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A Legal opinion for the Commission Inquiring into Disappearances

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1. The purpose of this memorandum is to provide my expert assessment regarding the widespread use of civilian human shields by LTTE forces in the final stages of the Sri Lanka civil war, which ended in May 2009. In particular, this opinion focuses on the intentional use of artillery fire directed to specifically respond to LTTE artillery fire emanating from within civilian areas. As you know, the LTTE refused to permit some 330,000 fellow Tamils to flee towards safer areas away from the zone of conflict, and in essence used them as human shields to deter offensive operations by the Sri Lanka Army. The Government of Sri Lanka previously declared the entire area as a safe civilian or no fire zone (NFZ) in order to protect the innocent civilians, which had the incidental effect of incentivizing international organizations to remain in that area. Aside from refusing to agree to the creation of such a safe zone, which itself constitutes prima facie evidence of its intent to use civilians and civilian objects as an impermissible extension of its military campaign, the LTTE embedded its heavy artillery within the NFZ and intentionally shelled Sri Lankan positions from the midst of the civilian population.

2. The use of the civilian population in that manner is roughly comparable to the war crime of perjury because the LTTE sought to use the government's compliance with the laws and customs of warfare in order to gain an unwarranted military advantage. This leveraging is precisely why the laws and customs of war uniformly reject the use of human shields in a variety of specific places. Civilians who would otherwise have spread out into areas remote from the conflict or sought shelter with family in other regions were prevented from doing so in order to dissuade the government from attacking lawful targets using lawful weapons. Intentional efforts to use the presence of such civilians to shield military operations constitutes a war crime in its own right, and this opinion therefore also addresses the law regarding the use of force directed against military objectives when one party to the conflict has attempted to insulate those targets through manipulation of the laws and customs of warfare.

3. At the outset, I wish to note two provide two preliminary observations that inform the analysis of the underlying issues. Firstly, the obligation to protect civilians within the zone of conflict is perhaps the most deeply embedded premise of the entire corpus of the laws and customs of warfare. In the language of Article 57(1) of Protocol I to the Geneva Conventions of 1949 the participants to an armed conflict must ensure that "in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." No responsible commander ever intentionally targets civilian populations during either international or non-international armed conflicts, and the law prohibiting such deliberate harm to civilians is clearly stated in a variety of forms and fundamental. 3 There is no evidence to suggest that Sri Lankan commanders ignored this fundamental obligation. As reported by the U.S. Embassy, the Sri Lankan military expressly took "the utmost care" to avoid civilian casualties, despite the intentional warping of its operational environment by the LTTE. This is reminiscent of the difficult operational balancing faced by NATO during operations in 'Kosovo, during which international media and diplomatic engagement highlighted the balance between the loss of civilian lives and the absolute prerogatives of commanders to seek to end the conflict lawfully. NATO repeatedly briefed the public and diplomatic communities on efforts to minimize civilian casualties. Even when confronted with the presence of human shields, the commander of air operations vehemently maintained that "every day we did our very very best to limit collateral damage and limit the loss of life on the adversary's side." Similar statements were made by Sri Lankan officials and there is no evidence to contradict that assertion. Thus, the nub of the issue at hand is whether government forces used a lawful weapon (artillery) against lawful military objectives (in this instance identified as the points of fire from LTTE batteries) in a lawful manner (remaining cognizant of the multiple provisions of law aimed at protecting the civilian population from the effects of hostilities insofar as possible).

4. Secondly, in distinguishing between "the civilian population and combatants and between civilian objects and military objectives" and directing military operations "only against military objectives" as required by Article 48 of the Protocol, the law is clear that the extensive obligations to protect innocent civilians enshrined in Article 57 of Protocol I apply to any "acts of violence against the adversary, whether in offence or in



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defence."⁴ In my expert opinion, these principles constitute customary international law that is unquestionably binding on all states and all parties to all conflicts. Thus, assuming that the operational goal of the LTTE was to effect a military advantage against the Sri Lanka government (which seems clear from the facts provided and the assessment of the U.S. Ambassador at the time), the very act of forcibly preventing the evacuation of civilians who wished to leave the declared safe zone constituted an independent war crime on the part of LTTE authorities. This tenet coincides perfectly with the internationally accepted basis for finding that the war crime of using human shields has been committed. The Elements of Crimes for the Rome Statute, which were adopted by widespread international consensus on June 30, 2000, are clear that any action by a perpetrator committed with the intent "to shield a military objective from attack" or to take advantage of one or more civilians to "shield, favour, or impede military operations" constitutes the completed war crime.⁵ Against that backdrop, Sri Lanka Panel of Experts suggestion (T 237) that the war crime of using human shields requires "credible evidence of the LTTE deliberately moving civilians towards military targets rgets to protect the latter from attacks" is unfounded as a matter of law. The elements of crimes to the International Criminal court make it plain that the crime of using human shields is committed by any perpetrator that intentionally "moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict." (emphasis added) The LTTE committed the war crime of using human shields on any occasion that it took advantage of the presence of innocent civilians with the intent of protecting its military assets from any attack or to "shield, favour or impede military operations." In other words, the war crime of using human shields was a completed offense with or without the deliberate moving of civilians, so long as the LTTE collocated equipment in an effort to gain an inappropriate military advantage from the presence of civilians and/or civilian objects.

