

## IX

---

---

### Distinction and Loss of Civilian Protection in International Armed Conflicts

---

---

Yoram Dinstein\*

#### *A. The Principle of Distinction*

**T**here are several cardinal principles lying at the root of the law of international armed conflict. Upon examination, none is more critical than the “principle of distinction.”<sup>1</sup> Undeniably, this overarching precept constitutes an integral part of modern customary international law.<sup>2</sup> It is also reflected in Article 48 of the 1977 Protocol I Additional to the Geneva Conventions of 1949, entitled “Basic rule,” which provides that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>3</sup>

As is clear from the text, the pivotal bifurcation is between civilians and combatants (and, as a corollary, between military objectives and civilian objects). It is wrong to present the dichotomy, as the International Committee of the Red Cross (ICRC) sometimes does,<sup>4</sup> in the form of civilians versus members of the armed forces.<sup>5</sup> Apart from the fact that not every member of the armed forces is a combatant (medical and religious personnel are excluded),<sup>6</sup> civilians who directly participate in hostilities lose their civilian status for such time as they are acting in this fashion although they are not members of any armed forces (see *infra* Section B).

---

\* Professor Emeritus, Tel Aviv University, Israel.

### *Distinction and Loss of Civilian Protection in International Armed Conflicts*

It is almost axiomatic that, as a rule, all enemy combatants can be lawfully attacked directly—at all times—during an international armed conflict. This can be done whether they are advancing, retreating or remaining stationary, and, as discussed later in this article, whether they are targeted in groups or individually.<sup>7</sup> There are, however, a number of caveats: (i) the attack must be carried out outside neutral territory, (ii) it is not allowed when a ceasefire is in effect, (iii) no prohibited weapons may be used, (iv) no perfidious methods of warfare may be resorted to, (v) combatants are not to be attacked once they become *hors de combat* (by choice (surrendered personnel) or because they are wounded, sick or shipwrecked),<sup>8</sup> and (vi) the attack must not be expected to cause excessive injury to civilians.

The hallmark of civilian status in wartime is that, in contrast to combatants, civilians—as well as civilian objects—enjoy protection from attack by the enemy. Intentionally directing attacks against civilians (not taking direct part in hostilities) or civilian objects is a war crime under Article 8(2)(b)(i)–(ii) of the 1998 Rome Statute of the International Criminal Court.<sup>9</sup>

The term “attack” in this context means any act of violence,<sup>10</sup> understood in the widest possible sense (including a non-kinetic attack), as long as it entails loss of life, physical or psychological injury, or damage to property. Attacks do not include non-forcible acts, such as non-injurious psychological warfare. The line of division between what is permissible and what is not is accentuated by computer network attacks (CNA). These would qualify as attacks within the accepted definition only if they engender—through reverberating effects—human casualties or damage to property (it being understood that a completely disabled computer is also damaged property).<sup>11</sup>

It is illegal to launch an attack the primary purpose of which is to spread terror among the civilian population.<sup>12</sup> The prohibition is applicable even if the attacker has every reason to believe that such a terror campaign will shatter the morale of the civilian population—so that the enemy’s determination to pursue the armed conflict will be eroded—and the war will be brought to a rapid conclusion (saving, as a result, countless lives on both sides).<sup>13</sup> Yet, an important rider is in order. What counts here is not the actual effect of the attack but its purpose or intent: an attack is not forbidden unless terrorizing civilians is its primary aim.<sup>14</sup> Nothing precludes mounting an otherwise lawful attack against combatants and military objectives, even if the net outcome (due to resonating “shock and awe”) is the collapse of civilian morale and the laying down of arms by the enemy.

The principle of distinction excludes not only deliberate attacks against civilians, but also indiscriminate attacks, i.e., instances in which the attacker does not target any specific military objective (due either to indifference as to whether the ensuing casualties will be civilians or combatants or, alternatively, to inability to

control the effects of the attack).<sup>15</sup> A leading example is the launching by Iraq of Scud missiles against military objectives located in or near residential areas in Israel in 1991, notwithstanding the built-in imprecision of the Scuds which made accuracy in acquiring military objectives virtually impossible (and, in the event, no military objective was struck).

