

---

---

# INTERNATIONAL LAW STUDIES

— *Published Since 1895* —

## U.S. NAVAL WAR COLLEGE



### Off Target: Selection, Precaution, and Proportionality in the DoD *Manual*

*Adil Ahmad Haque*

92 INT'L L. STUD. 31 (2016)

Volume 92

2016

Off Target:  
Selection, Precaution, and  
Proportionality in the DoD *Manual*

*Adil Ahmad Haque\**

CONTENTS

I. Introduction ..... 32

II. Target Selection ..... 36

    A. The Law ..... 37

    B. The *Manual*..... 41

    C. Logic ..... 45

III. Precautions in Attack and Acceptance of Risk ..... 48

    A. The Law ..... 48

    B. The *Manual*..... 52

    C. Logic ..... 57

IV. Proportionality and Human Shields..... 58

    A. The Law ..... 59

    B. The *Manual*..... 63

    C. Responsibility ..... 72

        1. Law..... 72

        2. Logic ..... 76

    D. Deterrence ..... 78

    E. Fairness..... 82

V. Conclusion..... 83

---

\* Professor of Law and Judge Jon O. Newman Scholar, Rutgers Law School.  
The thoughts and opinions expressed are those of the author and not necessarily of the U.S. government, the U.S. Department of the Navy or the U.S. Naval War College.

## I. INTRODUCTION

According to its authors, the purpose of the United States Department of Defense (DoD) *Law of War Manual* “is to provide information on the law of war to DoD personnel responsible for implementing the law of war and executing military operations.”<sup>1</sup> Unfortunately, the *Manual* provides *misinformation* on the law of war governing targeting and attack to its users and readers. Those who look to the *Manual* for guidance on these critical matters will be led astray.

Lawful targeting begins with lawful targets. Problems with the *Manual* begin there as well. I will mention three familiar problems before turning to my own concerns. First, international law protects civilians unless and for such time as they take a direct part in hostilities, through acts likely to directly cause harm in support of one party and against another.<sup>2</sup> In contrast, the *Manual* asserts that it is lawful to target civilians who “effectively and substantially contribute to an adversary’s ability to conduct or sustain combat operations.”<sup>3</sup> On the contrary, civilians do not lose their protection from attack through “acts that—although ‘ultimately harmful to the enemy’—are not part of military operations.”<sup>4</sup> In addition, the *Manual* states that the lawfulness of attacking a civilian may depend on “whether the [civilian’s] act is of comparable or greater value to a party’s war effort than acts that are commonly regarded as taking a direct part in hostilities.”<sup>5</sup> On the contrary, participation in a party’s war effort, no matter how valuable, is not legally equivalent to direct participation in hostilities.

1. U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL ¶ 1.1.1 (2015) [hereinafter DOD MANUAL].

2. *See, e.g.*, Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 48 (Int’l Crim. Trib. for the former Yugoslavia Dec. 5, 2003); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶ 100 (Dec. 6, 1999); INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 46 (2009) [(hereinafter INTERPRETIVE GUIDANCE)] (including acts that are an integral part of military operations likely to directly cause harm).

3. DOD MANUAL, *supra* note 1, ¶ 5.9.3. The *Manual* illustrates its position with the example of Vietnamese villagers “of all ages and sexes [who], willingly or under duress, served as porters [for] . . . communist forces.” *Id.* ¶ 5.9.3 n.227. It seems that, according to the *Manual*, children forced to serve as porters for opposing forces are lawful targets.

4. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 150 (2d ed. 2010).

5. DOD MANUAL, *supra* note 1, ¶ 5.9.3.

Second, under international law, an object is a military objective liable to lawful attack only if it makes “an effective contribution to military action.”<sup>6</sup> In contrast, the *Manual* states that it is lawful to attack any object that makes “an effective contribution to the war-fighting or war-sustaining capability of an opposing force.”<sup>7</sup> On the contrary, as Dinstein writes, “[t]he ‘war-fighting’ limb can pass muster, . . . but the ‘war-sustaining’ limb is untenable. . . . For an object to qualify as a military objective, there must exist a proximate nexus to ‘war-fighting’.”<sup>8</sup>

Finally, the *Manual* states that “[u]nder customary international law, no legal presumption of civilian status exists for persons or objects, nor is there any rule inhibiting commanders or other military personnel from acting based on the information available to him or her in doubtful cases.”<sup>9</sup> On the contrary, such a legal rule exists under customary international law, though its precise contours remain unsettled. According to one distinguished group of experts, “[t]he degree of doubt necessary to preclude an attack is that which would cause a reasonable attacker in the same or similar circumstances to abstain from ordering or executing an attack.”<sup>10</sup> Alternatively, the degree of doubt necessary to preclude an attack may vary based on, “*inter alia*, the intelligence available to the decision maker, the urgency of the situation, and the harm likely to result to the operating forces or to persons and objects protected against direct attack from an erroneous decision.”<sup>11</sup> By denying that any such legal rule exists, the *Manual* misses an opportunity to contribute to the progressive development of its content.<sup>12</sup>

This article focuses on three elements of lawful targeting that are less frequently discussed, but on which the lives of civilians often depend: tar-

---

6. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 29 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

7. DOD MANUAL, *supra* note 1, ¶ 5.9.3.

8. DINSTEIN, *supra* note 5, at 95–96.

9. DOD MANUAL, *supra* note 1, ¶ 5.5.3.2. Remarkably, the 1,200 page *Manual* does not mention the customary rule that attacking forces must “do everything feasible to verify that targets are military objectives” in order to avoid mistakenly targeting civilians. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 6, at 55.

10. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 87 (2010) [hereinafter COMMENTARY ON THE HPCR MANUAL].

11. INTERPRETIVE GUIDANCE, *supra* note 2, at 76.

12. For my own view, see Adil Ahmad Haque, *Killing in the Fog of War*, 86 SOUTHERN CALIFORNIA LAW REVIEW 63 (2012).

get selection, precautions in attack, and proportionality. The *Manual* says that

AP I provides that “[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.” The United States has expressed the view that this rule is not a requirement of customary international law.<sup>13</sup>

According to this passage, attackers presented with a choice of targets for obtaining a similar military advantage have no legal obligation to select the target that places the fewest civilians in danger. In addition, in its discussion of precautions in attack, the *Manual* says that

if a commander determines that taking a precaution would result in operational risk (i.e., a risk of failing to accomplish the mission) or an increased risk of harm to their own forces, then the precaution would not be feasible and would not be required.<sup>14</sup>

According to this passage, attackers have no legal obligation to take precautions that will entirely avoid or greatly reduce risk to civilians if doing so would involve any additional risk to themselves or to their mission. Most dramatically, in its section on proportionality, the *Manual* says that

Harm to the following categories of persons and objects would be understood not to prohibit attacks under the proportionality rule: (1) military objectives [that is, enemy combatants, civilians taking a direct part in hostilities, and military equipment]; (2) certain categories of individuals who may be employed in or on military objectives; and (3) human shields.<sup>15</sup>

According to this passage, the proportionality rule permits attackers to collaterally kill civilians forced to serve as human shields, no matter how many, in pursuit of any military advantage, no matter how small.

Of course, it is possible that these passages simply misstate DoD’s legal positions. If so, then perhaps this article will encourage their prompt revision. However, after nearly two decades of drafting and inter-agency re-

---

13. DOD MANUAL, *supra* note 1, ¶ 5.11.5.

14. *Id.* ¶ 5.3.3.2.

15. *Id.* ¶ 5.12.3.

view, we should presume that the *Manual* means what it says. Certainly, we should not presume that DoD expects users of the *Manual* to read between its lines to divine its true meaning. After all, it is a manual, not a constitution, we are expounding.

On each point, the *Manual* reflects neither *lex lata* nor *lex ferenda*. In my judgment, the *Manual* does not describe customary international law as it was in 1996, when work on the *Manual* began. Certainly, the *Manual* does not describe customary international law as it is in 2016. State practice, including U.S. practice, continued to evolve in the intervening decades. The *Manual* “is intended to be a description of the law as of the date of the manual’s promulgation.”<sup>16</sup> In my view, the *Manual* describes a law of war that no longer exists.

The law of war—also known as the law of armed conflict (LOAC) or international humanitarian law (IHL)—aims to strike a reasonable balance between humanity and military necessity. Yet, on these critical issues, the *Manual* does not merely tip the balance in favor of attackers. Instead, the *Manual* effectively strikes civilians from the scales. The balance itself is often misunderstood. Legal positions that ignore civilian protection frequently reduce rather than enhance military effectiveness. If the law of war loses its moral credibility then combatants will not trust that they can obey lawful orders in good conscience. They will hesitate, question, and dissent, looking elsewhere for the normative guidance that law ought to provide. Instead of relying on the law to strike a reasonable balance between humanity and necessity, combatants will have no choice but to strike their own.<sup>17</sup>

My substantive objections to the *Manual* should not be mistaken for personal criticism of its authors. The authors of the *Manual* are fine people, good lawyers, and dedicated public servants. They operated under a variety of institutional constraints, including the need to reach consensus and to reflect prior DoD positions. Nevertheless, the stakes are too high to mince words. With all due respect to its authors, the positions taken in the *Manual* are both wrong and dangerous. If U.S. forces do what the *Manual* permits then they will kill civilian men, women, and children in violation of interna-

---

16. DOD MANUAL, *supra* note 1, ¶ 1.1.2.

17. Cf. Richard C. Schragger, *Cooler Heads: The Difference between the President’s Lawyers and the Military’s*, SLATE (Sept. 20, 2006), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2006/09/cooler\\_heads.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2006/09/cooler_heads.html) (“Law allows our troops to engage in forceful, violent acts with relatively little hesitation or moral qualms. Law makes just wars possible by creating a well-defined legal space within which individual soldiers can act without resorting to their own personal moral codes.”).

tional law and without moral justification. On the other hand, if U.S. forces refrain from conduct that the *Manual* claims is lawful then the actual conduct of war will be regulated not by international law but by personal conscience and national policy. Either outcome subverts the aim of protecting civilians and guiding soldiers through international legal norms.

The law of war is international law. The law for the United States is the law for Russia and China, for Saudi Arabia and Sri Lanka, for North Korea and Pakistan, for Syria and Sudan. The legal authority that we claim for ourselves today, others will claim for themselves tomorrow. It is no defense of the *Manual* that our armed forces, surely, will never actually do what the *Manual* says that they may lawfully do. Surely, their moral character, professional integrity, and martial honor will prevent them from exercising the outer limits of the legal authority that the *Manual* claims for them. Yet what the *Manual* claims is legal for us, the *Manual* necessarily claims is legal for all.

The organization of this article is straightforward. Each part opens with a scenario that illustrates the legal issue at hand, followed by a presentation of contemporary international law and a legal analysis of the *Manual's* contrary position as well as its supporting evidence. The first two parts—on target selection and precautions in attack—conclude by examining the logic of the *Manual's* position, or lack thereof. In contrast, the final part—on proportionality and human shields—concludes by assessing three rather cursory arguments that the *Manual* offers in support of its position. Since these arguments raise quite distinct issues, I analyze them separately, challenging their bases in law and logic.

## II. TARGET SELECTION

Opposing forces need to cross both Bridge A and Bridge B in order to transport weapons and equipment to the front line. Destroying either bridge would prevent them from doing so. Bridge A is a major commuter route, while Bridge B carries little civilian traffic. If your forces destroy Bridge A then—even if your forces take reasonable precautions in carrying out the attack—you expect them to kill at least ten civilians. In contrast, if your forces destroy Bridge B then you expect them to kill no civilians. You determine that the deaths of ten innocent civilians, though tragic, would not be excessive in relation to the anticipated military advantage of destroying Bridge A. Of course, you could obtain a similar military advantage without killing any civilians, simply by destroying Bridge B instead.

As a legal officer, what would you advise? As a commander, what would you order? As an operator, what order would you obey?

A. *The Law*

Under Protocol I,

[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.<sup>18</sup>

This provision—which I will call *the target selection rule*—was adopted unanimously and ratified by all 174 States party to Protocol I without reservation.<sup>19</sup> Applied to the scenario described above, under Protocol I it would be unlawful to destroy Bridge A, killing ten civilians, rather than destroy Bridge B, killing no civilians, to obtain a similar military advantage. Equivalent scenarios may arise involving roads, tunnels, railroads, power lines, and other lines of communication. In such cases, the target selection rule simply requires what common sense and elementary considerations of humanity demand.

Of course, the United States is one of nineteen States that are not party to Protocol I. Accordingly, the United States is bound only by customary international law. Some argue that, paradoxically, the near-universal ratification of a treaty occludes its relationship with customary law.<sup>20</sup> On this approach, apparently positive practice of State parties like Australia, Germany, and the United Kingdom may be dismissed as reflecting treaty obligations. Conversely, the wartime conduct of non-parties like Sri Lanka may be accepted as contrary practice that reflects or changes customary law. Indeed, if we exclude the practice of 174 States and consider only the prac-

---

18. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 57(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

19. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 6, at 65.

20. According to the so-called “Baxter paradox,” “as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty.” In addition, “[a]s the express acceptance of the treaty increases, the number of states not parties whose practice is relevant diminishes. There will be less scope for the development of international law dehors the treaty . . . .” See Richard Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 64, 73 (1970).

tice of nineteen States then it is hard to see how any constraint on the conduct of hostilities could reflect the extensive and virtually uniform State practice necessary to establish customary law. In my view, this approach is a blueprint for legal stagnation at best and legal regression at worst.