5. In my expert opinion, it is wholly inconsistent with the broader legal and moral principles to reward such intentional misconduct by requiring the attacker to ignore the changed role of the otherwise protected civilians. In other words, there is no per se prohibition against attacking targets protected by human shields. Rather than summarily condemned, the government artillery strikes must be assessed under the established duties to comply with the principle of proportionality and the accompanying obligation to take "all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

6. Human shields - the difference between Hamas/LTTE On the surface, many commentators might be willing to analogize the situation of Hamas in the Gaza Strip with the tactics of the LTTE at the end of war. In both instances, the record is replete with instances of human shields being used unlawfully to favour military operations. There is much to be said of the specific tactics employed by Hamas to conduct indiscriminate rocket attacks against Israeli citizens, particularly in comparison to the tactics employed by the LTTE. I have seen little evidence that the LTTE specifically emplaced artillery in the homes of civilians as Hamas has repeatedly done. If necessary, I will conduct extensive research to document the tactics employed by Hamas and analyze the contradistinctions between the two situations.

7. However, there are at least two clear points of contrast where juxtaposition of the contexts helps to justify the actions of the Sri Lanka government forces. In the first place, the evidence is clear that targets were specifically attacked in response to LTTE fire emanating from within the civilian areas. This correlates to Israeli practice of course. It is noteworthy, however, that no government has declared the illegality of Israeli strikes simply because they were directed into civilian areas. In other words, the law is clear that artillery fire into civilian areas cannot be deemed per se unlawful in its own right, but must be subjected to the traditional analysis drawn from the principles of distinction, military necessity, and proportionality. The ICRC Customary Law study recounts many such instances of state practice in support of this proposition, to include the response of the German government following the 2009 Israeli incursion into Gaza.⁷ The Bundestag asked the following: How does the Federal Government assess the use of artillery ammunition, fin-stabilized ammunition, shrapnel shells, and other imprecise weapons in the densely populated residential areas in Gaza, documented by Amnesty International under international law? The response is telling because it supports the assertion that there is no per se prohibition on the use of artillery shells in urban areas: The Federal Government has no reliable information on the use of such ammunition. The use of means of warfare which cannot be directed against a specific military objective, so called indiscriminate attacks, would be prohibited ... This would depend not only on the type of ammunition, but also on the circumstances of their use.

8. By the same token, in their respective decisions in the Gotovina Case, neither the ICTY Trial Chamber⁸ (¶ 1904-1910) nor the Appeals Chamber (¶ 58-67) asserted that the use of artillery fire directed against purported military objectives located in civilian urban areas is in itself dispositive of illegality. Though they reach opposite conclusions for other reasons, both Chambers based their legal conclusions on assessments of the military value of targets, the evidentiary basis for concluding that attacks were (or were not) indiscriminate as conducted, or violative of the proportionality standard. The Appeals Chamber, for example, cites the location of artillery batteries as affecting the accuracy of fire into urban areas, but in no way suggests that there is any tenet in modern international law that such fire is- always prohibited as a matter of overarching international law.

9. Conversely, there is one vital distinction between the two situations. In the Gaza conflict, there has been much international criticism directed against the Israeli Defense Forces because of the implication

that widespread military strikes directed in the urban areas of Gaza can warrant the inference that such strikes in actuality constituted an unlawful attack directed against the civilian population as such. The law is clear, however, that there is no cognizable tenet of international law that treats the status of an entire area as being legally relevant. In the case against Dragomir Milosevic, the perpetrator attempted to argue that the presence of military targets in a designated zone warranted military strikes with no further analysis. In rejecting that claim, the Appeals Chamber of the ICTY9 reinforced the principle that the designation or functional description of a zone or area can never serve as a legal basis for attack:

53. The Appeals Chamber recalls that it is well established that the principle of distinction requires parties to distinguish at all times "between the civilian population and combatants, between civilian and military objectives, and accordingly direct attacks only against military objectives". There is an absolute prohibition against the targeting of civilians in customary international law, encompassing indiscriminate attacks.' As stated in the Galic Appeal Judgement, "Article 51(2) of Additional Protocol I "states in a clear language that civilians and the civilian population as such should not be the object of attack", that this principle "does not mention any exceptions", and in particular that it "does not contemplate derogating from this rule by invoking military necessity." Article 51(2) "explicitly confirms the customary rule that civilians must enjoy general protection against the danger arising from hostilities" and "stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish at all times between the civilian population and combatants and between civilian objects and military objectives and accordingly to direct their operations only against military objective.