In regular inter-State warfare—where asymmetrical warfare is not part of the military equation—the prohibition of indiscriminate attacks is perhaps of even greater practical import than that of the ban of direct attacks against civilians. The reason is that, generally speaking, the armed forces of a civilized country are rarely likely nowadays to target civilians with premeditation. However, the prospect of the incidence of indiscriminate attacks—predicated, as it is, on lack of concern rather than on calculation—is much higher. A commonplace illustration would be a high-altitude air raid, carried out notwithstanding conditions of zero visibility and malfunctioning instruments for identifying preselected military objectives. Certainly, military training must tenaciously address the issue of indiscriminate attacks if they are to be eliminated.

The flip side of civilian objects (which are protected from attack) is military objectives (which are not). The authoritative definition of military objectives appears in Article 52(2) of Additional Protocol I:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>16</sup>

This definition is very open ended, if only because every civilian object—not excluding even a hospital or a church—is susceptible to use by the enemy for military purposes. Such use (or abuse) will turn even a hospital or a place of worship into a military objective, exposing it to a lawful attack under certain conditions. The only attenuating consideration is that, under Article 52(3) of Protocol I, in case of doubt the presumption should be that such a place is actually used for the normal purposes to which it is dedicated.<sup>17</sup>

It follows that the key to robust civilian protection lies, perhaps, less in the fundamental requirement of concentrating attacks on identifiable military objectives and more in the complementary legal condition of observing proportionality in the effects of the attack. This means, as prescribed in Article 51(5)(b) of Protocol I, that—when an attack against a military objective is planned—incidental losses to civilians or civilian objects (usually called “collateral damage”) must not be

### *Distinction and Loss of Civilian Protection in International Armed Conflicts*

expected to be “excessive in relation to the concrete and direct military advantage anticipated.”<sup>18</sup> Intentionally launching an attack in the knowledge that it will cause incidental loss of life or injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated is a war crime under Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court.<sup>19</sup>

The expectation of excessive incidental losses to civilians or damage to civilian objects taints an attack as indiscriminate in character. Yet it must be borne in mind that not every inconvenience to civilians ought to be considered relevant. In wartime, there are inevitable scarcities of foodstuffs and services. Indeed, food, clothing, petrol and other essentials may actually be rationed; buses and trains may not run on time; curfews and blackouts may impinge on the quality of life; etc. These do not count in the calculus of proportionality. Moreover, the military advantage anticipated from an attack must be viewed in a rather holistic fashion: when a large-scale attack is in progress, it is not required to assess every discrete segment in isolation from the overall picture.<sup>20</sup>

Undeniably, what is deemed excessive is often a matter of subjective appraisal, which takes place in the mind of the beholder (always remembering that the appraisal must be done in a reasonable fashion). The difficulty is that military advantage and civilian casualties are like the metaphorical apples and oranges: a comparison between them is an art, not a science. Civilian losses can be counted, civilian damage can be surveyed and estimated, but how can you quantify a military advantage on a measurable scale? Additionally, since the entire process is a matter of pre-attack evaluation and expectation, it must be acknowledged that it is embedded in probabilities. What is to be done if “the probability of gaining the military advantage and of affecting the civilian population is not 100 percent but lower and different”?<sup>21</sup>

All the circumstances must be factored in. Thus, the bombardment of a hospital or a church used by the enemy may be given a green light if the actual number of patients or worshippers on site is negligible, whereas, should the numbers be disproportionate, the attack may have to be aborted. However, there is a difference between the cases of, say, one mosque where the minaret is used by a single enemy sniper and another serving as a command and control center of an armored division. Taking out the sniper must not entail a substantial civilian price tag, but the elimination of a key command and control center is a different matter. It has to be borne in mind that “excessive” is not interchangeable with “extensive.” Some scholars take that position,<sup>22</sup> but it is based on a misreading of the text.<sup>23</sup> If the strategic and military value of a military objective is exceedingly high, significant collateral civilian losses resulting from an attack may well be countenanced.

Any planned attack—and any commensurate estimate of the number of civilians present in or near military objectives—must be based on up-to-date intelligence. The “fog of war” is such that mistakes are unavoidable in every sizable military operation. When a legal analysis is made after the event, there is a built-in temptation to scrutinize the situation with the benefit of hindsight. But this temptation must be strongly resisted. The proper question is not whether collateral damage to civilians proved to be excessive in actuality: it is whether collateral damage could or should have been reasonably expected to be excessive at the time of planning, ordering or carrying out the attack. A reasonable expectation has to be linked to the data collated and interpreted at the time of action. Evidently, a valid evaluation of the state of affairs must be based on information that is current and not obsolete. If crucial information (say, about the absence of civilians from the vicinity of a military objective) is derived from a reconnaissance mission, the attack should follow soon thereafter since a long interval may mean that the facts on the ground have undergone a profound change.<sup>24</sup>