Fortunately, the relationship between treaty and custom is not so paradoxical. A treaty provision may codify established customary law, crystallize emerging customary law, or inspire the progressive development of customary law.<sup>21</sup> The fact that no party to Protocol I introduced objections, declarations or reservations regarding the target selection rule is itself substantial—though not dispositive—evidence that many parties believed that the target selection rule either codified existing custom or crystallized emerging custom.

According to the ICRC, the target selection rule,

described “as the lesser of two evils,” was already in the Draft Rules of 1956 (Article 8(a), paragraph 2). It was included in the 1973 draft and the Conference accepted it without much discussion. It is in accordance with the actual practices of belligerents in certain cases, particularly with respect to occupied allied countries.

In this field mention could be made of attacks launched against enemy road and rail traffic; some belligerents have tried to attack the adversary only when this would not result in severe damage for the population. Instead of attacking railway stations, which are usually located in towns, the railway lines were hit at crucial points, but away from inhabited areas; the same action was taken with respect to roads.

Such examples show that it is possible to choose objectives so that their destruction does not imperil the population and civilian objects, while still gaining the same military advantage.<sup>22</sup>

---

21. *See* North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20). *See also* Hon. Fausto Pocar, *To What Extent Is Protocol I Customary International Law?*, 78 INTERNATIONAL LAW STUDIES 337, 341 (2002) (noting that “the treaty itself is an important piece of State practice for the determination of customary law, although its role in this regard must be carefully assessed,” and considering “the impact that any subsequent practice of the contracting States in the application of the treaty which establishes their agreement or disagreement regarding its interpretation may bear on the development of a customary norm”).

22. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶¶ 2226–28 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter PROTOCOL I COMMENTARY].

Evidently, no party felt that the target selection rule places unreasonable constraints on military operations. To my knowledge, no party has expressed regrets in the decades since.

For its part, the U.S. Air Force endorsed the target selection rule in its 1976 law of war pamphlet—one year prior to Protocol I's adoption and two years prior its entry into force.<sup>23</sup> Logically, the Air Force must have thought that the proposed treaty provision codified established customary law or that the negotiating process was crystallizing emerging customary law. Certainly, the Air Force could not have thought that the target selection rule was legally binding on U.S. forces in virtue of a treaty that had not been finalized let alone ratified by the United States.

Subsequent State practice and *opinio juris* confirms that the target selection rule is a requirement of customary international law.<sup>24</sup> The ICRC cites the “official statements and reported practice” of thirteen States directly affirming the customary status of the rule.<sup>25</sup> Importantly, the ICRC cites the practice of seven States that were not, at the time, parties to Protocol I and whose positive practice therefore cannot be attributed to their treaty obligations.<sup>26</sup> Finally, the ICRC “found no official contrary practice” denying that the target selection rule is customary law. The ICRC found “only one instance of apparently contrary practice,” to which we will return shortly.

Unsurprisingly, the target selection rule is found in the law of war manuals of at least eighteen States, including Australia, Canada, France, Italy, Spain, Sweden, and the United Kingdom.<sup>27</sup> Although most of these States are party to Protocol I, it is hard to believe that, were they to with-

---

23. Department of the Air Force, AFP 110-31, International Law—The Conduct of Armed Conflict and Air Operations 5-9-5-10 (1976). *See also id.* at 5-7 (“Based on these developments [including the preparation of Protocol I] it is now possible to discuss meaningfully the law of armed conflict as it affects aerial bombardment.”). The 1976 pamphlet was subsequently rescinded but remains widely cited as evidence of U.S. practice, including in the DoD *Manual* itself.

24. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 6, at 65 (“State practice establishes this [target selection] rule as a norm of customary international law applicable in international, and arguably also in non-international, armed conflicts.”).

25. *Id.* These States are Egypt, France, Jordan, Indonesia, Iran, Iraq, Israel, Kenya, Malaysia, the Netherlands, Syria, the United States (more on this in a moment), and Zimbabwe.

26. *Id.* at 66–67. These States are France, Indonesia, Iran, Israel, Kenya, Malaysia, and the United States (again, more on this in a moment).

27. *Id.* at 65.

draw from Protocol I, these States would consider themselves legally free to ignore alternative targets that offer similar military advantage but risk less civilian harm.

Tellingly, the target selection rule appears in nine military manuals applicable to non-international armed conflicts, as well as in agreements between parties to the (partly) non-international conflict in the former Yugoslavia.<sup>28</sup> This practice also cannot be attributed to obligations found in Protocol I, since the Protocol applies only to international armed conflicts. Again, the absence of contrary practice is striking. No party to Protocol I has denied that the target selection rule applies to non-international armed conflicts. For their part, the expert drafters of the well-regarded *San Remo Manual on the Law of Non-International Armed Conflict* also concluded that the target selection rule is part of customary law applicable to non-international armed conflict.<sup>29</sup>

Likewise, the International Criminal Tribunal for the former Yugoslavia (ICTY) found that the provisions of Article 57 of Protocol I, which include the target selection rule, “are now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol.”<sup>30</sup> In particular, the ICTY stated that these provisions spell out the “general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness.”<sup>31</sup>

Finally, the well-regarded *HPCR Manual on International Law Applicable to Air and Missile Warfare* endorses the target selection rule as a “black-letter

---

28. *Id.* at 67. These States are Benin, Croatia, Germany, Italy, Kenya, Madagascar, Nigeria, Togo and Yugoslavia. *See also* Memorandum of Understanding on the Application of International Humanitarian Law between Croatia and the Socialist Federal Republic of Yugoslavia, para. 6, Nov. 27, 1991, <https://www.icrc.org/casebook/doc/case-study/yugoslavia-agreements-case-study.htm>; Agreement between Representatives of Mr. Alija Izetbegović (President of the Republic of Bosnia and Herzegovina and President of the Party of Democratic Action), Representatives of Mr. Radovan Karadžić (President of the Serbian Democratic Party), and Representative of Mr. Miljenko Brkić (President of the Croatian Democratic Community), para. 2.5, May 22, 1992, <https://www.icrc.org/casebook/doc/case-study/yugoslavia-agreements-case-study.htm>.

29. *See* MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY, & YORAM DINSTEIN, *THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: WITH COMMENTARY* 25, 28 (2006).

30. *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16, Judgment, ¶ 524 (Int’l Crim. Trib. for the former Yugoslavia Jan. 14, 2000).

31. *Id.*

rule” of customary international law.<sup>32</sup> The *HPCR Manual* reflects the consensus views of a 31-member group of experts from Australia, Canada, China, Germany, Israel, Norway, the UK, and the United States, among other nations.<sup>33</sup> According to the Commentary on the *HPCR Manual*,

Whenever three or more participants in the Group of Experts objected to a given text, it was changed to meet such objections or bridge over conflicting views. In the rare instances in which compromise formulas proved beyond the reach of the Group of Experts, it was agreed to follow in the text the majority view but to give in the Commentary full exposure to the dissenting opinions.<sup>34</sup>

Tellingly, the text of the *HPCR Manual* restates the target selection rule without qualification and the Commentary records no dissenting opinions regarding the rule’s customary status.

#### B. *The Manual*

As we have seen, the U.S. Air Force endorsed the target selection rule in its 1976 law of war pamphlet, which can only be interpreted as an acceptance of the rule as a requirement of customary international law.<sup>35</sup> Nevertheless, the DoD *Manual* states the following:

AP I provides that “[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.” The United States has expressed the view that this rule is not a requirement of customary international law.<sup>36</sup>

It follows that, according to the *Manual*, States that are not party to Protocol I are not bound by the target selection rule. Returning to the example with which this part began, the *Manual* entails that you may lawfully strike

---

32. COMMENTARY ON THE HPCR MANUAL, *supra* note 10, at 128.

33. Interestingly, the group of experts included W. Hays Parks of the DoD’s Office of General Counsel. *Id.* at 9. If Parks conveyed the DoD’s position on this issue then it appears that it did not garner much support from other members of the group.

34. *Id.* at 4.

35. AFP 110-31, *supra* note 23, at 5-9–5-10.

36. DOD MANUAL, *supra* note 1, ¶ 5.11.5.

either Bridge A, killing ten civilians, or Bridge B, killing no civilians. Of course, you must take feasible precautions in attacking either target and cancel or suspend an attack on either target if the expected harm to civilians appears excessive in relation to the anticipated military advantage. However, according to the *Manual*, if an attack on either target would satisfy these requirements then the choice between the two is not governed by any legal rule. So far as the law is concerned, you may select your target by flipping a coin rather than by considering the likely consequences for civilians.

Importantly, the *Manual* does not say that the target selection rule of API is a requirement of customary international law *provided that* it is interpreted in some specified way. On the contrary, the *Manual* says that the target selection rule of API is *not* a requirement of customary international law. Nor does the *Manual* identify an alternative rule of customary law regulating the selection of targets that promise similar military benefits but threaten different humanitarian costs. It seems that, according to the *Manual*, customary law is silent on this basic element of warfare.

Strikingly, the *Manual* does not cite the practice or *opinio juris* of a single foreign State in support of its position that the target selection rule is not a requirement of customary international law. Nor does the *Manual* reflect U.S. operational practice. The *Manual* does not cite a single occasion on which U.S. forces were faced with a choice of targets for obtaining similar military advantage, knowingly selected a target that put more civilians in harm's way than other targets, and later claimed that their selection of targets conformed to customary law. Indeed, it is hard to imagine a U.S. commander ordering an attack under such circumstances or to imagine a U.S. operator obeying such an order.

Instead, the *Manual* quotes a 1991 telegram sent by the United States to the ICRC in response to an ICRC memorandum on the applicability of international humanitarian law in the Gulf region:

Paragraph 4B(4) [of the ICRC memo] contains the language of Article 57(3) of Protocol I, and is not a part of customary law. The provision applies "when a choice is possible . . ." it is not mandatory. An attacker may comply with it if it is possible to do so, subject to mission accomplishment and allowable risk, or he may determine that it is impossible to make such a determination.<sup>37</sup>

---

37. *Id.* ¶ 5.11.5 n.303 (quoting U.S. Comments on the International Committee of the Red Cross's Memorandum on the Applicability of International Humanitarian Law in the

Like the *Manual*, the telegram did not cite the practice or *opinio juris* of a single foreign State in support of its position that Article 57(3) of Protocol I is not a part of customary law. Perhaps the authors of the *Manual* felt institutionally constrained to restate the position taken in the telegram. Alternatively, perhaps the authors were well-positioned to encourage a change in U.S. policy. In any event, the *Manual* can find no legal support in a bare assertion that, even if tenable in 1991, is unsustainable in 2016.

For its part, the ICRC initially seemed puzzled by the telegram, writing that “the United States denied that this rule was customary but then restated the rule and recognised its validity, consistent with its other practice,” namely the 1976 Air Force pamphlet.<sup>38</sup> The ICRC ultimately interpreted the telegram not as a rejection of the rule but as a qualified endorsement of it, writing that:

The United States has emphasised that the obligation to select an objective the attack on which may be expected to cause the least danger to civilian lives and to civilian objects is not an absolute obligation, as it only applies “when a choice is possible” and thus “an attacker may comply with it if it is possible to do so, subject to mission accomplishment and allowable risk, or he may determine that it is impossible to make such a determination.”<sup>39</sup>

Of course, the *Manual* cites the telegram for the proposition that “[t]he United States has expressed the view that this rule is not a requirement of customary international law.” It therefore seems that the *Manual* rejects the ICRC’s interpretation of the telegram and that the citation to the telegram does not in any way qualify the denial that the target selection rule is a rule of customary law.<sup>40</sup>

---

Gulf Region (Jan. 11, 1991), as reprinted in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1991–1999 at 2057, 2064 (Sally J. Cummins & David P. Stewart eds., 2005) [hereinafter U.S. Comments].

38. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 6, at 67.

39. *Id.*

40. But see Charles J. Dunlap, Jr., *Let’s Balance the Argument About the DoD Law of War Manual and Targeting*, JUST SECURITY (July 10, 2015), <https://www.justsecurity.org/24542/lets-balance-argument-dod-law-war-manual-targeting/>. For a response, see Adil Ahmad Haque, *DOD is Still Wrong About Target Selection and Civilians*, JUST SECURITY (July 15, 2015), <https://www.justsecurity.org/24671/dod-wrong-target-selection-civilians/>.

In fact, the telegram nowhere recognizes the validity of the target selection rule as a part of customary law. The first sentence says that Article 57(3) “is not a part of customary law.” The second and third sentences state the U.S. interpretation of “[t]he provision”—that is, of Article 57(3)—specifically of the phrase “when a choice is possible.” However, since the United States is not a party to Protocol I, Article 57(3) does not apply to the United States no matter how it is reasonably interpreted.<sup>41</sup>

Perhaps the ICRC was confused by the telegram’s repeated use of the pronoun “it.” However, upon close inspection, “it” clearly refers to “the provision,” which in turn refers to Article 57(3) of Protocol I, which the telegram clearly says is *not* a part of customary law. The telegram does not say that Article 57(3) imperfectly reflects customary law. The telegram says that Article 57(3) is *not* a part of customary law.

In any event, if the *Manual’s* authors intended the provision to be a qualified endorsement of the target selection rule as a requirement of customary international law, then they would have made that clear in the text of the *Manual*. They would not have done so through a parenthetical quotation contained in a footnote that denies that the rule is part of customary law. In my judgment, the *Manual* is clearly wrong, but at least it is wrong clearly.