54. There is no requirement that particular areas or zones be designated as civilian or military in nature. Rather, a distinction is to be made between the civilian population and combatants, or between civilian and military objectives. Such distinctions must be made on a case-by-case basis. Further, considering the obligations incumbent upon combatants to distinguish and target exclusively military objectives, the Appeals Chamber finds Milosevic's argument regarding the proportion of civilians present in areas "replete with military objectives" unpersuasive. In fact, Milosevic, does not even attempt to argue that the civilian victims in Sarajevo were proportional casualties of lawful military attacks launched by the SRK. A general assertion that the attacks were legitimate because they allegedly targeted "military zones" throughout the city is bound to fail. (emphasis added, citations omitted)

10. The holding of Milosevic in conjunction with Article 51(5)(a) of Protocol I10 definitively establishes that under modern international law, a number of distinct military objectives located within an urban area cannot lawfully be aggregated to constitute one single military objective. Just as the Israelis are required to make individualized assessments of the proportionality grounds for attacking any target within Gaza, the Sri Lanka government had that same duty. In other words, the mere labeling of an area as a safe area or protected zone had no legal effect on the underlying authority of the Sri Lanka forces to attack lawful targets using lawful weapons in a lawful manner as permitted under the laws and customs of warfare. While Hamas gains no higher degree of automatic protection from attack merely by the terminology attached to the urban areas within the Gaza Strip, the legal authority of Sri Lanka to respond to attacks initiated by the LTTE was similarly unaffected by the semantic designation of the NFZ. The legality of specific artillery strikes conducted by Sri Lanka in the so-called safe zone are thus entirely dependent upon the case by case, target by target, analysis common to the assessment of any operational decisions in the context of an armed conflict.

11. The need to rethink Proportionality in the light of modern human shielding -- The problem of human shields presents military decision-makers with one of the most potent challenges to the implementation of international humanitarian law in the world today. On the one hand, civilians remain entitled to absolute protection from the effects of hostilities "unless and for such time as they take a direct part in hostilities." This includes the right to be absolutely free of deliberate targeting efforts by both military adversaries at all times and under all circumstances. On the other, when one side violates its obligations "avoid locating military objectives within or near densely populated areas" and fails to "take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations" its opponent is faced with what I have termed an impermissible "forced choice." Either the commander in the field cedes an unlawfully obtained military advantage to the enemy, and suffers casualties with no possible recourse, or undertakes careful strikes in response directed against military objectives. If the law is warped to permit the enemy to unlawfully exploit human shields with no possibility of recourse, then it becomes irrelevant and essentially obsolete. Good faith application of the law of proportionality is the only way to balance these competing but equally important priorities.

12. No military commander in the world, and by extension no political official that authorizes the use of military force, should accept a legal premise that military forces must suffer the lethal force of the enemy while under a legal obligation not to respond using lawful force in self-defense. Because the LTTE enemy deliberately misused civilians to protect military targets, and ignored governmental efforts to establish safe areas for civilians while hindering their ability to seek safety, the only way to ensure respect for the overall fabric of the laws and customs of warfare is to recognize the right of the Sri Lankan government to respond using lawful (i.e. discriminate) weapons against identifiable military targets,

13. Nations should be alert to oppose any efforts to create or reinforce legal rules that would become tactically irrelevant on modern battlefields. Commenting on the impractical aspects of Additional Protocol I, the eminent Dutch jurist Bert Roling — who served on the bench of the Tokyo International Military Tribunal—observed that treaty provisions ought not "prohibit what will foreseeably occur" because the "laws of war are not intended to alter power relations, and if they do they will not be observed." 12 When one side in an armed conflict deliberately ignores its own legal duties, disconnects between aspirational legal rules and human experience are borne out in operational experience. This is a growing and troubling trend in modern operations, and the LTTE mastered the art in the final stages of its multi-generational conflict. States that act decisively to protect the lives and property of innocent citizens even when faced with human shields risk widespread but simplistic condemnation. Such lawful responses, even in the face of enemy war crimes, accord with their own legal obligations, yet inevitably feed an undercurrent of suspicion and politicization that could erode the very foundations of humanitarian law. This gap in turn leads to a cycle of cynicism and second-guessing that could weaken the commitment of some policy makers or military forces to actually follow the law. Phrased another way, if the laws and customs of war embed a presumption against the rights of individual or unit self-defense, then they will inevitably atrophy into disrepute and eventual disuse. The law of proportionality provides the intellectually consistent and time-tested framework for reconciling the competing priorities at hand when faced with human shields.