Pursuant to Article 57(2)(a)(ii) of Additional Protocol I, those who plan or decide on an attack must take all feasible precautions (taking into account all circumstances prevailing at the time), if not to avoid altogether, at least to minimize incidental losses to civilians or civilian objects.<sup>25</sup> Yet the aspiration to minimize collateral damage cannot trump all other military inputs. Minimize the costs to civilians, yes, but not at all costs to the attacking force. There is no obligation incumbent on the attacker to sustain military losses only in order to minimize incidental losses to enemy civilians or civilian objects. “Survival of the military personnel and equipment is an appropriate consideration when assessing the military advantage of an attack in the proportionality context.”<sup>26</sup>

Minimizing incidental losses or injury to civilians can be accomplished through the employment of precision-guided munitions (PGM)—where available—to target a military objective located in the midst of a densely populated residential area. The use of PGM enables the strike to be surgical, with little collateral damage expected to the surrounding civilians or civilian objects. As pointed out by Michael Schmitt, this is so not only because PGM are more accurate, but also because “the explosive charge needed to achieve the desired result is typically smaller than in their unguided counterparts.”<sup>27</sup>

In order to achieve the same goal of sparing civilians and civilian objects from the effects of attacks, Article 57(3) of Protocol I sets forth that, if a choice is possible among several military objectives for obtaining a similar military advantage, the one expected to cause the least incidental civilian losses and damage should be selected.<sup>28</sup> But, again, the unfortunate truth is that it is often impossible to determine

### **Distinction and Loss of Civilian Protection in International Armed Conflicts**

with any degree of credibility whether the elimination of diverse military objectives would afford a similar military advantage.

Other feasible precautions include—if circumstances permit—the issuance of effective advance warnings to civilians of an impending attack (in conformity with Article 57(2)(c) of Additional Protocol I<sup>29</sup>). All the same, circumstances do not always permit the issuance of such warnings. Otherwise, surprise attacks would have had to be struck out of the military vocabulary.

“The law of armed conflict singles out for special protection certain specified categories of civilians, either because they are regarded as especially vulnerable or on account of the functions they perform.”<sup>30</sup> The first category is illustrated by women and children,<sup>31</sup> and the second by civilian medical and religious personnel.<sup>32</sup> In the same vein, certain civilian objects—for instance, cultural property<sup>33</sup> or places of worship<sup>34</sup>—also enjoy special protection. But the special protection must be looked upon as merely the icing on the cake: it adds some flavor but it does not really affect the core. Some additional elements—enhancing the range of the protection—are brought into play, for the benefit of the selected persons or objects, yet the most vital safeguards are granted to all civilians and civilian objects without fail. There is also a proviso: protection (even special protection) may be lost as a result of a failure to meet prescribed conditions, as stipulated by the law of international armed conflict.

#### ***B. Direct Participation in Hostilities***

Direct participation of a civilian in hostilities leads to loss of protection from attack of the person concerned (within the temporal limits of the activity in question). As promulgated in Article 51(3) of Protocol I, civilians enjoy a general protection against dangers arising from military operations “unless and for such time as they take a direct part in hostilities.”<sup>35</sup> Occasionally, the reference is to “active” (instead of “direct”) participation in hostilities,<sup>36</sup> and at times either adjective is deleted.<sup>37</sup> The bottom line is essentially the same:<sup>38</sup> a person who takes part in hostilities loses his protection. There is no doubt that, as held by the Supreme Court of Israel (per President Barak) in the *Targeted Killings* case of 2006, this norm reflects customary international law.<sup>39</sup>

There is a consensus that a civilian can be targeted at such time as he is taking a direct part in hostilities.<sup>40</sup> There is nevertheless a serious debate about taxonomy. For my part, I believe that by directly participating in hostilities a person turns into a combatant—indeed, more often than not, an unlawful combatant.<sup>41</sup> On the other hand, the ICRC, while conceding that “[l]oss of protection against attack is

clear and uncontested,”<sup>42</sup> adheres to the view that the status of that person remains one of a civilian.