By way of contrast, the *HPCR Manual* recognizes the target selection rule as a requirement of customary international law. The Commentary to the *HPCR Manual* goes on to state that

There is no requirement to select among several objectives if doing so would be militarily unreasonable. As an example, if a choice has to be made between two alternative military objectives—one of which is more densely defended than the other—the attacker is not required to select the latter when heavy casualties are anticipated to the attacking force.<sup>42</sup>

---

41. It may seem odd for the United States to offer an interpretation of a treaty provision to which it is not bound and which it does not recognize as reflecting customary law. In fact, the United States routinely comments on the interpretation of Protocol I, including in the *Manual* itself. See, e.g., DOD MANUAL, *supra* note 1, ¶ 5.3.3.4 (“AP I Obligation to Take Constant Care to Spare Civilians and Civilian Objects”); *id.* ¶ 5.5.3.2 (“AP I Presumptions in Favor of Civilian Status in Conducting Attacks”); *id.* ¶ 5.5.8.2 (“AP I Obligation for Combatants to Distinguish Themselves During Attacks or Military Operations Preparatory to an Attack”); *id.* ¶ 5.9.1.2 (“AP I, Article 51(3) Provision on Direct Participation in Hostilities”).

42. COMMENTARY ON THE HPCR MANUAL, *supra* note 10, at 129.

The authors of the *HPCR Manual* had no trouble clearly endorsing the target selection rule as part of customary law while explaining how they interpret it. If the drafters of the *DoD Manual* had wished to do the same then they were more than capable of doing so.

The United States now appears to stand alone as the only nation in the world to deny that the target selection rule is a requirement of customary international law. The United States has yet to offer any evidence in support of its claim, other than its own twenty-five year old assertion. This bare assertion was itself unsupported by any recorded practice of acting contrary to the target selection rule and claiming legal authority to do so. Nor has the United States identified an alternative rule of customary law regulating the target selection process.

To be sure, States make customary international law. However, *one* State cannot make customary international law. When one State denies that a given rule is part of customary law that State must support its claim by citing foreign State practice and *opinio juris*, just like anyone else making an objective claim about the current state of customary law. In contrast, if a State cannot cite any contrary practice or *opinio juris* other than its own then it should concede that the rule otherwise reflects customary international law but argue that “the rule is not binding upon a State that has persistently objected to that rule during its development.”<sup>43</sup> In this case, the 1976 Air Force pamphlet endorsing the target selection rule makes it hard for the United States to persuasively argue that it has *persistently* objected to the rule and therefore is not bound by it. Nevertheless, such an alternative position would at least have some legal basis, since the Air Force pamphlet may have reflected the views of the Air Force but not that of the United States government as a whole. In contrast, the position of the *Manual* appears to have no legal basis.

### C. Logic

In principle, positive law can be as illogical, immoral, or unwise as its human creators. However, we should reject an interpretation of positive law that generates illogical, immoral, or unwise results absent overwhelming evidence in its favor. As it happens, the *Manual*'s rejection of the target se-

---

43. DOD MANUAL, *supra* note 1, ¶ 1.8.4 (“Even if a rule otherwise reflects customary international law, the rule is not binding upon a State that has persistently objected to that rule during its development.”).

lection rule seems illogical given the *Manual's* recognition of the precautions rule, the proportionality rule, and the principle of humanity.<sup>44</sup>

To its credit, the *Manual* states that “[c]ombatants must take feasible precautions in *conducting* attacks to reduce the risk of harm to civilians.”<sup>45</sup> In contrast, as we have seen, the *Manual* states that combatants need not select targets *for* attack so as to reduce the risk of harm to civilians. Evidently, harm to civilians often turns more on which targets are attacked than on how attacks on those targets are carried out. It seems illogical to regulate the latter but not the former.

Similarly, the *Manual* states that, when “the use of certain weapons rather than others may lower the risk of incidental harm, while offering the same or superior military advantage,” combatants are legally required to select the less risky weapons.<sup>46</sup> In other words, according to the *Manual*, combatants must select weapons that lower the risk of incidental harm but need not select targets that do the same. Since the risk of incidental harm often depends more on the selection of targets than on the selection of weapons, again it seems illogical to regulate the latter but not the former.

In addition, the *Manual* accepts the proportionality rule, namely that “[c]ombatants must refrain from attacks in which the expected loss of life or injury to civilians . . . would be excessive in relation to the concrete and direct military advantage expected to be gained.”<sup>47</sup> It is indeed wrong to kill civilians in pursuit of a military advantage too small to justify their deaths. However, it seems even worse to kill civilians in pursuit of a military advantage when one could obtain the same or a similar military advantage while killing fewer civilians. To refrain from the former but not the latter gets things backwards.<sup>48</sup>

The target selection rule, the precautions rule, and the proportionality rule form a logically coherent triad. One rule governs *what* to attack, another governs *how* to attack, and the third governs *whether* to attack. Together, these three rules ensure that a lawful attack on a lawful target will inflict neither unnecessary nor excessive incidental harm on civilians. Rejecting

---

44. *See infra*.

45. DOD MANUAL, *supra* note 1, ¶ 5.11 (emphasis added).

46. *Id.* ¶ 5.11.3.

47. *Id.* ¶ 5.12.

48. Interestingly, the Canadian LOAC Manual states the target selection rule under the heading of “Proportionality and multiple targets.” CHIEF OF THE GENERAL STAFF (CANADA), B-GJ-005-104/FP-021, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS ¶ 414 (2001).

one of these rules while endorsing the others leaves a logically inexplicable gap in the law.

The *Manual's* rejection of the target selection rule seems even more illogical given that the rule appears to follow logically from a general principle that the *Manual* recognizes as foundational. The *Manual* accepts that the principle of humanity “forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.”<sup>49</sup> Yet if an attacker can obtain the same military advantage by attacking any one of several targets then failing to select the target that places the fewest civilians in harm’s way inflicts more harm than necessary to accomplish that military purpose. For example, if you can obtain the same military advantage by destroying Bridge A, killing ten civilians, or by destroying Bridge B, killing no civilians, then an attack on Bridge A would seem to inflict suffering and injury unnecessary to accomplish a legitimate military purpose. In such cases, the target selection rule simply requires what the principle of humanity demands.

It seems illogical to recognize humanity as a fundamental principle of customary international law while insisting that the target selection rule is not a requirement of customary international law at all. In general, “[w]here a rule of customary international law is logical, because it can be deduced from an existing underlying principle, the burden of proving the rule by way of inductive reasoning is proportionally diminished.”<sup>50</sup> Conversely, the burden of disproving a logical rule, deducible from an accepted principle, is proportionally increased. If the *Manual* offered decisive evidence of State practice and *opinio juris* in support of its position then we would have no choice but to accept that the fault lies not in the *Manual* but in the law itself. As we have seen, the *Manual* offers no such evidence, nor could it do so. In my view, the target selection rule was a requirement of customary international law when Protocol I was adopted in 1977, when the U.S. telegram to the ICRC was sent in 1991, and when work on the *Manual* began in 1996. Certainly, the target selection rule is a requirement of customary international law in 2016.

---

49. DOD MANUAL, *supra* note 1, ¶ 2.3.

50. Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion*, 26 EUROPEAN JOURNAL OF INTERNATIONAL LAW 417, 427 (2015) (“In essence, a logical rule requires a smaller pool of state practice and *opinio juris*.”).

### III. PRECAUTIONS IN ATTACK AND ACCEPTANCE OF RISK

Based on surveillance, human intelligence, and thermal imaging, you determine that an insurgent commander is asleep in his home with his five young children. Based on the available information, you determine that a missile strike on the house will certainly kill the commander, as well as all five children, at no risk to your forces. You also determine that a night raid by special forces will almost certainly kill the commander and kill none of the children, but that there is a small chance that the commander will wake up and harm one of your operators before he is killed. Finally, you determine that the deaths of five innocent children, though horrific, would not be excessive in relation to the military advantage anticipated from killing the commander. Importantly, you could almost certainly obtain the same military advantage without killing any of the children by accepting a small risk to your own forces.

As a legal officer, what would you advise? As a commander, what would you order? As an operator, what order would you respect?

#### A. *The Law*

Under customary international law, “[a]ll feasible precautions must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects.”<sup>51</sup> This general rule of precautions in attack generates a number of specific obligations. Attacking forces must “do everything feasible to verify that targets are military objectives” in order to avoid mistakenly targeting civilians.<sup>52</sup> Similarly, attacking forces “must do everything feasible to assess whether the attack may be expected” to inflict excessive harm on civilians.<sup>53</sup> More distinctively, attacking forces “must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects.”<sup>54</sup> In particular, attacking forces “must give effective advance

---

51. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 6, at 51.

52. *Id.* at 55. *See also* Protocol I, *supra* note 18, art. 57(2)(a) (emphasis added).

53. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 6, at 58.

54. *Id.* at 56. *See also* Protocol I, *supra* note 18, art. 57(2)(a)(ii); *id.* art. 57(4) (“In the conduct of military operations at sea or in the air, each Party to the conflict shall . . . take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.”).

warning of attacks which may affect the civilian population, unless circumstances do not permit.”<sup>55</sup>

Since no one disputes the customary status of the precautions rule, let us turn to its proper interpretation. Under customary international law, feasible precautions are those precautions that are “practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.”<sup>56</sup> Intuitively, *taking into account* humanitarian and military considerations means *balancing* the humanitarian considerations in favor of taking a precaution and the military considerations against taking that precaution.<sup>57</sup> If the humanitarian considerations outweigh the military considerations then the precaution is required. Conversely, if the military considerations outweigh the humanitarian considerations then the precaution is not required.

Returning to the scenario with which this part began, the precautions rule would require you to raid the home, at some risk to your own forces, rather than to bomb the home, certainly killing the five children. In ordinary life, it is not reasonable to take a grave risk of killing innocent people rather than accept a small risk to yourself. The reasonable conduct of war is no different. While combatants are not always required to accept significant risks in order to protect civilians from others, combatants are required to accept some risks in order to avoid killing civilians themselves.<sup>58</sup>

This balanced approach is reflected in State practice, *opinio juris* and expert opinion. Since there is no difference between customary law and Protocol I with respect to precautionary obligations, let us examine the position of the United Kingdom. The UK *Manual of the Law of Armed Conflict* notes that, in order to comply with their precautionary obligation to do everything feasible to verify that their targets are military objectives, “traditionally commanders have accepted some risk in identifying targets by using, for example, artillery spotters, forward air controllers, and intelligence gatherers operating in enemy-held territory.”<sup>59</sup> In other words, attackers

---

55. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 6, at 62. *See also* Protocol I, *supra* note 18, art. 57(2)(c).

56. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 6, at 54, 70.

57. *See* Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 445, 462 (2005).

58. *See, e.g.*, Haque, *supra* note 12, at 106–10; David Luban, *Risk Taking and Force Protection*, in READING WALZER 277 (Yitzhak Benbaji & Naomi Sussman eds., 2014).

59. UNITED KINGDOM MINISTRY OF DEFENSE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.32.2 n.202 (2004) [hereinafter UK MANUAL].

customarily accept risks to themselves if necessary to reduce the risk of mistakenly targeting civilians.

Elsewhere, the UK *Manual* observes that “[s]ometimes a method of attack that would minimize the risk to civilians may involve increased risk to the attacking forces. The law is not clear as to the degree of risk that the attacker must accept.”<sup>60</sup> Put the other way around, attackers must accept some degree of risk in order to minimize risk to civilians, although the required degree of risk cannot be precisely quantified. Here, as elsewhere, the balance of humanitarian and military considerations calls for human judgment rather than mathematical calculation.

In a difficult passage that requires close reading, the UK *Manual* correctly notes that “[t]he proportionality principle does not itself require the attacker to accept increased risk,”<sup>61</sup> but only to refrain from inflicting excessive incidental harm on civilians. In contrast, invoking the language of the precautions rule, the UK *Manual* goes on to say that if “alternative, practically possible methods of attack would reduce the collateral risks” then “the attacker may have to accept the increased risk as being the only way of pursuing an attack in a proportionate way.”<sup>62</sup>

Obviously, attackers may have to accept increased risk if necessary to reduce the risk of inflicting excessive incidental harm on civilians. However, the phrase “pursuing an attack in a proportionate way” refers to *how* an attack should be carried out rather than to *whether* an attack should be carried out. In context, “pursuing an attack in a proportionate way” can only mean using methods of attack that reduce collateral risks without placing attackers at excessive or disproportionate risk.

To see this last point more clearly, notice that the UK *Manual* seems to adopt the view of A.P.V. Rogers, who writes that,

by adopting a method of attack that would reduce incidental damage, the risk to the attacking troops may be increased. The law is not clear as to the degree of care required of the attacker and the degree of risk that he must be prepared to take.<sup>63</sup>

---

60. *Id.* ¶ 2.7.1.