14. The warning of the U.S. Ambassador that strikes should not be undertaken against clearly identified military objectives when the LTTE used the presence of civilians in the so-called NFZ to launch military strikes is both naive and unfounded in modern international law. The law of armed conflict is integral to military professionalism, and the proportionality principle is at its core. Just as there should be no safe harbor for warfighters accused of clearly disproportionate war crimes, so to should the world remain united in its support for the appropriate range of discretion duly accorded to military commanders faced with the most difficult operational challenges who continue to apply the law in good faith to the best of their abilities. Policymakers and military practitioners should be absolutely clear that the law of proportionality itself provides an essential protection to noncombatant lives and property. Permitting one side to completely preempt the military prerogatives of its opponent through the use of human shields would endanger proportionality by transforming it into the property of the adversary with the most compliant media and the most well-tuned propaganda machine. Unless the law of proportionality is understood to apply even in the face of human shields, then war fighters may well begin simply to discount the constraints of the laws and customs of war because they have been twisted to provide an undue and essentially insurmountable military advantage to one side based solely on its own unlawful actions. The laws and customs of war cannot countenance such undue military leverage to the side that willfully ignores the reciprocal obligation to protect innocent civilians insofar as possible.

15. Modern international law remains unsettled on the precise application of the proportionality principle in the face of human shields. All forms of human shields pose the challenge of artificial, contrived circumstances under which a party must decide between two unappealing prospects that would not be the only options but for the human shields. This artificiality in turn affects the hostilities in profound ways. Whereas human shields force a choice upon the party that seeks to pursue an otherwise lawful military goal, civilians that voluntarily seek to use their own protected status to provide an undue military advantage to one side actually impose the unpalatable choice onto an opposing party that seeks to accomplish its military objectives while continuing to abide by its obligations never to intentionally direct attacks against the civilian population. Voluntary human shields seek to assist the military efforts of one of the belligerent states, but absent evidence of coercion or state coordination, it is difficult to directly attribute their actions to the responsibility of the LTTE.

16. Voluntary human shields, even though they do not wear uniforms, carry guns openly, or follow a chain of command, seem to have chosen directly to participate in the war effort. Indeed, by placing themselves in the line of fire, voluntary human shields move onto the battlefield and even directly to the precise point where the effects of hostilities are anticipated. It is true that once they are on the battlefield they are passive rather than active, but they intend to affect the war by their passivity, and the passivity is often even more efficacious than those soldiers who are carrying weapons and are actively ready to fire them. To be a voluntary human shield, a person must intentionally seek to put herself or himself between a likely attack and a military target. This volitional conduct epitomizes the essence of the principle from Article 51(3) of Protocol I that civilians enjoy express protections "unless and for such time as they take a direct part in hostilities." Indeed, the temporal caveat in Protocol I that such civilians may be targeted "for such time as" they participate in hostilities seems particularly appropriate for the human shields that forsake the safety of their homes in order intentionally to endanger their safety in an effort to serve the military interests of a party to the conflict. Voluntary human shields have acted, though the very act of shielding a military target is defined by inactivity, i.e. simple presence suffices.

17. Voluntary human shields risk their own lives for a particular military or political objective. They are therefore intellectually identical to unlawful belligerents or other insurgents in the sense that they participate in hostilities but do not enjoy combatant immunity or benefit from the full range of rights that accrue to lawful combatants. If we think of proportionality as only calculating likely casualties or harms to civilians, then the likely deaths to voluntary human shields are not properly part of the proportionality calculation. Neither the principle of discrimination nor the principle of proportionality applies to persons no longer legally categorized as civilians. Though the attacking force must comply

with its overall obligations under the laws and customs of war, the express right to protection derived from civilian status is forfeited by voluntary participation in the conflict. Voluntary human shields may reclaim their protections at any time by renouncing any role in the conflict and returning to their civilian homes to live and act as protected non-combatants.

