).

215. See Kieval, *supra* note 22, at 897–98 (arguing that creating rules that no parties will obey in times of danger only serves to erode the legitimacy of international law, and that "if international legal criticism is meant to affect incentives, it must leave a path for the targeted [s]tate to take without failing to protect its citizens").

216. See Jones, *supra* note 49, at 252 (asserting that because of international law's lack of coherence, which leads to unfair condemnations, "Protocol I . . . not only impedes an occupying army's ability to protect peaceful civilians, but it also removes incentives for occupying forces to properly weigh the humanitarian objectives of [international law] against the necessity of military attacks").

217. Gross, *Human Shields*, *supra* note 7, at 447 (believing that actors who use human shields "act on the assumption that a democratic state fighting in accordance with the law of war will refrain from causing harm to those civilians and, consequently, will also refrain from causing harm to the [belligerents who use human shields]"). International law does declare human tactics illegal. See HENCKAERTS & DOSWALD-BECK, *supra* note 114, at 337–40 (discussing various forms the prohibition on using human shields takes in international law); *supra* note 32 (explaining the prohibition on using human shields). However, the proposed law goes further than current international laws by directly and explicitly linking the *specific* risk posed by a given use of human shields to the resulting harm suffered by civilians.

218. The "harm within the risk" test would, in some circumstances, legitimize actions of states that attempt to abide by the basic moral principles embodied in

allowed to strike indiscriminately because the actors using human shields did not expose the civilians to the risk that they would be harmed by a careless (and thus morally unacceptable) attack.²¹⁹ However, when deciding whether an attack was proportional to the advantage gained, the new law incorporates the value of ending perfidious tactics into the DDE calculus.²²⁰

This adjustment is proper because the goal of the DDE is to assess when incidental damage is morally permissible.²²¹ Since the persistent use of human shield tactics presents such a large threat of harm to civilians, a higher level of incidental damage (when unavoidable, of course) is justified when a state is combating the ongoing use of such tactics.²²² In other words, the “harm within the

international law. *See supra* notes 53–72 and accompanying text (describing the condemnation from international courts and non-government organizations even when states attempt to obey the principles of distinction and proportionality). Indiscriminate military actions will still be condemned, but the new laws create a common legal framework from which to issue such condemnations, so that necessary criticisms of immoral acts will also carry more weight. *See* Robert J. Beck & Anthony Clark Arend, “Don’t Tread on Us”: *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT’L L.J. 153, 191–93 (1994) (observing that while many Israeli and U.S. military actions have been widely criticized for causing collateral damage, even the condemnations of the U.N. Security Council lack the consistency and legal sophistication necessary to be considered impartial and authoritative).

219. *See* Gross, *Human Shields*, *supra* note 7, at 487–88 (recognizing that the only harm to civilians that is morally acceptable according to the DDE is harm that is a “by-product” of an attack where incidental damage is limited “to the greatest extent possible”). The public perception of military actions taken against those using concealment warfare is important to all parties in a conflict. Given this reality, the laws proposed give groups analyzing military actions a common framework based both upon just war theory and the realities of concealment warfare. *See* Reynolds, *supra* note 9, at 106 (expressing hope that, when properly educated, humanitarian groups and the media can “provide[] a counter-measure to disinformation and deception, and ensure[] state responsibility”).

220. The DDE already considers the military advantage to be gained from a specific action, but the proposed laws give a legal (and not just moral) impetus for accounting for the good achieved by rooting out users of human shield tactics. *See* STANFORD ENCYCLOPEDIA, *War*, *supra* note 26 (noting the DDE’s requirement that the good accomplished must be worth the foreseeable, negative result); *supra* notes 172–177 and accompanying text (finding only a vague connection between current international law and the DDE). Using the formula expressed in note 172, the positive value of stopping perfidious tactics would be included in the determination of whether the attack was justified. *See supra* note 172.

221. *See supra* notes 172–174 and accompanying text (describing the historic use of the DDE in applying the principles of distinction and proportionality to conflicts between states).