61. *Id.*

62. *Id.*

63. A.P.V. Rogers, *Zero-casualty Warfare*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 165, 177 (2000).

Importantly, Rogers concludes that “[m]ilitary necessity cannot always override humanity. In taking care to protect civilians, soldiers must accept some element of risk to themselves.”<sup>64</sup> Rogers quotes the British Defense Doctrine of his day, which stated that “there may be occasions when a commander will have to accept a higher level of risk to his own forces in order to avoid or reduce collateral damage to the enemy’s civil population.”<sup>65</sup> Elsewhere, Rogers warns that “the feasible test must not be restricted so far as to render nugatory the protection of the civilian population.”<sup>66</sup>

Other experts share Rogers’ balanced view of precautions in attack. For example, as Michael Schmitt argues, “[i]t is reasonable to require military forces to assume some degree of risk to avoid collateral damage and incidental injury. They do so regularly. By this analysis, the greater the anticipated collateral damage or incidental injury, the greater the risk they can reasonably be asked to shoulder.”<sup>67</sup> Similarly, Dinstein concludes that “[w]hat is called for is a reasonable ‘allocation of risk’ between the attacker’s military personnel and the enemy civilians.”<sup>68</sup>

Finally, the Commentary to the *HPCR Manual* states—without recorded dissent among the group of experts—that “whereas a particular course of action may be considered non-feasible due to military considerations (such as excessive risks to aircraft and their crews), some risks have to be accepted in light of humanitarian considerations.”<sup>69</sup> Evidently, “excessive risks” to attackers are risks that are excessive in relation to the relevant humanitarian considerations. If a course of action would greatly increase risk to attackers and only slightly reduce risk to civilians then the attackers do not have to accept such excessive risks. Conversely, if a course of action would slightly increase risk to attackers and greatly reduce risk to civilians then the attackers have to accept such reasonable risks.

On this balanced approach, the precautions rule does not require soldiers to take suicidal risks, or to doom an otherwise lawful mission, in order to avoid any risk of harming civilians. However, the precautions rule

---

64. *Id.* at 177.

65. United Kingdom Ministry of Defence, JWP 0-01, British Defence Doctrine (1996).

66. A.P.V. Rogers, *Conduct of Combat and Risks Run by the Civilian Population*, 21 MILITARY LAW AND LAW OF WAR REVIEW 293, 308 (1982).

67. Schmitt, *supra* note 57, at 462. For my views, see Haque, *supra* note 12, at 106–10.

68. DINSTEIN, *supra* note 5, at 141.

69. COMMENTARY ON THE HPCR MANUAL, *supra* note 10, at 39.

may require attackers to accept some additional risk in order to reduce the risks that their actions pose to civilians. Here, as elsewhere, there will be hard cases in which reasonable commanders must exercise their professional judgment—with which reasonable observers may in turn disagree. However, as elsewhere, there will also be clear cases in which any reasonable commander would accept some risk to attacking forces or to mission success in order to entirely avoid or greatly reduce the possibility of needlessly killing civilians.

### B. *The Manual*

The *Manual* recognizes that “[p]arties to a conflict must take feasible precautions to reduce the risk of harm to the civilian population and other protected persons and objects.”<sup>70</sup> The *Manual* also accepts that feasible precautions are those precautions that are “practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.”<sup>71</sup> However, the *Manual* asserts that

if a commander determines that taking a precaution would result in operational risk (i.e., a risk of failing to accomplish the mission) or an increased risk of harm to their own forces, then the precaution would not be feasible and would not be required.<sup>72</sup>

In other words, if taking a precaution would even slightly increase risk to attacking forces or to mission success then that precaution is infeasible *per se*, even if taking that precaution would entirely avoid or greatly reduce risk to civilians. Returning to the case with which this section began, according to the *Manual*, it would be perfectly lawful to strike the house with a missile, certainly killing five children, rather than raid the house, killing no children, while placing attacking forces at only slightly greater risk. Put another way, if the proportionality rule does not prohibit a missile strike then the precautions rule does not require a raid.

---

70. DOD MANUAL, *supra* note 1, ¶ 5.3.3 (“Feasible precautions to reduce the risk of harm to civilians and civilian objects must be taken when planning and conducting attacks.”). See also *id.* ¶ 5.11 (“Combatants must take feasible precautions in conducting attacks to reduce the risk of harm to civilians and other protected persons and objects.”).

71. *Id.* ¶ 5.3.3.2.

72. *Id.*

It seems that, according to the *Manual*, “feasible” precautions are not all precautions that are practicable or practically possible but instead only precautions that are free of risk to the attacking force. Far from taking into account both humanitarian and military considerations, the *Manual* seems to disregard or exclude the former when they conflict with the latter—as they almost always do.

To see that the DoD’s view is dangerously unbalanced, imagine if a human rights group asserted the following:

If a commander determines that failing to take a precaution would result in an increased risk of harm to civilians, then the precaution is feasible and is required.

Such a view would be dismissed immediately, since it gives humanitarian considerations absolute priority over military considerations while the precautions rule requires taking into account both humanitarian and military considerations. Yet the DoD’s position goes just as far, except in the opposite direction. The DoD’s position gives military considerations absolute priority over humanitarian considerations in determining an attacker’s precautionary obligations. Neither view strikes a reasonable balance between the guiding concerns of the law of war.

The DoD appears to differ on this point with the U.S. Joint Chiefs of Staff, who in 2013 took the position that “circumstances permit” effective advance warning of an attack when “any degradation in attack effectiveness is *outweighed* by the reduction in collateral damage [e.g.,] because advanced warning allowed the adversary to get civilians out of the target area.”<sup>73</sup> On this balanced view, attackers must weigh the military reasons to attack without warning against the humanitarian reasons to give advance warning. If the latter outweigh the former then advance warning must be given; if not, then not.

Indeed, U.S. targeting practice routinely accepts some risk to attacking forces in order to avoid harming civilians. For example, in a 1991 letter to the UN Secretary General regarding its conduct of hostilities with Iraq, the United States stressed that “allied aircraft involved in these attacks are taking every precaution to avoid civilian casualties. These pilots are in fact placing themselves in greater danger in order to minimize collateral damage

---

73. Chairman, Joint Chiefs of Staff, Joint Publication 3-60, Joint Targeting, A-5 (2013) [hereinafter Joint Publication 3-60 (2013)] (emphasis added).

and civilian casualties.”<sup>74</sup> In a subsequent report to Congress, the U.S. Department of Defense stated that: “U.S. forces have taken reasonable measures to minimize collateral injury to civilians and damage to civilian objects while conducting their military operations, often at increased risk to U.S. personnel.”<sup>75</sup> U.S. forces seem to recognize that legitimate war-fighting requires that they accept reasonable risks in order to avoid harming civilians. As former Air Force pilot Chris Stewart writes: “I . . . never met a pilot or crewmember in the U.S. Air Force who was not willing to take at least some risk to avoid being the one to drop his ordnance atop women, children, hospitals or a passenger train. That is the way Americans conduct war.”<sup>76</sup> According to Charles Dunlap, the “disposition to so readily balance potential military losses against expected enemy civilian fatalities is rooted deep in the American psyche.”<sup>77</sup>

In support of its position, the *Manual* cites no U.S. practice of foregoing precautions that would greatly reduce risk to civilians while only slightly increasing risk to attacking forces, let alone accompanying *opinio juris* that such conduct is lawful. Instead, the *Manual* cites the 1991 telegram to the ICRC discussed earlier:

“Feasible precautions” are reasonable precautions, consistent with mission accomplishment and allowable risk to attacking forces. While collateral damage to civilian objects should be minimized, consistent with the above, collateral damage to civilian objects should not be given the same level of concern as incidental injury to civilians. Measures to minimize collateral damage to civilian objects should not include steps that will place U.S. and allied lives at greater or unnecessary risk.<sup>78</sup>

---

74. Permanent Rep. of the United States to the U.N., Letter dated 30 January 1991 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council at 1, UN Doc. S/22173, 30 January 1991.

75. U.S. DEPARTMENT OF DEFENSE, REPORT TO CONGRESS ON INTERNATIONAL POLICIES AND PROCEDURES REGARDING THE PROTECTION OF NATURAL AND CULTURAL RESOURCES DURING TIMES OF WAR (Jan. 19, 1993), reprinted in CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 447–48 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

76. Chris Stewart & David Forsmark, *If Clinton Won Kosovo War, Why Did He Invoke a New Draft?*, DETROIT NEWS, June 17, 1999, at A18, quoted in Charles J. Dunlap, Jr., *Kosovo, Casualty Aversion, and the American Military Ethos: A Perspective*, 10 U.S. AIR FORCE ACADEMY JOURNAL OF LEGAL STUDIES 95, 103 (1999–2000).

77. Dunlap, *supra* note 76, at 100.

78. DOD MANUAL, *supra* note 1, ¶ 5.3.3.2 n.39 (quoting U.S. Comments, *supra* note 37, at 2057, 2063).

Nowhere does the telegram state that any operational risk or risk to attacking forces renders a precaution unreasonable, infeasible, or otherwise optional. On the contrary, a precaution that only slightly increases operational risk may be “consistent with mission accomplishment.” Similarly, a precaution that only slightly increases risk to attacking forces may be “allowable.” The *Manual* contains no such qualifications.

Importantly, the telegram states that measures to minimize collateral damage to *civilian objects* should not include steps that will place U.S. and allied lives at greater risk. In contrast, the telegram does not say that measures to minimize incidental injury to *civilians* should not include steps that will place U.S. and allied lives at greater risk. On the contrary, the telegram states that “collateral damage to civilian objects should *not* be given the *same* level of concern as incidental injury to civilians.”<sup>79</sup> Presumably, this sentence means that injury to civilians should be given a *higher* level of concern than damage to civilian objects. It seems to follow that measures to minimize incidental injury to civilians *may* include steps that will place attackers at greater risk, at least when the greater risk to attackers is clearly outweighed by the reduced risk to civilians. If anything, the telegram undercuts rather than supports the position of the *Manual*.

According to the *Manual*, the precautions rule never requires attackers to accept “an increased risk of harm to their own forces.”<sup>80</sup> In contrast, according to the telegram, the precautions rule requires attackers to accept “allowable risk to attacking forces.”<sup>81</sup> Some readers may hope that the citation to the telegram is intended to qualify the seemingly unqualified language of the text. However, according to the *Manual*,

it was desirable that this manual’s main text convey as much information as possible without the reader needing to read the footnotes. For example, it was desirable to avoid the possibility that a reader might misunderstand a legal rule addressed in the main text because a notable exception to that rule was addressed only in a footnote accompanying the text.<sup>82</sup>

---

79. *Id.* (emphasis added).

80. DOD MANUAL, *supra* note 1, ¶ 5.3.3.2.

81. *Id.* ¶ 5.3.3.2 n.39 (quoting U.S. Comments, *supra* note 37, at 2057, 2063).

82. *Id.* ¶ 1.2.1

This passage suggests that sources quoted in footnotes are not intended to significantly modify propositions put forward in the text.<sup>83</sup>

The *Manual* itself offers no direct argument for its interpretation of the precautionary principle, but we might cobble one together from pieces of an earlier section. Consider the following claims made by the *Manual*:

*Military necessity* may be defined as the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.<sup>84</sup>

Certain law of war rules may direct that persons comply with an obligation, but only to the extent feasible or consistent with *military necessity*. Examples of rules incorporating the concept of *feasibility* or *necessity* include the following:

- Certain affirmative duties to take feasible precautions to reduce the risk of harm to the civilian population and other protected persons and objects.<sup>85</sup>

These passages suggest that, according to the *Manual*, a feasible precaution is one that is consistent with military necessity, that is, with defeating the enemy as quickly and efficiently as possible. It would follow that any precaution that might make defeating the enemy more difficult is *ipso facto* infeasible and therefore not legally required.

This approach is clearly mistaken. While military necessity reflects only military considerations, the feasibility of a precaution takes into account both humanitarian and military considerations. It is therefore incorrect to equate feasibility with military necessity alone. As the *Manual* elsewhere states, “[t]he extent to which military necessity justifies [incidental] harms [to civilians] is addressed by the principle of proportionality.”<sup>86</sup> As we shall see, the principle of proportionality, not the principle of military necessity, determines the scope of our precautionary obligations.

---

83. As an aside, according to the *Manual*, the absence of an introductory signal indicates that a source directly states the proposition for which it is cited while sources that support a proposition are introduced by “see” and sources that elaborate upon a proposition are introduced by “see also.” *Id.* ¶ 1.2.4. This is some evidence (of course not alone dispositive) that the authors of the *Manual* believed that the telegram directly states the proposition contained in the text rather than merely supporting it or elaborating upon it.

84. DOD MANUAL, *supra* note 1, ¶ 2.2.

85. *Id.* ¶ 2.2.2.2.

86. *Id.* ¶ 2.2.1.

### C. Logic

Interestingly, the *Manual* distinguishes between the proportionality *principle* and the proportionality *rule*. The proportionality principle “generally weighs the justification for acting against the expected harms to determine whether the latter are disproportionate in comparison to the former.”<sup>87</sup> In contrast, the proportionality rule specifically “obliges persons to refrain from attacking where the expected harm incidental to such attacks would be excessive in relation to the military advantage anticipated to be gained.”<sup>88</sup>

According to the *Manual*,

[t]he principle of *proportionality* is reflected in many areas in the law of war.

*Proportionality* most often refers to the *jus in bello* standard applicable to persons conducting attacks. *Proportionality* considerations, however, may also be understood to apply to the party subject to attack, which must take feasible precautions to reduce the risk of incidental harm.<sup>89</sup>

Of course, persons conducting attacks also must take feasible precautions to reduce the risk of incidental harm. It seems to follow that proportionality considerations should inform the precautionary obligations of both attackers and defenders.

What would it mean for attackers or defenders to apply proportionality considerations to their precautionary obligations? It seems logical that they should weigh the justification for acting without taking a precaution against the expected harms of not taking that precaution to determine whether the latter are disproportionate in comparison to the former. If choosing different weapons or tactics would place civilians at much less risk and would place soldiers at only slightly greater risk, then they must be chosen. Conversely, if choosing different weapons or tactics would place civilians at only slightly less risk and would place soldiers at much greater risk, then they need not be chosen. When the risks on each side are more closely balanced, military commanders must exercise reasonable judgment based on the information available to them at the time.