18. At the same time, the killing of involuntary human shields cannot be treated merely as acceptable collateral damage in all circumstances. The US Joint Targeting Manual adopts this approach by recognizing that while an enemy cannot lawfully use civilians as human shields in an attempt to protect, conceal, or render military objects immune from military operations or force them to leave their homes or shelters to disrupt the movement of an adversary, the proportionality principle remains fully applicable in its conventional application (i.e., permitting attacks unless the collateral damage is clearly excessive in relation to the concrete and direct overall military advantage anticipated). There may be some sense in which it is indirect rather than direct targeting because the lives of protected civilians are foreseeably endangered, but that aspect of proportionality is no different with respect to human shields than it is for any other application of proportionality. Killing innocent civilians may often be an integral part of the destroying of the military target and the proportionality principle thus hinges on the anticipated extent of civilian casualties as well as the degree of military advantage forecast. Hence, it may appear that in cases of involuntary human shields, the principle of discrimination or distinction is primarily implicated because the attacker must endeavor by all feasible means to direct attacks at military objectives while employing all feasible measure to minimize or to eliminate civilian deaths.

19. Involuntary human shields should not be understood to have waived or forfeited their human right to life. Yet, we can still discount the human shields' lives during the, proportionality analysis because of the wrongful way, if it is demonstrably wrongful, that the enemy adversary has acted even as we keep the larger framework of humanitarian law intact. Hence, the attacking commander must do his best to avoid harming them, perhaps by changing the choice of weaponry or the time of attack, or by vigorous advance warning." In this context the actions of the LTTE had the effect of nullifying any advance warnings by government forces by preventing them from leaving. Indeed, but for the LTTE use of artillery fire from civilian areas, the civilians were perfectly safe based on the government declaration of the area as protected. But that does not mean that the rights of involuntary human shields trump every countervailing consideration. If the lives of combatants have inherent value, as I believe that they both under the human rights regime and the laws and customs of warfare, undue constraints on the ability of an adversary to respond to hostile actions could undermine respect for the fabric of jus in bello by creating a fatalistic sense of unavoidable death at the hands of an adversary that uses human shields to enhance the enemy war effort.

20. Emer de Vattel was absolutely correct in my view by maintaining that the law should not be fashioned or applied in order to favor oppressors, 14 which in turn logically requires the conclusion that the use of human shields should not be permitted to provide an automatic asymmetric advantage to one adversary. This is particularly appropriate because of the extensive listing of explicit precepts built into the law that the LTTE ignored in its actions in the safe zone. Vattel's logic applies perfectly to the LTTE attempts to exploit the presence of civilians in order to favour military operations because unduly tilting the application of proportionality to disfavor the lawful and limited responses of the government would be rewarding its own illegality. In other words, if the law exists to protect innocent civilians to the greatest degree possible given the realities of modern conflicts, it cannot be construed to reward the party that intentionally endangers civilians.

21. In my view, the Sri Lanka government military responses to illegal LTTE actions should be seen as proportionate for the following reasons:

a. In psychological terms, the Sri Lanka strikes directed at military objectives, despite the presence of human shields should be categorized as a form of positive punishment designed to end the unwanted behavior. The humanitarian concerns of innocent civilians ought to be equally shared by all parties to the conflict at all times. Responding to the deliberate attacks of the LTTE helped to signal to the LTTE and to the world that an asymmetric advantage secured using unlawful means should not be rewarded. The resolve of the government to end the conflict even when faced with the unpalatable choice of killing or injuring civilians in the vicinity of LTTE artillery batteries likely saved many more civilian lives.

b. Similarly, even in circumstances when the Sri Lanka forces were able to issue effective warnings to the civilian population, the effect of those warnings was nullified by the demonstrated ability of the LTTE to prevent the flow of civilians to safety. This had the effect of making the anticipated civilian casualties essentially unknowable. In other words, by rejecting the declaration of the area as a safe zone and then nullifying the effect of warnings, the military advantage anticipated through targeting specifically identified military targets was enhanced while the foreseeable collateral damage remained inherently imprecise. Thus, the LTTE bears responsibility for civilian deaths because their own conduct was the causal factor in such deaths and because only the LTTE was properly positioned to accurately assess the precise likelihood of death or injury to civilians located in the area.

c. There is no evidence in the record to suggest that the government used inherently indiscriminate weapons such as barrel bombs or Grad rockets 15, that are typically used for their capacity to affect a wide area at great range but have been shown in a number of conflicts to result in unacceptably high

levels of harm to civilians when fired into a populated area. This prima facie evidence of governmental efforts to defend its own military forces by applying the laws and customs of war in good faith indicates that the proportionality principle was similarly respected so far as the circumstances permitted.

d. The SLA can almost certainly produce evidence that it undertook artillery strikes in compliance with the best practices designed to minimize or to eliminate civilian casualties. For example, artillery experts will attest that frequent adjustments to equipment are needed to account for wind changes, humidity changes and temperature changes that affect the predictability of artillery round trajectories. These practices in turn served to decrease the foreseeable civilian casualties by ensuring that rounds were directed specifically to the lawful LTTE targets.