The difference of opinion about status has a practical consequence only when the person concerned is captured. I am inclined to think that, as an unlawful combatant, the person loses the general protection of the Geneva Conventions (except in occupied territories) and only enjoys some minimal safeguards, in conformity with human rights standards. The ICRC maintains that the general protection of civilian detainees under Geneva Convention (IV) applies also to civilians directly participating in hostilities. My own position is predicated on Article 5 of that Convention, whereby—other than in occupied territories—those engaged in hostilities do not benefit from the privileges of the Convention, although they still have to be treated with humanity and are entitled to a fair trial.<sup>43</sup>

The words “for such time” appearing in Article 51(3) of Protocol I raise serious questions about their scope.<sup>44</sup> The government of Israel has traditionally contended that these words do not reflect customary international law, but the Supreme Court has utterly rejected that submission.<sup>45</sup> The Court made it clear that a civilian who only sporadically takes a direct part in hostilities does not lose protection from attack on a permanent basis: once he disconnects himself from these activities, he regains his civilian protection from attack<sup>46</sup> (although he may still be detained and prosecuted for any crime that he may have committed during his direct participation in hostilities<sup>47</sup>).

The desire to confine the exposure of the civilian who directly participates in hostilities to a finite space of time makes a lot of sense. It is worthwhile to remember that many armed forces in the world incorporate large components of reservists who are called up for a prescribed period and are then released from service. A reservist is basically a civilian who wears the uniform of a combatant for a while and is then cloaked again with the mantle of a civilian. Surely, for such time as he is a combatant, a reservist can be attacked. Yet, before and after, *qua* civilian, he is exempt from attack. The same consideration should apply *grosso modo* to other types of civilians turned combatants and vice versa.

There are two salient riders added to the general proposition by the judgment in the *Targeted Killings* case. The first is that the cycle of direct participation in hostilities commences at an early stage of preparation and deployment, continuing throughout the engagement itself, to cover also the disengagement and return phase.<sup>48</sup> Although there are those who maintain that the expression “for such time” should be construed strictly as encompassing only the engagement itself, this claim is generally rejected.<sup>49</sup> I (and others) take the position that, in demarcating the relevant time span in the course of which the person concerned is actually taking part

### *Distinction and Loss of Civilian Protection in International Armed Conflicts*

in hostilities, it is permissible to go as far as reasonably possible both “upstream” and “downstream” from the actual engagement.

The second rider is that while a person directly participating in hostilities more than once may still revert to a civilian status during an interval, this cannot be brought off when the hostile activities take place on a steadily recurrent basis with brief pauses (the so-called “revolving door” phenomenon).<sup>50</sup> Those attempting to be “farmers by day and fighters by night” lose protection from attack even in the intermediate periods punctuating military operations. The same rationale applies if an individual becomes a member of an organized armed group (which collectively takes a direct part in the hostilities): he would lose civilian protection for as long as that membership lasts. In the locution of the Court, an organized armed group becomes the “home” of the terrorist for whom a respite—interposing between acts of hostilities—merely means preparation for the next round.<sup>51</sup> In practical terms, the individual in question may be targeted (see *infra* Section C), even when not personally linked to any specific hostile act—simply due to his membership in such a group—as long as that membership continues.

There is no doubt that the construct of direct participation in hostilities is not open ended, and it “is far narrower than that of making a contribution to the war effort.”<sup>52</sup> Still, a whole range of activities can be identified as concrete examples of direct participation in hostilities. As the Supreme Court of Israel expounded, these include not only using firearms or gathering intelligence, but also acting as a guide to combatants, and, most pointedly, masterminding such activities through recruitment or planning (in contradistinction to, e.g., merely donating money contributions or selling supplies to combatants: the latter activities do not come within the ambit of direct participation in hostilities).<sup>53</sup>

Under Article 50(1) of Protocol I, “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”<sup>54</sup> The provision is particularly germane to the issue of direct participation in hostilities. It is imperative to ensure that military units tasked with the mission of winnowing out civilians who engage in hostilities will not treat all civilians as targetable, “shooting first and asking questions later.”<sup>55</sup> Additionally, the presence of civilians directly participating in hostilities among the civilian population does not deprive the population at large of the protection from attack that it is entitled to.<sup>56</sup>

The theme of direct participation in hostilities has been under study for a number of years by a group of experts under the aegis of the ICRC. While the study has not yet been consummated, it has exposed a number of challenging questions and has led to lengthy debates. One hotly contested point will be discussed *infra* in detail. But there is a host of thorny problems. By way of illustration, there are disputes regarding the different degrees of civilian contribution to electronic warfare,



ranging from the mere maintenance of military computers to playing the role of the “man in the loop” guiding—perhaps from a great distance—a military unmanned aerial vehicle (UAV) or a CNA, with a view to causing death, destruction or damage. There are also arguments concerning the roles of civilian contractors who may offer purely logistical services (e.g., refueling military aircraft en route to a far-away armed conflict) but may also be carrying out paramilitary missions (such as guarding supply convoys) near the contact zone with the enemy.