---

87. *Id.* ¶ 2.4.1.2.

88. *Id.*

89. *Id.* ¶ 2.4.2.

On this approach, the precautions rule and the proportionality rule work together to balance humanitarian and military considerations across the targeting process. The proportionality rule weighs the *overall* military considerations in favor of an attack against the *overall* humanitarian considerations against an attack. In contrast, the precautions rule balances the *marginal* military considerations in favor of attacking using particular means and methods against the *marginal* humanitarian considerations in favor of attacking using alternative means and methods.<sup>90</sup>

Indeed, it would be illogical for the law of war to determine *whether* attacks may be carried out based on humanitarian considerations but not to regulate *how* attacks may be carried out based on humanitarian considerations. Put another way, the proportionality rule can *prohibit* the pursuit of a military advantage while the precautions rule can only *regulate* the pursuit of a military advantage. It makes no sense for humanitarian considerations to inform the more restrictive rule but not the less restrictive rule.

To see the illogic of the *Manual* even more clearly, consider that often the military advantage anticipated from an attack lies precisely in its contribution to the success of future missions or to the future safety of the attacking force. Nevertheless, if the expected harm to civilians is excessive in relation to the anticipated reduction in future operational and personal risk, then the attack is flatly prohibited by the proportionality rule. Yet, according to the *Manual*, humanitarian considerations that can outweigh operational and personal risk under the proportionality rule count for nothing under the precautions rule. We might be forced to accept such an illogical result by strong evidence or argument that the result is compelled by treaty or custom. As we have seen, the *Manual* provides no such evidence.

#### IV. PROPORTIONALITY AND HUMAN SHIELDS

An ordinary combatant takes refuge in an apartment building, for the specific purpose of using the presence of the residents to dissuade your forces from attacking him. Most of the residents are unaware of his presence. Others are too young, old, sick or infirm to leave. Your armed forces have no troops on the ground and no way to warn those residents who can leave

---

90. See Seth Lazar, *Necessity in Self-Defense and War*, 40 PHILOSOPHY AND PUBLIC AFFAIRS 3, 43 (2012) (“When comparing options that involve different degrees of risk to civilians and to friendly combatants, we must ask whether the additional marginal risk imposed on civilians is justified by the marginal reduction in risk to combatants.”).

to do so. The most discriminate weapons and tactics available to you will destroy half of the building, killing scores of residents.

As a legal officer, what would you advise? As a commander, what would you order? As an operator, what order would you obey?

#### A. *The Law*

Article 51 of Protocol I declares that

The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.<sup>91</sup>

The same article later states the proportionality rule that protects civilians from attacks “which may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>92</sup> One sentence later, the very same article categorically prohibits using civilians as human shields, either by moving civilians near military objectives (active shielding) or by moving military objectives near civilians (passive shielding) for the purpose of shielding those objectives from attack.<sup>93</sup> Finally, the next sentence states that “any violation of these prohibitions shall not release the [other] Parties to the conflict from their legal obligations with respect to the civilian population.”<sup>94</sup>

The import of Protocol I is unmistakable. The proportionality rule *shall be observed in all circumstances*. In particular, one party’s unlawful use of civilians as human shields *shall not release* other parties from their legal obligation not to knowingly inflict incidental harm on those civilians that would be excessive in relation to the anticipated advantage.<sup>95</sup> Returning to the scenar-

---

91. Protocol I, *supra* note 18, art. 51(1).

92. *Id.* art. 51(5)(b). *See also id.* art. 57(2)(a)(iii).

93. *Id.* art. 51(7). On some views, civilians who freely serve as voluntary human shields directly participate in hostilities and thereby forfeit their civilian immunity. One counter-intuitive implication of this view is that such civilians lose their legal protection against being used as human shields and hence it is not unlawful to use them as such.

94. *Id.* art. 51(8).

95. *See, e.g.*, Australian Department of Defence, ADDP 3.14, Targeting ¶ 3.12 (2009) (“Breaches of obligations by a party. A party is still required to apply the protections in Additional Protocol I (including the precautions required by Article 57), notwithstanding that the enemy attempts to shield military objectives from attacks or to shield, favour or

io with which this part began, under Protocol I it would be unlawful to attack the apartment building, killing scores of residents, in order to kill one ordinary combatant. This approach seems normatively sound. The residents should not lose their rights through no fault of their own, and it would be wrong to punish them for the crimes that the combatant commits against them.

Importantly, most international lawyers distinguish between *voluntary shields* and *involuntary shields*. Voluntary shields are civilians who freely choose to remain in or near military objectives, specifically intending to thereby prevent or dissuade attacks on those objectives.<sup>96</sup> Involuntary shields are civilians who are used by defending forces to prevent or dissuade attacks on nearby military objectives against their will, without their knowledge, or without their consent.<sup>97</sup> Although the legal status of voluntary shields remains controversial, many experts argue that voluntary shields directly participate in hostilities and thereby lose their protection under the proportionality rule.<sup>98</sup> In contrast, most international lawyers agree that involuntary shields retain their protection under the proportionality rule.<sup>99</sup> This part will focus on the status of involuntary shields, for reasons that will soon become clear.

On this balanced view, attacking forces must compare the collateral harm that they expect to inflict on involuntary shields with the military advantage that they expect to obtain from their attack. If the anticipated advantage is great and the expected harm is small then the attack is lawful. Conversely, if the expected harm is great and the anticipated advantage is small then the attack is unlawful. On this balanced view, the presence of involuntary shields does not automatically preclude an attack. Nor, however, does the fact that civilians are involuntary shields—rather than unwitting passersby—automatically permit an attack. Here, as elsewhere, the law-

---

impede military operations, by the presence or movement of civilians.”). Note that Article 57(2)(a)(iii) of Protocol I repeats the proportionality rule.

96. See, e.g., COMMENTARY ON THE HPCR MANUAL, *supra* note 10, at 144.

97. *Id.*

98. *Id.* But see INTERPRETIVE GUIDANCE, *supra* note 2, at 41–64; IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING 217–18 (2009); ADIL AHMAD HAQUE, LAW AND MORALITY AT WAR ch. 9 (forthcoming 2016).

99. *Id.* The UK *Manual* suggests that, under Protocol I, a defender’s use of human shields is “a factor to be taken into account in favour of the attackers in considering the legality of attacks.” UK MANUAL, *supra* note 59, ¶ 2.7.2. I examine and reject this position elsewhere. See HAQUE, *supra* note 98, ch. 9. For now it is sufficient to note that the UK *Manual* accepts that harm to human shields can render an attack disproportionate.

fulness of an attack depends on the balance of military considerations in favor of attack and humanitarian considerations against attack.

So much for the 174 parties to Protocol I. What about the 19 *non-signatories* to Protocol I, including the United States, Iran, Israel, and Sri Lanka? Is it possible that, under customary law, the proportionality rule need not be observed in all circumstances? Is it possible that, under customary law, one party's use of civilians as involuntary shields releases opposing parties from their legal obligation not to inflict otherwise excessive harm on those civilians?

Such a view defies the general principle of customary international law that "[t]he obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity."<sup>100</sup> Under customary law, each party's legal obligations with respect to the civilian population apply categorically, unconditionally and independently of the conduct of the opposing party. After all, these legal obligations are not owed to the opposing party but to the civilian population. These legal obligations rest not on considerations of fairness or reciprocity but on considerations of humanity.

To see the same point from a different angle, consider that the legal obligations of combatants correspond to and are grounded in the legal rights of civilians. Under international law, "individual civilians shall enjoy general protection against dangers arising from military operations . . . unless and for such time as they take a direct part in hostilities."<sup>101</sup> More broadly, civilians can only lose their legal rights through their own conduct. Conversely, civilians cannot lose their legal rights due to the illegal conduct of others. As Michael Schmitt puts it, "a Party to the conflict [that] is placing the civilians at risk in order to enhance its military position . . . should not be permitted to deprive civilians of the protections to which they are entitled under the LOAC."<sup>102</sup>

Put another way, the "in all circumstances" provision and the "shall not release" provision of Protocol I are not substantive norms that may be rejected while the principles of distinction, precautions, and proportionality are accepted. Instead, the two provisions are declaratory norms, and what they declare is the unconditional application of the principles of distinction,

---

100. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 6, at 498.

101. Protocol I, *supra* note 18, arts. 51(1), 51(3). *See also* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 6, at 19.

102. Michael N. Schmitt & John J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 37 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 53, 118 (2015).

precautions, and proportionality. One cannot endorse the principles of distinction, precautions, and proportionality only on the condition that the opposing party fulfills its legal obligations. On the contrary, it is constitutive of the principles of distinction, precautions, and proportionality that they apply unconditionally.

With these general considerations in mind, let us turn to specifics. According to the ICRC,

State practice indicates that an attacker is not prevented from attacking military objectives if the defender fails to take appropriate precautions or deliberately uses civilians to shield military operations. The attacker remains bound in all circumstances, however, to take appropriate precautions in attack and must respect the principle of proportionality even though the defender violates international humanitarian law.<sup>103</sup>

Put more precisely, an attacker is not *automatically* prevented from attacking military objectives if the defender uses civilians to shield military operations. In contrast, if the expected harm to involuntary shields would be excessive in relation to the anticipated military advantage then the attacker must respect the principle of proportionality even though the defender violates international humanitarian law.

For example, Israel is not a party to Protocol I and regularly faces adversaries that use civilians as human shields. Arguably, Israel is even a “specially affected State” with “a distinctive history of participation in the relevant matter, . . . that ha[s] had a wealth of experience, or that ha[s] otherwise had significant opportunities to develop a carefully considered military doctrine” and whose practice is therefore particularly significant.<sup>104</sup> Famously, the Israeli Supreme Court holds that when “civilians are forced to serve as “human shields” . . . the rule is that the harm to the innocent civilians must fulfill, *inter alia*, the requirements of the principle of proportionality.”<sup>105</sup> The official position of the Israeli Defense Forces remains that, “[w]ith respect to involuntary shields, Israel adopts the majority view that involuntary shields retain all civilian protection. An attacker . . . must consider their presence when making proportionality calculations.”<sup>106</sup>

---

103. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 6, at 71.

104. DOD MANUAL, *supra* note 1, ¶ 1.8.2.3.

105. HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel, 62(1) PD 507, ¶ 42 [2006] (Isr.), *reprinted in* 46 INTERNATIONAL LEGAL MATERIALS 373.

106. Schmitt & Merriam, *supra* note 102, at 117.

The ICRC found no contrary practice among States that are not party to Protocol I. In addition, no State party to Protocol I has stated that harm to involuntary shields may be excluded from the proportionality rule in non-international armed conflicts to which Protocol I does not apply. Since the use of involuntary shields is particularly common in non-international armed conflicts, the absence of contrary practice on this point is particularly telling.

Finally, according to Michael Schmitt, the view that “treats involuntary shields as civilians entitled to the full benefits of their international humanitarian law protections,” “seems to dominate among international humanitarian law experts.”<sup>107</sup> Schmitt elsewhere describes the opposing view, that harm to involuntary shields may be entirely disregarded in determining the proportionality of an attack, as “an extreme view that has, fortunately, gained little traction.”<sup>108</sup>

#### B. *The Manual*

From 2002 to 2013, the U.S. Joint Chiefs of Staff consistently took the position that

Joint force targeting . . . is driven by the principle of proportionality, so that otherwise lawful targets involuntarily shielded with protected civilians may be attacked . . . provided that the collateral damage is not excessive compared to the concrete and direct military advantage anticipated by the attack.<sup>109</sup>

While U.S. forces were engaged in over a decade of irregular warfare against armed groups that used civilians as involuntary shields, the Joint

---

107. Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 38 ISRAEL YEARBOOK ON HUMAN RIGHTS 17, 50–51 (2008).

108. Michael N. Schmitt, *Fault Lines in the Law of Attack*, in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 300 (Susan Breau & Agnieszka Jachec-Neale eds., 2006).

109. Joint Publication 3-60 (2013), *supra* note 73, at A-2. *See also* Chairman, Joint Chiefs of Staff, Joint Publication 3-60, Joint Targeting, A-2–A-3 (2002) (“Civilians may not be used as human shields in an attempt to protect, conceal, or render military objects immune from military operations. . . . Joint force responsibilities during such situations are driven by the principle of proportionality as mentioned above.”).

Chiefs consistently maintained that such civilians “have not lost their protected status” and remain protected by the proportionality rule.<sup>110</sup>

Unfortunately, the *Manual* departs from the balanced view of the U.S. Joint Chiefs of Staff, the IDF, the ICRC, and the majority of law of war experts. The *Manual* takes the following position:

Harm to the following categories of persons and objects would be understood not to prohibit attacks under the proportionality rule: (1) military objectives [that is, enemy combatants, civilians taking a direct part in hostilities, and military equipment]; (2) certain categories of individuals who may be employed in or on military objectives; and (3) human shields.<sup>111</sup>

Strikingly, the *Manual* draws no distinction between civilians who freely choose to serve as voluntary human shields and civilians forced to serve as involuntary human shields. According to the *Manual*, neither harm to voluntary shields nor harm to involuntary shields will prohibit attacks under the proportionality rule.

Recall the scenario with which we began. According to the *Manual*, the proportionality rule would not prohibit an attack on the apartment building, despite the fact that the expected deaths of scores of residents would be clearly excessive in relation to the concrete and direct military advantage anticipated from killing one ordinary combatant. Since the combatant intends to use the residents to shield himself from attack, harm to the residents is effectively excluded from the proportionality rule. According to the *Manual*, as far as proportionality is concerned, the residents may as well not exist.