e. Similarly, commanders are experts at using the artillery batteries that are best positioned to respond to a given attack. Use of on-scene observers whenever possible and stringent rules of engagement to require higher level approval under specific operational conditions for the return of artillery fire into the safe zone served to minimize civilian casualties.

f. Accounting for the use of artillery further or closer to the strike zone, which in turn affects the accuracy of projectiles, the Gotovina Appeals Chamber dismissed the 200 meter 'margin of error' per se rule that had been developed and imposed by the Trial Chamber. This is important for two reasons: 1) there is no bright line prohibition that would have tilted the proportionality calculation through a rigid analytical template that ought to have been known to Sri Lanka commanders, and 2) evidence that the Sri Lanka forces did their best to anticipate causal factors that could have exacerbated civilian casualties such as firing at a military objective from a greater distance indicates compliance with the proportionality principle, The Sri Lanka military cannot be responsible for a higher margin of error than anticipated, and in the language of the ICTY Appeals Chamber "it could not be excluded that the shells were all aimed at legitimate military targets." (§§60-65, Gotovina et al., ICTY, Appeals Chamber Judgment, 16 November 2012.)

g. The legal standard is very clear that the strikes must have been intentionally launched in the knowledge that they were "clearly excessive" in relation to the anticipated gain – that standard cannot be met with supposition or speculative predictions of the adverse publicity that the LTTE sought by instigating the strikes.

22. Civilians, Combatants and the loss of civilian status -- Faced with a widespread pattern of human shields, the NATO Air Commander in Kosovo noted that despite the best efforts of the coalition, every time civilians were killed in air strikes "the reaction by political leaders was hysterical." 16 The case of involuntary human shields is much more difficult than the case of voluntary human shields at least in part because involuntary human shields clearly remain civilians and noncombatants. You do not lose your status as a civilian because of what someone else does to you. Involuntary human shields are civilians who have been victimized even more than regular civilians are during wartime because they are endangered by the government that has the legal and moral duty to protect them from the effects of hostilities. Sri Lankans caught in the so-called protected zone still benefited from a dual set of legal protections because their lives and safety were protected from government strikes under both the laws and customs of warfare and the law of domestic human rights.

23. It may be the case that some involuntary human shields are endangered by an organization or political party within a state at war, but in those circumstances the government still has the overarching obligation to protect civilians. When Saddam Hussein abducted foreign nationals and placed them in the vicinity of military objectives during the First Gulf War in August 1990, the fact that he termed them "special guests" in no way changed the illegality of his actions, which the United Nations (UN) Security Council unanimously condemned." Yet, while it may be that involuntary human shields find themselves in harm's way contrary to their intentions, they are no less an impediment to the attacking forces who would never have asked for such a situation of forced choice. Indeed, the situation of involuntary human shields creates risks both for the civilians who are forced to be shields as well as for the political community that finds it necessary to attack a military target guarded by the shields and is made more reluctant to do so than might be good for the community in question.

24. For the reasons specified above, I take the position that the civilians that intentionally shielded LTTE targets forfeited their otherwise protected status by virtue of having directly participated in hostilities. Involuntary human shields, by contrast, remain protected by virtue of their civilian status. In both instances, the concurrent obligations of the attacking force remain fully in effect such as the duty to issue effective warnings, the obligation to refrain from launching any attack deemed to be clearly disproportionate in its anticipated effects, and the duty to take all feasible measures to minimize or to eliminate civilian death or injury under all circumstances. In the memorable phrasing of Article 14 of the Lieber Code "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war. The actions of the Sri Lanka military in specifically targeting illegal enemy artillery fire as a responsive measure using the most discriminate weapons available and reiterating the desire to grant all civilians complete safety through mutual respect the NFZ complied with the principle of proportionality.