### *C. Targeted Killings of Civilians Directly Participating in Hostilities*

Hague Regulation 23(b) forbids the treacherous killing of enemy individuals,<sup>57</sup> and Article 37(1) of Additional Protocol I prohibits killing an adversary by resort to perfidy (defined as an act inviting the confidence of an adversary to lead him to believe that he is entitled to—or is obliged to accord—protection under the law of international armed conflict, with an intent to betray that confidence).<sup>58</sup> However, when perfidy is not in play, even the ICRC *Model Manual* concedes that an enemy individual combatant may be targeted (including a head of state who is the commander-in-chief).<sup>59</sup>

There is a nexus between the question of whether a civilian is directly participating in hostilities and the issue of targeted killing. Logic dictates that, since a combatant may be individually targeted for attack, the same rule should apply to a civilian who takes a direct part in hostilities (at such time as he is indulging in that activity). But scholars like to debate the deceptively simple hypothetical scenario of a civilian driving an ammunition truck to supply the armed forces. One view (maintained by General A.P.V. Rogers) is that this will not result in the forfeiture of civilian protection, although the presence of the civilian driver in the ammunition truck—a palpable military objective—will put him at risk should the truck be attacked on his watch.<sup>60</sup> To fully perceive what is at issue, it is necessary to flesh out the postulated sequence of events. Let us assume that the ammunition truck reaches a gas station and the driver parks the truck, going into a mini-mart to purchase some refreshments. An enemy commando unit, lying in wait, is mounting an attack during that exact time frame. The question is: can the commandos attack only the ammunition truck (at its parking spot, which may be heavily guarded) or can they also kill or neutralize the driver when he is by himself inside the mini-mart? General Rogers’s position is clear cut: only the ammunition truck can be attacked. As soon as the driver detaches himself from the truck, he sheds the risk and benefits from civilian protection. I (among others) disagree. We believe that it all depends on whether the script unfolds in geographic proximity to the front line or far away from it. If the location is at a great distance from the front line (say, in the

### *Distinction and Loss of Civilian Protection in International Armed Conflicts*

continental United States while the front line is in Afghanistan), the driver remains a civilian and runs a risk solely when he is in or near the ammunition truck. However, if the venue shifts and the ammunition truck is being driven in immediate logistical support of the military units deployed at the front line, the driver must be considered a civilian directly participating in hostilities: he then loses protection from attack even when he steps out of the truck.<sup>61</sup> In the *Targeted Killings* case, the Supreme Court of Israel has clearly endorsed the latter view.<sup>62</sup>

In occupied territories, there is a preliminary issue related to targeted killings of civilians directly participating in hostilities, namely, whether the occupying power is capable of taking effective law enforcement measures vis-à-vis such persons in lieu of slaying them. As President Barak stressed, detention of a person directly participating in hostilities against the occupying power is the preferred step, provided that his arrest is feasible.<sup>63</sup> If detention is not a viable option, it must be recognized that a civilian taking a direct part in hostilities risks his life—like any combatant—and is exposed to a lethal attack.<sup>64</sup> Differently put, a strike targeting such a person—and killing him—is permissible when non-lethal measures are either unavailable or ineffective.<sup>65</sup>

Although the Supreme Court of Israel pronounced that a targeted killing of a terrorist in an occupied territory (when detention is not feasible) is lawful, the Court was adamant that whenever innocent civilians are present in the vicinity of the targeted individual and they are likely to be injured, the principle of proportionality must be applied.<sup>66</sup> The relevance of the principle of proportionality in the setting of targeted killings has come to the fore in Israel, because of a highly publicized use of a one-ton bomb against a well-known Palestinian terrorist hiding in a residential area. There is a growing public sentiment that such a massive bomb should not have been used, since it was almost bound to cause excessive collateral damage to civilian bystanders.