The *Manual*'s position generates other illogical results. Consider the following scenario:

Military targets A and B are weapons caches containing the same number of rifles. Ten civilians are unwittingly passing by target A. Twenty civilians are forced to serve as involuntary human shields for target B.

If the military advantage anticipated by destroying the weapons in each cache is fairly small then it might be disproportionate to strike target A,

---

110. Chairman, Joint Chiefs of Staff, Joint Publication 3-60, Joint Targeting, E-2–E-3 (2007) (“[A] defender may not use civilians as human shields . . . . In these cases, the civilians have not lost their protected status and joint force responsibilities during such situations are driven by the principle of proportionality.”).

111. DOD MANUAL, *supra* note 1, ¶ 5.12.3.

killing ten civilians. However, according to the *Manual*, it is necessarily proportionate to strike target B, killing twenty civilians, because those civilians are being used as involuntary human shields. This result seems illogical. If a military advantage cannot justify killing ten civilians who have done nothing to forfeit their legal rights then an equivalent military advantage cannot justify killing twenty civilians who also have done nothing to forfeit their legal rights.

To see a subtler problem with the *Manual*'s position, compare the following scenarios:

1. An ordinary combatant runs through a crowded market because that is the fastest route to his destination. Attacking him will kill many nearby civilians.

On any plausible view, the proportionality rule would prohibit attacking the combatant in scenario 1, because the expected collateral harm is great and the anticipated military advantage is small. Now consider the following variation:

2. The same combatant runs through the same market because he hopes that he will not be attacked with so many civilians nearby. Attacking him will kill the same number of nearby civilians.

According to the *Manual*, the proportionality rule would permit attacking the combatant in scenario 2 because he is using the nearby civilians as human shields. Yet it seems illogical that the lawfulness of killing the nearby civilians should turn on the combatant's mental state—his purpose or motive for co-locating with civilians—rather than on the expected harm to the civilians and the anticipated military advantage of killing the combatant.

A legal position that generates such illogical results should be rejected absent overwhelming evidence in its favor. Remarkably, the *Manual* offers none. The *Manual* cites no State practice or *opinio juris* directly supporting its claim that harm to human shields cannot render an attack disproportionate. Since the proportionality rule states a general prohibition, the *Manual* bears the burden of establishing a specific exception or exemption to that general prohibition.

Interestingly, the *Manual* does not suggest that human shields directly participate in hostilities or are otherwise military objectives. Nor does the *Manual* suggest that, like civilians who work in or on military objectives, human shields "are deemed to have assumed the risk of incidental harm

from military operations” and therefore lose their protection under the proportionality rule.<sup>112</sup> Finally, the *Manual* does not suggest that there is some additional military advantage to attacking military objectives protected by human shields that offsets the expected loss of civilian life.<sup>113</sup>

Instead, the *Manual* states the following:

Use of human shields violates the rule that civilians may not be used to shield, favor, or impede military operations. The party that employs human shields in an attempt to shield military objectives from attack assumes responsibility for their injury, provided that the attacker takes feasible precautions in conducting its attack.

If the proportionality rule were interpreted to permit the use of human shields to prohibit attacks, such an interpretation would perversely encourage the use of human shields and allow violations by the defending force to increase the legal obligations on the attacking force.<sup>114</sup>

It is not clear whether these statements are intended *de lege lata* or *de lege ferenda*. I will consider each of these statements in the following sections, both as a matter of law and as a matter of logic.

Interestingly, in a 1990 law review article, W. Hays Parks writes that

While an attacker facing a target shielded from attack by civilians is not relieved from his duty to exercise reasonable precautions to minimize the loss of civilian life, neither is he obligated to assume any additional responsibility as a result of the illegal acts of the defender. Were an attacker to do so, his erroneous assumption of additional responsibility with regard to protecting the civilians shielding a lawful target would serve as an

---

112. *Id.* ¶ 5.12.3.2. In fact, harm to munitions workers can render an attack unlawful under the proportionality rule. *See, e.g.*, UK MANUAL, *supra* note 59, ¶ 2.5.2, at 24 (stating that “munitions factories are legitimate military targets and civilians working there, though not themselves legitimate targets, are at risk if those targets are attacked. Such incidental damage is controlled by the principle of proportionality”); COMMENTARY ON THE HPCR MANUAL, *supra* note 10, at 93–94 (“The majority of the Group of Experts felt that the principle of proportionality applies to such civilians as in all other cases.”).

113. As I argue elsewhere, the advantage anticipated from preventing one’s adversary from preventing an attack through the use of human shields is just the advantage anticipated from the attack itself. *See* HAQUE, *supra* note 98, ch. 9.

114. DOD MANUAL, *supra* note 1, ¶ 5.12.3.3.

incentive for a defender to continue to violate the law of war by exposing other innocent civilians to similar risk.<sup>115</sup>

Parks later chaired the DoD working group that prepared the *Manual*, from 1996 until 2010.<sup>116</sup> Although the *Manual* does not cite Parks' article in its discussion of human shields, the similarities between the two suggests that Parks' views may have influenced its formation. We should therefore consider any additional evidence or arguments contained in Parks' article.

First, we should consider whether the *Manual's* basic position—that no amount of expected incidental harm to human shields can render an attack unlawfully disproportionate—has any basis in U.S. practice. We have already seen that the U.S. Joint Chiefs have consistently maintained that involuntary shields retain their protection under the proportionality rule. What of the various branches of the U.S. Armed Forces?

The Commander's Handbook on the Law of Naval Operations rewards close reading. The applicable passage says that

Deliberate use of civilians to shield military objectives from enemy attack is prohibited. Although *the principle of proportionality underlying the concept of collateral damage continues to apply in such cases*, the presence of civilians within or adjacent to a legitimate military objective does not preclude attack of it. Such military objectives may be lawfully targeted and destroyed as needed for mission accomplishment. In such cases, responsibility for the injury and/or death of such civilians, if any, falls on the belligerent so employing them.<sup>117</sup>

Since the principle of proportionality “continues to apply” to involuntary shields, the claim that their presence “does not preclude attack” on shielded objectives can only mean that the presence of involuntary shields does not *automatically* or *necessarily* preclude attack on shielded objectives. Instead, such attacks are precluded *if and only if* they would be disproportionate. Similarly, the claim that “responsibility for the injury and/or death of such

---

115. W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1, 163 (1990).

116. See Edwin Williamson & Hays Parks, *Where Is the Law of War Manual?*, WEEKLY STANDARD (July 22, 2013), [http://www.weeklystandard.com/articles/where-law-war-manual\\_739267.html](http://www.weeklystandard.com/articles/where-law-war-manual_739267.html).

117. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCWP 5-12/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 8-3 (2007) (emphasis added).

civilians, if any, falls on the belligerent so employing them” can only mean that *if* the principle of proportionality is satisfied *then* responsibility falls on the defender but not the attacker. Conversely, if the principle of proportionality is violated then responsibility falls on both the defender that unlawfully uses human shields and the attacker that unlawfully kills human shields.

To see this point more clearly, contrast the previous passage with the immediately following passages:

The presence of civilian workers, such as technical representatives aboard a warship or employees in a munitions factory, in or on a military objective, does not alter the status of the military objective. *These civilians may be excluded from the proportionality analysis.*

Civilians who voluntarily place themselves in or on a military objective as “human shields” in order to deter a lawful attack do not alter the status of the military objective. While the law of armed conflict is not fully developed in such cases, *such persons* may also be considered to be taking a direct part in hostilities or contributing directly to the enemy’s war-fighting/war-sustaining capability, and *may be excluded from the proportionality analysis.*<sup>118</sup>

The Handbook explicitly states that civilian workers and voluntary shields may be excluded from the proportionality analysis. In sharp contrast, the Handbook does *not* say that involuntary shields may be excluded from the proportionality analysis. This sharp contrast between adjacent provisions implies that involuntary shields may *not* be excluded from the proportionality analysis.

In 2011, the U.S. Air Force targeting doctrine endorsed the proportionality rule and nowhere excluded harm to involuntary shields from its application or interpretation.<sup>119</sup> Instead, the Air Force stated that

civilians may not be used as “human shields” to protect military targets from attack. The fact that they may be used to do so does not necessarily prevent the military object from being attacked. As directed or time permitting, targets surrounded by human shields will probably need to be re-

---

118. *Id.* at 8-4 (emphasis added).

119. Department of the Air Force, AFDD 3-60, Targeting 89 (2006, updated 2011).

viewed by higher authority for policy and legal considerations based on the specific facts.<sup>120</sup>

Indeed, the use of involuntary shields does not *necessarily* prevent military objects from being lawfully attacked. Nevertheless, the use of involuntary shields may render an attack unlawful under the proportionality rule.

In 2014, the U.S. Air Force Judge Advocate General's School explained that

Where civilians are present on the battlefield or in proximity to legitimate military objectives, or are being used to shield legitimate targets from an attack that otherwise would be lawful, they are at risk of injury incidental to the lawful conduct of military operations. A law of armed conflict violation occurs where the civilian population is attacked intentionally; where collateral civilian casualties become excessive in relation to military necessity; and/or where a defender or attacker employs civilians as voluntary or involuntary human shields. Each constitutes a violation of the principle of distinction.<sup>121</sup>

Indeed, involuntary shields are at risk of injury incidental to the *lawful* conduct of military operations. In contrast, an attack that *otherwise* would be lawful is a law of armed conflict violation where collateral civilian casualties become excessive in relation to military necessity. Tellingly, the Air Force JAG School draws no distinction between civilians present on the battlefield or in proximity to legitimate military objectives and civilians being used as involuntary shields. The proportionality rule protects them both equally.

Elsewhere, the Air Force JAG School notes that a “nation that uses its civilian population to shield its own military forces violates the law of war at the peril of the civilians behind whom it hides.”<sup>122</sup> Importantly, this statement appears in a discussion of the principle of distinction, expressing the obligation of defenders to distinguish themselves from their civilian population. When the authors discuss the principle of proportionality, a mere five sentences later, involuntary shields are not even mentioned. The authors later clarify that “the use of human shields does not necessarily

---

120. *Id.* at 90.

121. Department of the Air Force, The Judge Advocate General's School, Air Force Operations and the Law 17 (3d ed., 2014).

122. *Id.* at 271.

prevent the military object from being attacked.”<sup>123</sup> In contrast, as we have seen, an attack that inflicts excessive harm on civilians not taking direct part in hostilities—including involuntary shields—is a law of armed conflict violation. It therefore seems that the *Manual* departs from consistent U.S. practice.

In his 1990 article, Parks took the view that

Excluded in determination of collateral civilian casualties are: . . . civilians injured or killed as a result of the enemy placing them around a lawful target in an effort to shield it from attack.<sup>124</sup>

Naturally, Parks’ article could not anticipate U.S. practice, Israeli practice, or other State practice in the twenty-six years since its publication. Most of the State practice cited in the article pre-dates the adoption of Protocol I. Since Protocol I crystallized the proportionality rule—and affirmed that the rule rests on humanity irrespective of reciprocity—State practice prior to 1977 is inherently unreliable evidence that customary international law exempts human shields from protection under the proportionality rule.

In any event, Parks’ article does not identify a single example of a State applying the proportionality rule while excluding human shields from its protection. Of course, States have carried out attacks on military objectives despite the presence of human shields. It hardly follows that these States excluded expected harm to human shields from their proportionality analysis. They may have determined that the expected harm to human shields was outweighed by the anticipated military advantage. Alternatively, these States may not have conducted a serious proportionality analysis at all. As leading U.S. lawyers elsewhere explain,

Although the same action may serve as evidence both of State practice and *opinio juris*, the United States does not agree that *opinio juris* simply can be inferred from practice.

...

A more rigorous approach to establishing *opinio juris* is required. It is critical to establish by positive evidence, . . . that States consider themselves

---

123. *Id.* at 273.

124. Parks, *supra* note 115, at 174.

legally obligated [or permitted] to follow the courses of action reflected in [purported] rules.<sup>125</sup>

Such positive evidence of *opinio juris* is essential to distinguish State practice that reflects or generates customary law from State practice that misapplies or violates customary law. *Opinio* without *usus* is sometimes empty, but *usus* without *opinio* is always blind.

Remarkably, in 225 pages, which include 663 footnotes, Parks identifies only one source that explicitly states that the proportionality rule excludes harm to involuntary shields: an unpublished 1983 document entitled “Proportionality in a Nutshell” written by Parks himself.<sup>126</sup> Simply put, Parks’ article identifies no State practice or *opinio juris* supporting the categorical exclusion of harm to involuntary shields from the proportionality rule.<sup>127</sup>

Importantly, Parks writes that “The classic example of a disproportionate action is the destruction of a village of 500, including its population, to destroy a single enemy sniper or machine gun position.”<sup>128</sup> Yet, if the sniper or gunner positions himself in the village for the specific purpose of using the proximity of civilians to prevent or dissuade an attack on his position then he uses those civilians as passive, involuntary human shields. As we have seen, according to Parks, expected harm to involuntary shields should be excluded from the application of the proportionality rule. It follows that Parks’ “classic example of a disproportionate action” is, according to Parks’ own view, perfectly proportionate after all. This implication seems like a *reductio ad absurdum* of the view from which it derives.

---

125. John B. Bellinger and William J. Haynes, *A US Government Response to the International Committee of the Red Cross’s Customary International Humanitarian Law Study*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 443, 446–47 (2007).