25. Proportionality explained and the impact of hostages on proportionality -- Jus in bello proportionality is best preserved when it is understood to be an integral dimension of the mission. Accomplishing the mission is a nonnegotiable necessity for professionalized armed forces around the world, which in turn breeds a military culture that prizes the selfless pursuit of duty. Correctly applying the precepts of proportionality should seldom if ever force good-faith war fighters into an absolute choice. This is why the law of armed conflict in general, and the law of proportionality in particular, is designed to fully accommodate both competing demands. The Israeli Supreme Court summarized this notion by noting that the authority of military commanders "must be properly balanced against the rights, needs, and interests of the local population: the law of war usually creates a delicate balance between two poles: military necessity on one hand, and humanitarian considerations on the other."¹⁸

26. In modern international law, it is inarguable that the principle of proportionality applies to all conflicts, whether international or non-international. The ICRC categorically maintains that State practice has proven the principle of proportionality to be a norm of customary law applicable in both international and non-international armed conflicts.¹⁹ Proportionality becomes an embedded aspect of war fighting on both the horizontal level (by linking disparate units and national contingents) and on the vertical (by virtue of its binding effect on the strategic, operational, and tactical goals of a military operation). The ICTY Trial Chamber in Kupregkic (though only in dicta) further underlined the principle of proportionality as a transcendent norm in noting that "certain fundamental norms still serve unambiguously to outlaw (widespread and indiscriminate attacks against civilians), such as rules pertaining to proportionality."²⁰ In addition, the ICTY noted in Galic that "an attack on civilians can be brought under Article 3 by virtue of customary international law."²¹

27. Proportionality provides no license to recklessly destroy civilian lives and property; neither should it serve as an impenetrable cipher designed to ensnare commanders attempting to perform their mission with endless allegations of criminality and interminable investigations. The non-derogable right to life of innocent civilians is balanced against the mandate to accomplish the mission, for which one must be prepared to sacrifice selflessly. Theorists have long noted that insurgent propagandists make the most of government excesses, "so that the burning of a few shops and homes [becomes] magnified into the rape of entire villages."²² In one of his most poignant observations from the context of the Algerian insurgency, David Galula noted that the "asymmetrical situation has important effects on propaganda. The insurgent, having no responsibility, is free to use every trick; if necessary, he can lie, cheat, exaggerate. He is not obliged to prove, he is judged by what he promises, not by what he does."²³ This prescient forecast described the actions of the LTTE in the NFZ perfectly.

28. The law of armed conflict prohibitions on taking of hostages are as all-encompassing as the application of the proportionality principle. Apart from the plain language of Common Article 3, which prohibits the taking of hostages by all participants to during armed conflicts under all circumstances, the taking of hostages is an enumerated crime in the Rome Statute in both international and non-international armed conflicts (Articles 8(2)(a)(viii) and 8(2)(c)(iii) respectively), as well as in Article 4(2)(c) of Protocol II Additional. The Blaskic, 25 Trial Chamber reiterated the importance of the prohibition against the taking of hostages:

187. The taking of hostages is prohibited by Article 3(b) common to the Geneva Conventions which is covered by Article 3 of the Statute. The commentary defines hostages as follows:

hostages are nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces

Consonant with the spirit of the Fourth Convention, the Commentary sets out that the term "hostage" must be understood in the broadest sense. The definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the Statute, that is - persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death. The parties did not contest that to be characterised as hostages the detainees must have been used to obtain some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking. In this respect, the Trial Chamber will examine the evidence as to whether the victims were detained or otherwise deprived of their freedom by the Croatian forces (HVO or others) (emphasis added, citations omitted)

29. The synergy between these parallel protections can only be fully respected by virtue of their simultaneous application. In other words, I am of the firm opinion that the presence of hostages, unlawful by every measure of human rights law and the law of armed conflict, in no way decreases the prerogatives of one party to the conflict to strike lawful targets using lawful means. Applying the "broadest" understanding of the term hostage as recommended by the ICRC and accepted by the ICTY, the LTTE attempted to keep the civilians inside the NFZ as hostages. The reported inflation of estimated civilian casualties sought to aggrandize the wrongfulness of the military responses, and to obscure the prior war crimes committed by the LTTE precisely to achieve a propaganda victory that might translate into strategic success. In my opinion, the Sri Lanka military had every right to respond to those provocations with artillery fires targeting the LTTE positions, provided that the estimate of civilian casualties was not "clearly excessive" in relation to the anticipated military value.

30. Evaluations of Proportionality (military commanders taking into account the security of their own forces) — Military commanders are vested with the broadest possible discretion to determine the combination of means needed to accomplish the military mission subject to the outer boundaries of permissiveness established by the applicable provisions of the laws and customs of warfare. This includes the latitude to expressly take the lives and safety of their own personnel into account when making the proportionality analysis. In his seminal work *War and Law Since 1945*, Geoffrey Best pointed out that "proportionality is certainly an awkward word. It is a pity that such indispensable and noble words as proportionality and humanitarian(ism) are in themselves so lumbering, unattractive and inexpressive." 26 Proportionality is, nevertheless, a deeply embedded and indispensable aspect of decision-making during war or armed conflict for many decades. Although the textual incarnations of proportionality came after more than a century of development within the field that gap should not be attributed to unfamiliarity with the basic precepts of the precautions expected to be taken by attackers and defenders alike. The developmentally delayed formulation of the treaty language was "because it was thought to be too slippery and in its potential implications embarrassing to commit to a set form of words." 27 In particular, the DUTY of military commanders to achieve military victory while minimizing casualties to units under the effective control of the commander is so intertwined in the development of the law of proportionality as to be inseparable.