#### ***D. Human Shields***

This raises the cognate issue of the use of civilian “human shields” intended to lend protection to combatants or military objectives. Article 28 of Geneva Convention (IV) states that “[t]he presence of a protected person may not be used to render certain points or areas immune from military operations.”<sup>67</sup> For its part, Article 51(7) of Protocol I reads, in part, that “[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations.”<sup>68</sup> Irrefutably, the prohibition of the use of civilians as human shields mirrors customary

international law.<sup>69</sup> Utilizing the presence of civilians or other protected persons to render certain points, areas or military forces immune from military operations is recognized as a war crime by Article 8(2)(b)(xxiii) of the Rome Statute.<sup>70</sup>

It is incontrovertible that when combatants (including civilians directly participating in hostilities) surround themselves by civilians, this is a breach of the law of international armed conflict. All the same, it is necessary to distinguish between voluntary and involuntary human shields. As the Supreme Court of Israel (per President Barak) held in the *Targeted Killings* case, whereas involuntary human shields are victims, voluntary human shields are to be deemed civilians who take a direct part in hostilities.<sup>71</sup> That being the case, voluntary human shields are targetable and, of course, they “are excluded in the estimation of incidental injury when assessing proportionality.”<sup>72</sup>

What if, contrary to the law of international armed conflict, involuntary human shields are actually compelled to screen a military objective? Article 51(8) of Protocol I sets forth that a violation of the prohibition of shielding military objectives with civilians does not release a belligerent party from its legal obligations vis-à-vis the civilians.<sup>73</sup> What this means is that the principle of proportionality in attack remains in effect. I do not deny that the principle of proportionality must still govern the planning of an attack against a military objective screened by involuntary civilian human shields. However, in my opinion, the test of excessive injury to civilians must be relaxed in such exceptional circumstances. That is to say, to my mind, the appraisal of whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that, by dint of the large (albeit involuntary) presence of civilians at the site of the military objective, the number of civilian casualties can be expected to be higher than usual. To quote Louise Doswald-Beck, “[t]he Israeli bombardment of Beirut in June and July of 1982 resulted in high civilian casualties, but not necessarily excessively so given the fact that the military targets were placed amongst the civilian population.”<sup>74</sup> This approach is confirmed by the 2004 UK *Manual on the Law of Armed Conflict*:

Any violation by the enemy of this rule [the prohibition of human shields] would not relieve the attacker of his responsibility to take precautions to protect the civilians affected, but the enemy’s unlawful activity may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage expected.<sup>75</sup>

Customary international law is certainly more rigorous than Protocol I on this point. It has traditionally been grasped that, should civilian casualties ensue from an illegal attempt to shield a military objective, their blood will be on the hands of

### *Distinction and Loss of Civilian Protection in International Armed Conflicts*

the belligerent party that abused them as human shields.<sup>76</sup> The long and the short of it is that a belligerent party is not vested by the law of international armed conflict with the power to block an otherwise lawful attack against military objectives by deliberately placing civilians in harm's way.<sup>77</sup>

The prohibition of placing civilians as human shields around a military objective applies to all belligerent parties. Even though this has become a *modus operandi* typical of terrorists, there are multiple ways in which regular armed forces may be tempted to employ analogous tactics to facilitate military operations. The issue arose before the Supreme Court of Israel (per President Barak), in 2006, in the *Early Warning* case.<sup>78</sup> The Court had to determine the legality of an "Early Warning Procedure" (adopted by the Israel Defense Forces (IDF)) whereby, when a terrorist has been cornered and besieged, a local resident would be encouraged to volunteer (provided that no harm to the messenger was anticipated) in order to relay a warning and a call to surrender so as to avoid unnecessary bloodshed.<sup>79</sup> The "Early Warning Procedure" drew criticism from outside observers<sup>80</sup> and it was nullified by the Court. President Barak—relying on Article 28 of Geneva Convention (IV) and on Article 51(7) of Protocol I (although Israel is not a contracting party to Protocol I)—stressed that the IDF was not allowed to use protected persons as human shields and that, therefore, the assistance of a local resident could certainly not be required coercively.<sup>81</sup> But what about assistance offered voluntarily in circumstances where this is not expected to place the person concerned in jeopardy? President Barak ruled against the "Early Warning Procedure" on four grounds: (i) protected persons must not be used as part of the military effort of the occupying power, (ii) everything must be done to separate the civilian population from combat operations, (iii) voluntary consent in these circumstances is often suspect, and (iv) it is not possible to tell in advance whether the activity of the protected person puts him in danger.<sup>82</sup>

Generally speaking, President Barak's reasoning is persuasive. Yet, he did not explain why such assistance cannot be offered by a close relative—especially, a mother or a father—of a terrorist besieged in a building that is about to be stormed (with the likelihood of death in action of the terrorist), when the initiative is taken by, for example, the parent who begs to be given a chance to persuade the besieged son to surrender and save his life.<sup>83</sup> In such exceptional circumstances, there is little if any danger to the life of the parent, and humanitarian considerations actually tip the balance in favor of allowing the requested intercession to take place.