126. Parks, *supra* note 115, at 174.

127. Unfortunately, Parks’ article seems to be cited more often than it is critically examined. For example, Yoram Dinstein writes that, under customary international law, “should civilian casualties ensue from an illegal attempt to shield combatants or a military objective, the ultimate responsibility lies with the Belligerent Party placing civilians at risk.” DINSTEIN, *supra* 5, at 155. In support of this claim, Dinstein cites only two sources: Parks’ article and a student comment that in turn cites only Parks’ article.

128. Parks, *supra* note 115, at 168.

### C. Responsibility

As we have seen, the *Manual* asserts that:

The party that employs human shields in an attempt to shield military objectives from attack assumes responsibility for their injury, provided that the attacker takes feasible precautions in conducting its attack.<sup>129</sup>

It seems that, according to the *Manual*, a defender's "responsibility" for expected harm to human shields relieves an attacker of its "responsibility" for expected harm to human shields, provided that the attacker takes feasible precautions in conducting its attack. On this view, attackers may not inflict *unnecessary* harm on human shields but attackers may inflict *disproportionate* harm on human shields or, more precisely, expected harm that would ordinarily be considered excessive in relation to the anticipated military advantage. As we shall see, this argument has no basis in law or logic.

#### 1. Law

In support of its argument, the DoD cites two U.S. sources: an instructor training document from 1975 and the 1991 telegram to the ICRC discussed earlier.<sup>130</sup> Since the training document predates Protocol I and is clearly not an official expression of *opinio juris*, I will discuss it no further.

The telegram to the ICRC is worth reading closely. Recall that the telegram is a point-by-point response to an ICRC memorandum. Paragraph 4B(1) of the ICRC memorandum states that

A distinction must be made in all circumstances between combatants and military objectives on the one hand, and civilians and civilian objects on the other. It is forbidden to attack civilian persons or objects *or to launch indiscriminate attacks*.<sup>131</sup>

In direct response to this paragraph, the telegram says that

In no case may a combatant force utilize individual civilians or the civilian population to shield a military objective from attack. A nation that utilizes

---

129. DOD MANUAL, *supra* note 1, ¶ 5.12.3.3.

130. *Id.* ¶ 5.12.3.3 n.315.

131. U.S. Comments, *supra* note 37, at 2057, 2059 (emphasis added).

civilians to shield a target from attack assumes responsibility for their injury, so long as an attacker exercises reasonable precaution in executing its operations.<sup>132</sup>

Read alongside the passage of the ICRC memorandum to which it directly responds, this passage of the telegram says that harm to human shields will not render an attack *indiscriminate* so long as an attacker exercises reasonable precaution in executing its operations. So understood, this passage of the telegram seems sound. Presumably, reasonable precaution in executing operations includes directing attacks at specific military objectives, using means and methods of combat that can be so directed and the effects of which can be limited as required by international humanitarian law.

Crucially, the *Manual* cites the quoted passage of the telegram in support of its position that harm to human shields will not render an attack *disproportionate*.<sup>133</sup> Yet, as we have seen, neither this passage of the telegram nor the passage of the memorandum to which it directly responds says anything about the proportionality rule. Instead, the ICRC invokes the proportionality rule for the first time in the next paragraph of its memo, 4B(2):

All feasible precautions must be taken to avoid loss of civilian life or damage to civilian objects, and attacks that would cause incidental loss of life or damage which would be excessive in relation to the direct military advantage anticipated are prohibited.<sup>134</sup>

In direct response to *this* paragraph, the telegram makes four comments on the nature and application of the proportionality rule.<sup>135</sup> Revealingly, nowhere in its discussion of the proportionality rule does the telegram refer to the responsibility of the defending force or otherwise indicate that the proportionality rule excludes harm to human shields.

In short, the telegram states that involuntary shields *retain* their protection under the precautions rule and that an attack that satisfies the precautions rule is necessarily not *indiscriminate*. In contrast, the telegram never says that involuntary shields *lose* their protection under the proportionality rule or that an attack that satisfies the precautions rule is necessarily not *disproportionate*. Simply put, the telegram provides no legal support for the

---

132. *Id.* at 2063.

133. DOD MANUAL, *supra* note 1, ¶ 5.12.3.3 n.315.

134. U.S. Comments, *supra* note 37, at 2057, 2059.

135. *Id.* at 2063–64.

*Manual's* position that civilians used as involuntary shields retain their protection under the precautions rule but lose their protection under the proportionality rule.

In his 1990 article, Parks asserts that “[u]nder the customary law of war, casualties resulting from a defender’s use of the civilian population as concealment or cover from attack of legitimate military objectives are not the responsibility of the attacker so long as he has exercised ordinary care.”<sup>136</sup> Parks repeats this assertion throughout his article.<sup>137</sup> Remarkably, Parks cites only two sources that directly support his assertion. The first source is a quotation from the 1924 edition of *Air Power and War Rights* by James Spaight, a distinguished scholar and lawyer for the British Air Ministry:

[A]s a belligerent cannot allow himself to be prejudiced because the enemy locates . . . [military] objectives in places where they cannot be destroyed without incidental injury to civilians, he is not responsible for the resulting damage provided all due care is taken to prevent unnecessary injury.<sup>138</sup>

Parks’ reliance on this quotation is curious since, in the 1933 edition of the very same book, Spaight writes that “[i]f a military objective is situated in such a densely populated neighborhood, or if the circumstances of the case are otherwise such that any attack upon it from the air is likely to involve a disastrous loss of non-combatant life, aircraft are bound to abstain from bombardment.”<sup>139</sup> It seems that Spaight’s considered view was that attackers remain bound by the proportionality rule despite the misconduct of defenders.

The second source that Parks cites as direct support for his assertion is the following passage from the 1976 Air Force Pamphlet discussed earlier:

The failure of states to segregate and separate their own military activities, and particularly to avoid placing military objectives in or near populated areas and to remove such objectives from populated areas, significantly and substantially weakens effective protection for their own population. A party to a conflict which places its own citizens in positions of danger

---

136. Parks, *supra* note 115, at 162.

137. *See, e.g., id.* at 163, 168, 176, 178, 182.

138. *Id.* at 162 (quoting JAMES SPAIGHT, *AIR POWER AND WAR RIGHTS* 244 (1st ed. 1924)).

139. JAMES SPAIGHT, *AIR POWER AND WAR RIGHTS* 210 (2d ed. 1933).

by failing to carry out the separation of military activities from civilian activities necessarily accepts, under international law, the results of otherwise lawful attacks upon valid military objectives in their territory.<sup>140</sup>

This passage provides no support for Parks' assertion. The pamphlet states that a defender's placement of military objectives in or near a populated area weakens *effective* protection for their own population. The pamphlet does not state that a defender's misconduct weakens *legal* protection for its own population. Similarly, the pamphlet states that a party that places its own citizens in danger accepts the results of *otherwise lawful* attacks upon valid military objectives. Evidently, an attack expected to cause harm to civilians out of all proportion to the anticipated military advantage is not otherwise lawful. Nowhere does the pamphlet state that an otherwise unlawful attack is lawful if the civilians it is expected to kill are human shields.

On the contrary, the Air Force pamphlet observes that civilian casualties may occur in armed conflict due to several factors, including the fact that civilians may be "used unlawfully in an attempt to shield military objectives from attack."<sup>141</sup> In the very same paragraph, the pamphlet then explains that

Attacks are not prohibited against military objectives even though incidental injury or damage to civilians will occur, but such incidental injury to civilians or damage to civilian objects must not be excessive when compared to the concrete and direct military advantage anticipated. Careful balancing of interests is required between the potential military advantage and the degree of incidental injury or damage . . . .<sup>142</sup>

In short, the pamphlet applies the proportionality rule to all incidental injury to civilians, with no exception for civilians used as involuntary shields.

Finally, Parks asserts throughout his article that international law traditionally held defenders "responsible" for collateral harm to civilians.<sup>143</sup> Parks appears to rest his assertion on the historical fact that, for centuries, international law did not clearly prohibit attackers from inflicting extensive collateral harm on civilians, paradigmatically during siege warfare, but only

---

140. Parks, *supra* note 115, at 162 (quoting AFP 110-31, *supra* note 23, at 5-13).

141. AFP 110-31, *supra* note 23, at 5-10.

142. *Id.*

143. *See, e.g.*, Parks, *supra* note 23, at 4, 51, 55, 59, 62.

from attacking undefended areas. Parks goes on to claim that Protocol I illegitimately “shifted” responsibility from defenders to attackers.<sup>144</sup>

In my view, Parks’ legal argument rests on a conceptual mistake. As the *Manual* itself recognizes, the law governing the conduct of hostilities is prohibitive rather than permissive.<sup>145</sup> It follows that the absence of a clear prohibition should never be confused for an affirmative authorization. Sadly, there was a time when international law did not clearly prohibit rape, enslavement, or the murder of prisoners. It hardly follows that international law authorized such conduct or held defenders “responsible” for such conduct. Similarly, the fact that the proportionality rule was slow to crystallize does not entail that customary law authorized attackers to inflict expected harm out of all proportion to anticipated advantage or absolved attackers of “responsibility” for such disproportionate harm. We should not interpret the slow and halting advance of international law as a positive endorsement of the *status quo ante*. It seems that Parks’ argument, repeated almost *verbatim* in the *Manual*, is legally unsound. As we shall see, this argument is logically invalid as well.

## 2. Logic

To recall, the *Manual* claims that a defender who employs human shields *assumes responsibility* for their injury and concludes that an attacker who expects to kill many human shields in pursuit of a small military advantage does not violate the proportionality rule. Simply put, the DoD’s conclusion is a *non sequitur*. Of course, defenders who use human shields are responsible for the foreseeable harm that they occasion. It simply does not follow that attackers who kill human shields are not responsible for the foreseeable harm that they inflict and may therefore inflict foreseeable harm out of all proportion to the military advantage they anticipate. In the context of war, attributing responsibility is not a zero-sum game.

Return to the scenario with which we began. No doubt, the combatant has acted wrongfully, even criminally, by using the residents as involuntary shields. But now the choice is yours: to kill the residents or to spare them. If you choose to kill the residents then you cannot deny responsibility for your choice. The combatant is responsible for his choice and you are responsible for yours. The combatant is wrong to use the residents as invol-

---

144. See, e.g., *id.* at 112.

145. DOD MANUAL, *supra* note 1, ¶ 1.3.3.1.

untary shields and you would be wrong to kill the residents simply to eliminate the combatant.

Suppose that a bank robber takes a bank teller hostage and uses her to shield his escape. You are a police officer and may lawfully kill the bank robber to prevent his escape. However, if you shoot at the bank robber then you will almost certainly kill the hostage as well. If you shoot at the bank robber and kill the hostage then no doubt the robber (assuming he survives) will be held criminally responsible for her death. After all, he put her in harm's way. But surely you may also be held criminally responsible for her death. After all, you shot her. Perhaps you can convince a court that you did not act recklessly, that the risk of killing the hostage, though substantial, was justifiable in light of the danger posed by the bank robber. But surely you will convince no one that, so long as you tried your best not to shoot the hostage, you had no obligation to weigh the risk of killing her against the need to stop the robber. The robber put her in harm's way but, ultimately, her life was in your hands.

In his 1990 article, Parks writes that “[p]lacing civilians in proximity to a military position that is likely to be attacked with the intent of shielding that object from attack differs little from lining up those same civilians and executing them by firing squad; the same premeditation is required.”<sup>146</sup> Certainly, those who line up civilians before a firing squad are responsible for their deaths. Nevertheless, the members of the firing squad who *shoot* the civilians are *also* responsible for their deaths. The guilt of the former does not entail the innocence of the latter.

Parks begs the question when he writes that “the illegal act . . . is the crime that places innocent civilians at risk, while attack of a lawful target is a legitimate act authorized by the law of war.”<sup>147</sup> Indeed, using human shields is an illegal act and a war crime. However, attack of a lawful target is *not* a legitimate act authorized by the law of war if such an attack is expected to inflict harm on civilians that would be excessive in relation to the military advantage anticipated. In the quoted passage, Parks seems to as-

---

146. Parks, *supra* note 115, at 163. As an aside, note that this sentence is literally false. If the defenders place civilians in proximity to a military position with the intent of shielding that object from attack then they do not intend for the civilians to be killed. On the contrary, they intend for no attack to take place and for both the object and the civilians to remain unharmed. If the defenders are aware that the position is likely to be attacked then they cause the deaths of the civilians with extreme recklessness, not with premeditation.

147. *Id.* at 163.

sume his conclusion, namely that expected harm to human shields cannot render attack of a lawful target an illegitimate act prohibited by the law of war.

Finally, Parks writes the following:

Attack of a military objective, wherever located, is lawful. While the number of civilian casualties that occur are the result of that attack, the attack is not necessarily the cause of those casualties, nor may they necessarily be attributable to the attacker. The approach under discussion suggests that “but for the attack, these civilian losses would not have occurred; therefore the attacker is responsible.” This approach would make any attack on any target, wherever located, illegal, notwithstanding the actions of the defender.<sup>148</sup>

Every sentence of this passage is incorrect. First, attack of a military objective, wherever located, is lawful *only if* it is not expected to inflict harm on civilians that would be excessive in relation to the military advantage anticipated. Second, if civilian casualties are the result of an attack then, by definition, the attack *is* necessarily the cause of those casualties. That is what the words “cause” and “result” mean. Third, if “but for the attack, these civilian losses would not have occurred” then of course the attacker is *causally* responsible for those losses (as is the defender). In contrast, the attacker is *criminally* responsible for those losses only if the expected losses were excessive in relation to the anticipated advantage. For its part, the defender is criminally responsible for using human shields whether harm results or not.<sup>149</sup> Finally, the approach Parks rejects would not make any attack on any target, wherever located, illegal, if it is expected to harm civilians. Instead, on this approach, an attack on a legitimate target is illegal only if the expected harm to civilians would be excessive in relation to the anticipated military advantage.