31. The Rome Statute describes proportionality in a manner consistent with modern State practice following the adoption of Protocol I as:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated." (emphasis added to note the words added to align the Rome Statute with state practice following Protocol I)

In addition, the Elements of Crimes (adopted by consensus as mentioned above) included a key footnote that reads as follows:

The expression "concrete and direct overall military advantage" refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.

32. The inclusion of a proportionality requirement to mark off a specific war crime under the Rome Statute is significant because unlike the grave breach formulation found in Protocol I, the criminal offense in the Rome Statute is completed based on the intentional initiation of a disproportionate attack. The highest possible *mens rea* standard implicitly concedes that some foreseeable civilian casualties are lawful. Thus, the Rome Statute standard strongly mitigates against the inference of a criminal intent based on after the fact inferences that the commander might have had knowledge that a particular attack might cause some level of damage to civilians or their property, or indeed might have selected another mode of attack likely to engender more casualties to one's own force.

33. The modern articulation of the proportionality principle in Article 8(2)(b)(iv) (the crime of disproportionate attack) widens the scope of the military advantage that can be considered in the proportionality analysis (through inclusion of the word overall) and narrows what level of collateral damage is considered excessive (by specifying that the damage needs to be clearly excessive to generate criminal liability). These revisions to the treaty terminology employed by the drafters of Protocol I could be discounted as a *sui generis* necessity based on diplomatic convenience, but the reality is that the standard of Article 8(2)(b)(iv) accurately reflects the state practice that established the meaning of proportionality under customary international law at the time that the LTTE launched its artillery fire from within the NFZ. To be more precise, the text of the Rome Statute, as understood in light of the Elements footnote adopted by consensus, accurately embodies preexisting customary international law.

34. The governments of the United Kingdom, the Netherlands, Spain, Italy, Australia, Belgium, New Zealand, Germany, and Canada each published a virtually identical reservation with respect to Articles 51 and 57 as they acceded to Protocol I. 28 The overwhelming weight of the reservations made clear that state practice did not intend to put the warfighter into a straightjacket of rigid orthodoxy. The New Zealand reservation for example (virtually identical to those of other states listed above) reads as follows:

In relation to paragraph 5 (b) of Article 51 and to paragraph 2 (a) (iii) of Article 57, the Government of New Zealand understands that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack and that the term "military advantage" involves a variety of considerations, including the security of attacking forces. It is further the understanding of the

Government of New Zealand that the term "concrete and direct military advantage anticipated", used in Articles 51 and 57, means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved.

35. Furthermore, commanders have every right to consider the safety of their own forces in making proportionality determinations because, the perspective of the commander (or other warfighting decision maker) is entitled to deference based on the subjective perspective prevailing at the time. The Italian declaration with respect to Protocol I states that in "relation to Articles 51 to 58 inclusive, the Italian Government understands that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time." This understanding is replicated in a number of other State pronouncements. Another reservation from the government of Austria declares that "Article 57, paragraph 2, of Protocol I will be applied on the understanding that, with respect to any decision taken by a military commander, the information actually available at the time of the decision is determinative." The language of the United Kingdom Law of War Manual summarizes the state of the law which was captured in the prohibition of Article 8(2)(b)(iv) as it should be understood in light of the Elements of Crimes,²⁹

The military advantage anticipated from the attack refers to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack. The point of this is that an attack may involve a number of co-ordinated actions, some of which might cause more incidental damage than others. In assessing whether the proportionality rule has been violated, the effect of the whole attack must be considered. That does not, however, mean that an entirely gratuitous and unnecessary action within the attack as a whole would be condoned. Generally speaking, when considering the responsibility of a commander at any level, it is necessary to look at the part of the attack for which he was responsible in the context of the attack as a whole and in the light of the circumstances prevailing at the time the decision to attack was made.

36. In the circumstances prevailing at the time, it is my unqualified opinion that the overarching necessity of ending the multi-generational struggle against the LTTE permitted Sri Lanka commanders to consider means of attack that accomplished the vital goal of "final victory", even as they sought to protect their own forces. It would be ludicrous to suggest that there is some precept of international law that required them to send ground forces into the NFZ to respond to the LTTE artillery fire. I cannot imagine a knowledgeable expert in my field that would suggest otherwise.

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