In conclusion, this article should show that, although the protection of civilians is a basic tenet of the international law of armed conflict, a civilian cannot take that protection for granted. There are many ways in which civilian protection will not render practical assistance, and a civilian would become a victim of war

inadvertently (due to collateral damage). But, above all, civilian protection can be lost if the person who purports to benefit from it crosses a red line by directly participating in hostilities. He may then be targeted, and this need not be done in an anonymous fashion. Absent perfidy, the bullet that kills him may lawfully have his name engraved on it.

*Notes*

1. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8).
2. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) (2 volumes: Volume I, Rules; Volume II, Practice (2 Parts)).
3. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR 422 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter Protocol I].
4. HENCKAERTS & DOSWALD-BECK, *supra* note 2, Vol. I, at 17.
5. See Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 ISRAEL YEARBOOK ON HUMAN RIGHTS 1, 8–9 (2006).
6. HENCKAERTS & DOSWALD-BECK, *supra* note 2, Vol. I, at 11.
7. On the issues of retreating troops and individual targeting, see YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 94–95 (2004).
8. Hague Regulations, annexed to Hague Convention IV Respecting the Laws and Customs of War on Land reg. 23(c), Oct. 18, 1907; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 12, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention (I)]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 12, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention (II)]; all reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 69, 77; 197, 201; and 222, 226, respectively.
9. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 671, 676 [hereinafter Rome Statute].
10. See Protocol I, *supra* note 3, art. 49(1), at 447.
11. See Knut Dörmann, *The Applicability of the Additional Protocols to Computer Network Attacks: An ICRC Viewpoint*, in INTERNATIONAL EXPERT CONFERENCE ON COMPUTER NETWORK ATTACKS AND THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW 139, 142–43 (Karin Byström ed., 2005).
12. See Protocol I, *supra* note 3, art. 51(2), at 448.
13. See Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 105, 157 (Dieter Fleck ed., 1995).
14. See Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of The Hague)*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 93, 118 (United Nations Educational, Scientific and Cultural Organization ed., 1988).
15. On indiscriminate attacks, see Protocol I, *supra* note 3, art. 51(4)–(5), at 448–49.
16. Protocol I, *supra* note 3, at 450.

**Distinction and Loss of Civilian Protection in International Armed Conflicts**

17. *Id.*
18. *Id.* at 449.
19. Rome Statute, *supra* note 9, at 676.
20. See UNITED KINGDOM (UK) MINISTRY OF DEFENCE, MANUAL OF THE LAW OF ARMED CONFLICT para. 5.4.4 (2004) [hereinafter UK MANUAL].
21. Marco Sassòli, *Targeting: The Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts*, in *NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS* 181, 204 (David Wippman & Matthew Evangelista eds., 2005) [hereinafter NEW WARS].
22. See Claude Pilloud & Jean Pictet, *Article 51 – Protection of the Civilian Population*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 613, 626 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).
23. Christopher Greenwood, *A Critique of the Additional Protocols to the Geneva Conventions of 1949*, in *THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW* 3, 11 n.29 (Helen Durham & Timothy L. H. McCormack eds., 1999).
24. See LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 160 (2d ed. 2000).
25. Protocol I, *supra* note 3, at 739.
26. Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 445, 462 (2005).
27. Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES: SYMPOSIUM IN HONOUR OF KNUT IPSEN 11, 42 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007).
28. Protocol I, *supra* note 3, at 453.
29. *Id.*
30. FRITS KALSHOVEN, *REFLECTIONS ON THE LAW OF WAR: COLLECTED ESSAYS* 553 (2007).
31. See Protocol I, *supra* note 3, arts. 76(1)–77(1), at 466.
32. See *id.*, art. 15, at 431.
33. See Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 373.
34. See Protocol I, *supra* note 3, art. 53, at 450.
35. *Id.*
36. See, e.g., common Article 3(1) to Geneva Convention (I), *supra* note 8, at 198; Geneva Convention (II), *id.* at 223; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 244, 245 [hereinafter Geneva Convention (III)]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in id.* at 301, 302 [hereinafter Geneva Convention (IV)].
37. See, e.g., Additional Protocol I, *supra* note 3, art. 8(a), at 426.
38. Cf. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 629 (Sept. 2, 1998).
39. HCJ [High Court of Justice] 769/02, Public Committee against Torture in Israel et al. v. Government of Israel et al. para. 30. (A full translation is available in 46 INTERNATIONAL LEGAL MATERIALS 375 (2007)).
40. *Id.*, para. 31.
41. On unlawful combatants, see DINSTEIN, *supra* note 7, at 27–44.
42. HENCKAERTS & DOSWALD-BECK, *supra* note 2, Vol. I, at 22.