222. *See* Beres, *supra* note 32, at 150–52 (arguing that if Israel were to give in to perfidious tactics, the victory won by aggressors would open the door for even more civilian casualties); Anderson, *supra* note 141, at 43 (articulating concern that the status quo rewards weaker actors’ “systematic violations of the law” by forcing all the burdens of conducting a just war to the actor with superior technology and manpower, and that such a system “is unsustainable as a basis for the law of war”); *cf.* ALAN M. DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* 185 (2006) (questioning the effectiveness of the human rights movement in ending military threats).

risk” test respects the traditional principles of proportionality and distinction, while strengthening the means available to combat the use of perfidious tactics.²²³

D. The Importance of Prioritizing Actors’ Duties

The international law proposed in this Comment brings combatants’ affirmative duty to avoid placing military targets near civilians to the forefront of legal analysis in a human shield situation.²²⁴ A failure to observe the duty to keep military targets separate from the civilian population is often analyzed apart from attacks against actors that violate their duty.²²⁵

Keeping these analyses separate makes little sense because of the clear connection between the violation of the duty to isolate military targets and the determination of whether an attack on such targets met the requirements of discrimination and proportionality.²²⁶ Actors are provided with little guidance on how to conduct themselves in the future when both parties are considered culpable but those determinations are made separately. By mandating joint considerations of one party’s culpability for using human shields and the proportionality of the opposing party’s attack, each party’s

223. Unfortunately, current international law as applied to human shield situations has failed to achieve success in both preventing civilian deaths and in deterring the use of perfidious tactics. See Jones, *supra* note 49, at 296–97 (asserting that many civilian deaths during Operation Iraqi Freedom occurred not because of any “refusal to obey” Protocol I, but because Protocol I’s “contradictory construct” allows for a “weakening of distinction requirements in favor of insurgents”; this, in turn, discouraged the occupying military from valuing proportionality over the “demands of military necessity”).

224. See *supra* Part IV.A (proposing that one of the factors in determining whether the defending actor is culpable for incidental damage to its military action in self-defense is whether the resulting damages are within the risk of the aggressor’s violation of the duty to separate its military targets from the civilian population).

225. See, e.g., AMNESTY INT’L, ISRAEL/LEBANON: OUT OF ALL PROPORTION—CIVILIANS BEAR THE BRUNT OF THE WAR (2006), <http://web.amnesty.org/library/Index/ENGMDE020332006?open&of=ENG-ISR> (failing to list Article 58 of Protocol I as applicable law and decrying many actions of the Israeli Defense Force as disproportionate without seriously considering the military advantage to be gained—a necessary component of the determination of proportionality); see also *supra* notes 53–65 and accompanying text (arguing, *inter alia*, that this isolated analysis unduly criticizes the justified actions of an attacker while undermining the attacker’s right to self-defense).

226. A determination of the proportionality of an attack requires knowledge of the ends sought by the party accused of performing a disproportionate attack. See STANFORD ENCYCLOPEDIA, *War*, *supra* note 26 (defining the *jus in bello* principle). However, if the threat posed by the party using human shields is not evaluated along with the allegedly disproportionate attack, then accurately gauging the military advantage to be gained becomes difficult. See *supra* Part III.B (explaining the difficulty of analyzing fault under the existing provisions of Articles 51, 52(2), and 58 in the human shield context).

culpability can more effectively be determined relative to the other's.²²⁷ Obviously, it would be best that no civilian deaths occur, but the realities of warfare make that unlikely.²²⁸ So where both parties to a conflict might be declared responsible for the loss of innocent lives, actions that are most justifiable in light of the aims of protecting innocent lives and preserving sovereignty should be encouraged over acts that serve those purposes less—or not at all.²²⁹

Therefore, the law proposed in this Comment distributes culpability in an attack against human shield actors so that the goal of combating perfidious tactics justifies some incidental damage, and so those tactics do not render an otherwise permissible self-defense action illegal.²³⁰ In other words, an aggressor's deliberate failure to abide by the duty to separate military targets from civilians is a greater evil than a certain amount of incidental damage from a self-defense action because a justified self-defense measure at least has acceptable aims, whereas the use of human shields does not.²³¹ Of course, if the incidental damage was reasonably avoidable, the self-defense action becomes the greater evil because the same goal could have been

227. See *supra* notes 103–109 (describing how a “harm within the risk” test is an effective tool for determining culpability where one party's illegal behavior created a likelihood that another party would harm innocent people). Compare *supra* Part IV.A (proposed law providing for dual culpability analysis), with *supra* notes 53–65, 225 and accompanying text (explaining the faults of non-reciprocal culpability analysis).