#### D. Deterrence

The *Manual* also claims that “[i]f the proportionality rule were interpreted to permit the use of human shields to prohibit attacks, such an interpreta-

---

148. *Id.* at 177.

149. *See, e.g.*, Rome Statute of the International Criminal Court art. 8(2)(b)(xxiii), July 17, 1998, 2187 U.N.T.S. 90.

tion would perversely encourage the use of human shields.”<sup>150</sup> Put the other way around, if the proportionality rule is interpreted to exclude expected harm to human shields, such an interpretation would discourage the use of human shields. Parks makes similar claims throughout his 1990 article.<sup>151</sup> This argument rests on a series of legal, factual, and logical mistakes.

First, this argument falsely assumes that individual civilians enjoy specific legal protections unless and for such time as stripping them of some legal protections might yield desirable consequences. On the contrary, individual civilians enjoy general legal protection unless and for such time as they take a direct part in hostilities.<sup>152</sup> It is a truism that the law of war seeks to “alleviat[e] as much as possible the calamities of war.”<sup>153</sup> It hardly follows that the law of war is some crude exercise in rule-consequentialism.<sup>154</sup> Parties should always strive to reduce overall suffering, but never at the expense of individual civilians entitled to legal protection.

For example, the law of war does not permit terroristic attacks directed against civilians even when such terror would hasten the end of the war. Nor does the law of war permit attacking civilians in order to leave irregular combatants nowhere to hide. Similarly, even if excluding expected harm to involuntary shields from the proportionality rule would discourage the future use of involuntary shields, it simply does not follow that the law of war should deny those civilians who are used as involuntary shields legal protection under the proportionality rule. Civilians lose their legal protection only when they choose to directly participate in hostilities, not whenever dictated by some utilitarian calculus.

Importantly, it is a State’s conduct, not its interpretation of the proportionality rule as such, that affects a defender’s incentives to use human shields. In order to discourage the use of human shields in the way the *Manual* suggests, the United States would have to order our forces to knowingly kill civilian men, women, and children—forced against their will or used without their consent as involuntary human shields—whose deaths

---

150. DOD MANUAL, *supra* note 1, ¶ 5.12.3.3.

151. See Parks, *supra* note 115, at 163, 177, 181.

152. See CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 6, at 19; Protocol I, *supra* note 18, art. 51.

153. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight [St. Petersburg Declaration], Nov. 29/Dec. 11, 1868, 138 Consol. T.S. 297, 18 Martens Nouveau Recueil (ser. 1) 474.

154. Roughly, rule-consequentialism is the view that we morally ought to follow those rules that, were they generally followed, would produce the greatest aggregate wellbeing across all affected persons. See, e.g., 1 DEREK PARFIT, ON WHAT MATTERS 375 (2011).

would ordinarily be considered excessive in relation to the concrete and direct military advantage anticipated. In blunt terms, the *Manual* proposes that we kill more civilians now so we will have to kill fewer civilians later.

As far as I am aware, there is no empirical evidence that if we exclude civilians used as human shields from the proportionality rule then we will end up killing fewer civilians overall. True, if attackers disregard harm to human shields then defenders may use fewer civilians as human shields; on the other hand, attackers will kill almost all of those civilians whom defenders nevertheless use as human shields. The number used may be smaller, but the proportion killed will be greater. Conversely, if attackers apply the proportionality rule to human shields then defenders may use more civilians as human shields; on the other hand, attackers will only kill some of the civilians who are in fact used as human shields. The number used may be greater, but the proportion killed will be smaller. Absent empirical evidence that the difference in the number used will offset the difference in the proportion killed, the DoD's position seems to rest entirely on *a priori* speculation.

Of course, the proportionality rule prohibits attacks expected to kill civilians that are based on mere speculation that the long-term benefits will outweigh the short-term costs. Instead, the proportionality rule compares expected harm to civilians only to the *concrete and direct* military advantage anticipated. According to the ICRC, "the advantage concerned should be substantial and relatively close, and . . . advantages which are hardly perceptible and those which would only appear in the long term should be disregarded."<sup>155</sup> The *Manual* takes a more expansive view (a topic for another day), but concedes that, under the proportionality rule, "the military advantage may not be merely hypothetical or speculative."<sup>156</sup> It seems illogical to deny civilians protection under the proportionality rule based on the very kind of speculation that the rule itself rejects.

Indeed, the DoD's *a priori* prediction that disregarding expected harm to involuntary shields will dramatically reduce the use of involuntary shields is highly implausible. Presumably, defenders heedless of law and morality will use involuntary shields if and only if the expected benefits to defenders outweigh the expected costs to defenders. By disregarding harm to involuntary shields, attackers deprive defenders of one potential benefit of using human shields, namely temporary avoidance of attack. The question then

---

155. PROTOCOL I COMMENTARY, *supra* note 22, ¶ 2209.

156. DOD MANUAL, *supra* note 1, ¶ 5.12.5.

becomes whether the other expected benefits of using involuntary shields outweigh the expected costs of using involuntary shields.

Importantly, it is not ordinarily costly for a combatant to take refuge in a residential building, for a group to establish a command center in a hospital, or for a unit to fire rockets from a schoolyard. In each such case, defenders use civilians as involuntary shields at little cost to themselves. It follows that if ruthless defenders expect any significant benefit from using civilians as involuntary shields then they will do so irrespective of the legal position of the attacking force. For example, if such defenders expect that the killing of involuntary shields by attackers will redound to the defenders' broader strategic advantage—by, for instance, gaining them new recruits or by politically isolating attackers—then defenders will continue to use involuntary shields when it is not costly to do so. Significantly, since only the defenders' subjective expectations affect their behavior, it does not matter whether they are in fact likely to gain the advantage that they expect.

In an earlier exchange, Charles Dunlap notes that taking and maintaining hostages is often quite costly, such that if harm to hostages is excluded from the proportionality rule then the costs of taking hostages would outweigh the benefits of taking hostages.<sup>157</sup> Of course, most involuntary shields are not hostages who need to be fed, clothed, washed, hidden, and regularly moved (think again of the apartment residents, the hospital patients, and the school children in the previous examples). In addition, many hostages are held for ransom rather than for use as human shields. Finally, many hostages are taken from the attacker's political community; attackers may therefore refrain from attack not for legal reasons but for emotional, political or ethical reasons. It is therefore doubtful that excluding harm to hostages from the proportionality rule will reduce the number of hostages taken by defenders enough to offset the number of hostages killed by attackers.

In any event, as we have seen, such utilitarian considerations are legally beside the point. The law of war protects each individual civilian unless and for such time as he or she directly participates in hostilities. There is no legal basis for stripping individuals of their protection under the propor-

---

157. See Charles J. Dunlap, Jr., *Human Shields and the DOD Law of War Manual: Can't We Improve the Debate?*, JUST SECURITY (June 25, 2015), <https://www.justsecurity.org/24199/human-shields-dod-law-war-manual-cant-improve-debate/>. For my initial response, see Adil Ahmad Haque, *Human Shields and Proportionality: A Reply to Charlie Dunlap*, JUST SECURITY (June 26, 2015), <https://www.justsecurity.org/24233/human-shields-reply-charlie-dunlap/>.

tionality rule in the hope that the long-term benefits to others may outweigh the immediate costs to them. Nor, as we have seen, is there any factual or logical basis for doing so.

*E. Fairness*

Finally, the DoD claims that

If the proportionality rule were interpreted to permit the use of human shields to prohibit attacks, such an interpretation would . . . allow violations by the defending force to increase the legal obligations on the attacking force.<sup>158</sup>

Similarly, in his 1990 article, Parks writes that “an attacker facing a target shielded from attack by civilians . . . is [not] obligated to assume any additional responsibility as a result of the illegal acts of the defender.”<sup>159</sup>

In fact, violations by the defending force do not “increase” the legal obligations on the attacking force, but instead trigger the ordinary legal obligation not to inflict excessive incidental harm on civilians. Evidently, defending forces trigger this obligation whenever they locate their personnel and equipment near civilians, whether or not they intend to thereby shield their personnel and equipment from attack and whether or not they fail to take feasible precautions against the effects of attacks. When this obligation is triggered, attackers are free to grumble but they must obey.

Similarly, Parks’ reference to “additional responsibility” is misplaced. Both the responsibility to exercise reasonable precautions and the responsibility not to inflict excessive incidental harm on civilians are basic responsibilities that the law of war imposes on all attacking forces. Naturally, both responsibilities are triggered if, and only if, civilians are near military objectives. Importantly, these general responsibilities are triggered whether civilians are near military objectives by chance or by force, and whether defenders are fulfilling or breaching their own legal responsibilities.

Perhaps the DoD means that it is *unfair* for defending forces to intentionally trigger the legal obligations of the attacking force, through unlawful conduct, as a means of obtaining tactical advantage. Put more simply, it seems unfair for defenders to profit from their wrongdoing. Indeed it is. However, it does not follow that attacking forces may deprive defending

---

158. DOD MANUAL, *supra* note 1, ¶ 5.12.3.3.

159. Parks, *supra* note 115, at 163.

forces of such unfair advantages by killing involuntary shields out of all proportion to the military advantage anticipated from an attack.

War, like other parts of life, is often unfair. Killing involuntary shields shifts the unfair burdens imposed on the attacking force, not onto the defending force that imposed them, but onto the latter's civilian victims. We cannot correct but can only compound the unfairness of war by killing civilians who have done nothing to forfeit their legal rights. Instead, we should annul the unfair advantages gained through the use of involuntary shields by prosecuting those who use them for war crimes. We should not, in effect, punish civilians for war crimes committed against them.<sup>160</sup>

## V. CONCLUSION

As its authors remind its users, the *Manual* "is not a substitute for the careful practice of law."<sup>161</sup> In my view, the careful practice of law will often require cautioning commanders and warfighters against following the *Manual*'s provisions on target selection, precautions in attack, and proportionality as it concerns human shields. Legal advisors are duty-bound to offer professional, candid, and independent counsel regarding, *inter alia*, the international law of war. If a legal advisor determines that military operations that comply with the *Manual* nevertheless violate international law then it is his or her duty to inform combatants of the discrepancy and to advise the legally safer course of action. If combatants find such advice confusing or unsatisfying then they should address their concerns to the General Counsel of the DoD.

The *Manual* "does not necessarily reflect the views of any other department or agency of the U.S. Government or the views of the U.S. Government as a whole."<sup>162</sup> It follows that the *Manual* cannot be assumed to reflect U.S. *opinio juris* or to generate customary international law. Nevertheless, states like Saudi Arabia and Sri Lanka may cite the *Manual* to justify their wartime conduct, particularly with respect to the killing of civilians forced to serve as involuntary human shields.<sup>163</sup> If they do so then the U.S. State Department may have to intervene and clarify the U.S. position.

---

160. Cf. Schmitt, *supra* note 108, at 301 (observing that "equalizing the fighting position of belligerents is not an underlying purpose of LOIAC").

161. DOD MANUAL, *supra* note 1, ¶ 1.1.2.

162. *Id.* ¶ 1.1.1.

163. See, e.g., Daya Gamage, *U.S. Clears Sri Lanka of Civilian Deaths: Faults Tiger Human Shield*, ASIAN TRIBUNE (Aug. 14, 2015), <http://www.asiantribune.com/node/87659> ("The

Finally, the *Manual* “does not . . . preclude the Department from subsequently changing its interpretation of the law.”<sup>164</sup> In my view, the Department should change its interpretation of the law without delay. Every day that the *Manual* remains unchanged increases the risk that it will be relied upon by the U.S. military, by the U.S. Central Intelligence Agency, or by foreign States. If that happens then civilian men, women, and children will lose their lives in violation of international law. Alternatively, the law of war may lose its moral credibility in the eyes of our armed forces.

When the President of the United States assures the American people and the people of the world that the United States obeys the law of war—even in covert operations—those words should mean something. Those words should mean that the United States selects targets so as to minimize loss of civilian life; that the United States takes precautions to avoid harm to civilians, even at reasonable risk to attacking forces; and that the United States will not knowingly kill civilians except when justified by the concrete and direct military advantage anticipated. So long as the *Manual* remains unchanged, such assurances will mean little or even nothing. The world will not know whether the President refers to the international law of war or to the law of the *Manual*. Whenever civilians are killed in U.S. operations the world will wonder which law we followed. Many will assume the worst. In such ways, the *Manual* undermines the international legitimacy of U.S. military action. In this sense, the *Manual* is a self-inflicted act of “lawfare.”<sup>165</sup>

---

Government of Sri Lanka should immediately use its diplomatic channels to clear its name with the US Department of State based on the deliberations found in the 1204-page DOD Manual. . . . Using the language of the DOD Manual when in discourse with state department officials is the first move: after all, it is their policy document on Law of War.”)

164. DOD MANUAL, *supra* note 1, ¶ 1.1.1.

165. For the intended meaning and unintended use of the term, see Charles J. Dunlap, Jr., *Lawfare Today . . . and Tomorrow*, 87 INTERNATIONAL LAW STUDIES 315 (2011).