43. Geneva Convention (IV), *supra* note 36, at 303.
44. See Kenneth Watkin, *Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict*, in *NEW WARS*, *supra* note 21, at 137, 154–57.
45. HCJ 769/02, *supra* note 39, paras. 30, 38.
46. *Id.*, paras. 39–40.
47. See Pilloud & Pictet, *supra* note 22, at 613, 619.
48. HCJ 769/02, *supra* note 39, para. 34.
49. See Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 1, 17 (2004).
50. HCJ 769/02, *supra* note 39, para. 40.
51. *Id.*, para. 39.
52. FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR* 99–100 (3d ed. 2001).
53. HCJ 769/02, *supra* note 39, para. 35.
54. Protocol I, *supra* note 3, at 448.
55. KALSHOVEN, *supra* note 30, at 73–74, 214.
56. Cf. Protocol I, *supra* note 3, art. 50(3), at 448.
57. Hague Regulations, *supra* note 8, at 77.
58. Protocol I, *supra* note 3, at 442.
59. MODEL MANUAL ON THE LAW OF ARMED CONFLICT FOR ARMED FORCES para. 1013.2–3 (A.P.V. Rogers & P. Malherbe eds., 1999) [hereinafter MODEL MANUAL].
60. See A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 11–12 (2d ed. 2004).
61. Interestingly enough, the MODEL MANUAL (*supra* note 59)—coauthored by General Rogers—states that it is prohibited for civilians to act “as drivers delivering ammunition to firing positions” (para. 601.2.b).
62. HCJ 769/02, *supra* note 39, para. 35.
63. *Id.*, para. 40.
64. *Id.*, para. 46.
65. *Id.*, para. 60.
66. *Id.*, paras. 42–46.
67. Geneva Convention (IV), *supra* note 36, at 312.
68. Protocol I, *supra* note 3, at 449.
69. HENCKAERTS & DOSWALD-BECK, *supra* note 2, Vol. I, at 337.
70. Rome Statute, *supra* note 9, at 678.
71. HCJ 769/02, *supra* note 39, para. 36.
72. Michael N. Schmitt, *War, Technology and the Law of Armed Conflict*, in *THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE* 137, 177 (Anthony M. Helm ed., 2006) (Vol. 82, US Naval War College International Law Studies).
73. Protocol I, *supra* note 3, at 449.
74. See Louise Doswald-Beck, *The Civilian in the Crossfire*, 24 *JOURNAL OF PEACE RESEARCH* 251, 257 (1987).
75. See UK MANUAL, *supra* note 20, para. 5.22.1.
76. See W. Hays Parks, *Air War and the Law of War*, 32 *AIR FORCE LAW REVIEW* 1, 162–63 (1990).
77. See Andrew D. McClintock, *The Law of War: Coalition Attacks on Iraqi Chemical and Biological Weapon Storage and Production Facilities*, 7 *EMORY INTERNATIONAL LAW REVIEW* 633, 663–64 (1993).

**Distinction and Loss of Civilian Protection in International Armed Conflicts**

78. HCJ 3799/02, Adalah – Legal Center for Arab Minority Rights in Israel et al. v. Commander of the Central Region et al. (2007).

79. *Id.*, paras. 5–7.

80. See Roland Otto, *Neighbours as Human Shields? The Israel Defense Forces’ “Early Warning Procedure” and International Humanitarian Law*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 771–86 (2004).

81. HCJ 3799/02, *supra* note 78, paras. 21–22.

82. *Id.*, para. 24.

83. The possibility was raised by Deputy President Cheshin in paragraph 3 of his Separate Opinion, *id.*