228. See Bruderlein, *supra* note 31, at 221 (lamenting the “limited ability of the international community” to respond effectively to “major humanitarian crises” despite many states’ “renewed commitment . . . to abide by the rules of international humanitarian law”).

229. See ELSHTAIN, *supra* note 152, at 19–20 (stressing the need to distinguish between civilian deaths caused accidentally in the course of war and those caused intentionally).

230. Professor Emanuel Gross posits that when the duty to avoid harming the innocent is at tension with the duty to protect citizens of the state, the first duty may be breached, “even though we are aware our activities will lead to the death of innocents who are located in the vicinity of the [enemy].” Gross, *Human Shields*, *supra* note 7, at 483–84. However, states are still bound by rules of proportionality, and absent “exceptional circumstances,” states still have a moral duty to refrain from killing civilians. See *id.*

231. See ELSHTAIN, *supra* note 152, at 19–20 (analogizing the failure to distinguish between intentional harm to combatants and injury to peaceful civilians to the failure to distinguish between murder and accidental death). Further, certain acts, such as using weapons that cannot be controlled or disguising combatants as supposedly immune personnel (*e.g.*, U.N. observers), are violations of international law because they are considered *mala in se*, or “evil in themselves.” STANFORD ENCYCLOPEDIA, *War*, *supra* note 26. Like the tactics considered *mala in se* in international law, the intentional use of human shields can only make conflict more hazardous to civilians and belligerents. See Swiney, *supra* note 13, at 743 (“With urban fighting a reality and insurgents who are often indistinguishable from civilians, the temptation for American forces to ignore Distinction might be high. . . . Iraq provides a snapshot of how Distinction is practiced and how it is preached.”).

accomplished without violating the principles of distinction and proportionality.²³²

Further, when states perform a self-defense action against human shield actors, humanitarian groups, the media, and other members of the international community would have a legal impetus to more closely scrutinize *both* actors' conduct, and not just the actor whose weapon physically caused the collateral damage.²³³ This approach should in turn reduce the ability of perfidious actors to pervert the international law to generate favor in the court of public opinion.²³⁴ Also, since each actor's conduct would be considered relative to the other's, it will be easier to assess whether specific measures were proportional to the advantage gained.²³⁵

E. Closing Loopholes

Finally, the laws proposed in this Comment close loopholes in international law that could be exploited by belligerents using human shield tactics.²³⁶ Specifically, the new laws eliminate controversy regarding whether an attack by a non-state actor satisfies the "armed attack" requirement of Article 51 of the U.N. Charter.²³⁷ This approach is necessary because a failure to hold non-state actors culpable for perfidious acts ends up being a grant of immunity from

232. See *supra* Parts III.B, IV.A (outlining the principles of distinction and proportionality as embodied in current law and proposing new law to account for the use of human shields in armed conflict).

233. See Warren Hoge, *Attacks Qualify as War Crimes, Officials Say*, N.Y. TIMES, July 20, 2006, at A-6 (reporting Louise Arbour, chief prosecutor for the International Criminal Tribunals for Rwanda and the former Yugoslavia, as questioning the legality of rocket attacks between Hezbollah and Israel without simultaneously considering culpability for performing military operations in a civilian area); *supra* Part IV.A (proposing a modification of international law that requires analysis of both parties' actions to determine culpability rather than immediate assignment of blame to the attacker).

234. "The combination of expanded media access, greater disclosure of military activities, and increased presence of humanitarian interest groups in the battle space translates into an improved level of influence over domestic and international opinion by these groups." Reynolds, *supra* note 9, at 103. Reynolds persuasively suggests that to enable these outlets to portray conflicts fairly (and to evaluate their own behavior), states whose attacks result in incidental damage should impartially investigate those attacks, which would counteract perfidious actors' reporting of distorted versions of the facts or law. *Id.* at 104.

235. See *supra* notes 53–65, 225 and accompanying text (describing the negative consequences of one-sided analysis).

236. See *supra* Part IV.A (proposing international law that emphasizes the duty of combatants to separate themselves from civilian populations); cf. Jones, *supra* note 49, at 297 ("There must be a clear prohibition under [international law] against any conduct that impedes or compromises an occupying force's ability to distinguish insurgents from peaceful civilians so as to preserve innocent lives.").

237. *Supra* Part IV.A (legitimizing a military response to both state and non-state acts of aggression).

military response.²³⁸ International law cannot achieve goals such as defending state sovereignty and protecting innocent lives if the conduct of a significant portion of the actors in modern conflict is not universally seen to trigger the protections available to states under international law.²³⁹

This approach is also justified because the language of the U.N. Charter, and Protocol I simply reflect that states were the dominant institutions in international conflict at the time those documents were conceived.²⁴⁰ The right to be free from aggression should not be exclusively enforced against state actors because it is the aggression that is wrong, and that wrongness is not predicated on what type of actor commits the aggression.²⁴¹ Saddling the right to self-defense against aggression with a requirement that the aggressor be a state actor ignores the purpose of that right in the first place.²⁴²

238. See Murphy, *supra* note 77, at 51 (“Today our appreciation of . . . non-traditional means of engaging in an armed attack must also comprehend the pernicious methods of terrorist organizations.”); Travalio, *supra* note 1, at 166 (observing that traditional interpretations of the requirements for self-defense are “too restrictive to reasonably respond to the threat posed by international terrorism”).

239. This is not meant to suggest that courts will necessarily hold non-state actors accountable. However, self-help and collective remedies by states should be allowable regardless of who infringes upon the state’s rights. See Guruli, *supra* note 13, at 123 (arguing that for international law to be legitimate and consistent “it is essential that certain terrorist acts be included in the definition of armed attack”).

240. See JOHNSON, MORALITY, *supra* note 14, at 58–61 (arguing that because the United Nations’ authority and effectiveness necessarily relies on agreements between and actions of sovereign member states, the charter was written in state-centric language). The Geneva Convention and Protocol I’s language are directed at “states,” evidencing the drafters focus on state-actors over non-state actors. Protocol I, *supra* note 11.

241. *Id.* at 27–31 (equating Walzer’s “theory of aggression” with the concept of “just cause” for war, and arguing that legal requirements, such as the armed attack requirement, were intended to make sure that only sovereigns with proper authority undertook a defensive war).

242. See HENCKAERTS & DOSWALD-BECK, *supra* note 114, at 497 (reporting that non-States are required to follow the rules of international humanitarian law and that some international laws reflect this requirement by referring to “parties to the conflict” instead of states); WALZER, JUST AND UNJUST WARS, *supra* note 23, at 59 (recognizing that regardless of whether there is state action, when the “victim of aggression fights in self-defense” against aggression, the victim is defending against and punishing the aggressor in order to maintain rights and deter future aggressors); see also Guruli, *supra* note 13, at 105 (explaining that despite the lack of a “conclusive authority” stating that a terrorist attack is an armed attack, the United States and Israel have argued that a military response to such attacks is implicitly recognized in the Charter’s right of self-defense); Sofaer, *supra* note 2, at 122–23 (questioning why anyone would support law that limited “a nation’s right to defend itself to situations in which its territory or political independence is threatened”).

CONCLUSION

If justice is the goal of the laws of armed conflict, then the laws must be changed to reflect previously unconsidered scenarios. Indeed, “every war is a Petri dish for the next round of the laws of war.”²⁴³ Human shield tactics make modern conflicts more dangerous to civilians. Since international law does not clearly address the human shield issue, states and commentators struggle to interpret current law in light of new tactics. Rather than using outdated law as the basis for the analysis of human shield conflicts, this Comment argues that new international law should be promulgated to deal with this unique and deadly tactic.

While the right to self-defense is embraced in international law, current law can serve to undermine that right in human shield situations. Using tests of causation that explicitly account for all relevant factors in determining culpability for civilian deaths ensuing from the use of human shield tactics ensures, however, that military actions will not be judged in a vacuum. Rather, military actions will be evaluated on their practical necessity, as well as their moral justifiability. The law proposed uses legal standards borrowed from domestic law to make the attribution of culpability in a human shield situation more just by updating legal interpretations of the traditional just war principles of proportionality, distinction, and self-defense to account for the proliferation of human shield tactics.

243. Anderson, *supra* note 141, at 43.