

Legal Implications Surrounding the Use of Human Shields
A Conversation with Laurie R. Blank, Geoffrey S. Corn, and Orde F. Kittrie,
moderated by Mark Dubowitz

DUBOWITZ: Alright, folks. I think we're going to get going. Thank you very much for joining FDD today on Capitol Hill. Great to see a lot of people who we work with, and I know there's a lot of folks watching on the livestream. I'm Mark Dubowitz. I'm the chief executive of FDD. As many of you know, FDD, we're a nonpartisan national security think tank here in town providing research analysis to the Hill, to the executive branch, to the intel community, and to the media.

We field about 2,000 requests every year from the Hill, we call on-demand research, and also from across the executive branches. I think most of you know my colleagues who work the Hill, Toby Dershowitz and Tyler Stapleton. Tyler's here today. Please don't hesitate to reach out to us with your research requests. We've got a very enthusiastic team on almost 24-hour standby to provide open source research.

We obviously are here at an important time for lots of reasons, but specifically on this issue. Around the globe, terrorists are increasingly using civilians as human shields, and they're hiding in, they're firing from hospitals, and schools, homes, and places of worship. This unlawful tactic, which we refer to as human shields, presents a major challenge for the United States and for other law-abiding armed forces. The problem, obviously, with this tactic is that it causes our armed forces to restrain themselves, and it renders them less effective. It undermines their military legitimacy. These terrorist organizations are causing and then later exploiting civilian casualties.

I'm very happy to moderate this event. We've got an excellent panel here of top-notch experts on this question. To my immediate right is Laurie Blank. She's a clinical professor of law and director of the International Humanitarian Law Clinic at Emory University's School of Law. Welcome, Laurie.

Then to Laurie's right is Geoff Corn. He's a professor of law and presidential research professor at South Texas College of Law in Houston. He was the U.S. Army's leading expert on the human shields issue.

Then Orde Kittrie, who is FDD senior fellow. He's a professor of law at Arizona State University, and is a former State Department attorney.

What we're going to do is I'm going to moderate a 30-40 minute discussion with these three scholars, and then turn it over to you for questions. All right, Geoff. Geoff, you previously served as the Army's senior expert on the law of war. You're a professor of law. You were at the U.S. Army JAG School. You've written several books on this issue of the laws of war. Can you just give us a brief overview on the laws of war as it relates to the protection of civilians and the use of human shields? What does it require? What does it prohibit? Perhaps just a few minutes of an overview.

CORN: Sure. To make this as simple as possible, I want to try and have people imagine that you are a legal advisor to a commander in combat, trying to decide whether or not it's lawful to engage an enemy. Once that commander knows that the attack on the enemy will place civilians in jeopardy, there's a methodology that the commander goes through to decide whether or not it's lawful to conduct the attack.

The first question is whether or not the person, place, or thing that's been nominated for attack qualifies as what we call a military objective. In its simplest terms, that just means it's something that as a result of the attack will damage the enemy's military capability and/or give you a military advantage, in a nutshell. It's a little bit more complex than that, but that's really what the commander is deciding.

The second question is, if it is a military objective, then the commander has to decide whether or not it's feasible to implement precautionary measures to mitigate the risk to civilians. Precautionary measures include things like adjusting the timing of the attack, or issuing warnings to the civilian population to help them avoid the consequence of the attack, or facilitating the evacuation of civilians from the area, or maybe selecting a different target that will produce the same military advantage without jeopardizing the civilian population, and then even into the weeds of what we call the weaponeering process.

What weapons system do I have that can feasibly achieve my military objective and do it in a way that mitigates risk to civilians? If I have a choice between two tactics or two weapons, I'm supposed to pick the one that has the least risk to the civilian population. You can imagine how that would play out, for example, if I had to choose between using artillery versus a precision-guided weapon that might be fired from a drone. The precision-guided weapon would probably reduce the risks to civilians, so if they were equally available, that would be the one that the commander would gravitate towards.

Once the commander has exhausted all feasible precautions, and the word feasible is important, because it means that the commander has to use these precautions unless doing so will compromise the effectiveness of his military operation. The last issue is the one that most civilians think about the most when they think of civilian casualties, which is what we generally call the proportionality rule.

On this point, I think it's very important that people understand that when a military commander assesses the proportionality of an attack in war, he's not thinking the way a police officer would think about proportionality in the normal peacetime context. When we think of proportionality in its normal context, what we think about is using only the amount of force needed to reduce the threat. The beneficiary of the proportionality rule in peacetime is the object of attack, if you think about it. If a police officer has to use force against somebody who's posing a threat, that person gets the benefit of the proportionality rule.

In war, it's completely different. In war, the object of attack is not the beneficiary of the proportionality rule. There's no requirement that the commander use minimally necessary force against the enemy. The beneficiary is the people who will be incidentally harmed as a result of the attack on that enemy. The law doesn't use the word proportional. The law uses the word

excessive. As a legal advisor, what I tell the commander is, “You are allowed to conduct that attack unless you conclude that the risk to the civilian population will be excessive in relation to the military advantage you'll gain from conducting that attack.”

I've done some writing on this issue. Candidly, I believe that the legal community in general has made a mistake on focusing so much on proportionality and less on the precautions rule, because I think the precautions rule is much more instinctive for a commander. I can think about things like timing and weapons. Proportionality is very general in its conception, and we can debate a lot in the middle about what is or what is not an excessive civilian risk.

Ultimately, if the commander determines that the value of the attack outweighs the risks to the civilian population, then the law says the attack is awful—is lawful. Ironic, right? It is awful, if you think about it. Actually, I'm glad I made that little slip, because what most people do when they talk about proportionality is they talk about unintended or accidental harm to the civilian population.

In fact, it's quite the opposite. It's supposed to be calculated, and that is a terrible burden, if you think about it, to carry, that I'm going to conduct an attack knowing that my attack is likely to cause the death or injury to innocent civilians, but also knowing that it's lawful. When the enemy uses human shields, what the enemy is doing is the enemy is complicating that equation at every step in the process, but also imposing a terrible burden on that commander, because the commander ultimately has to make a judgment that the attack is necessary, knowing that it's likely going to result in civilian harm.

I just want to close with one point. I think to understand this issue, you have to understand that the very nature of warfare has been substantially changed by what are commonly referred to as asymmetric enemies or asymmetric threats. As you say, Mark, the terrorist threat. I was part of a group of generals that went to Israel after the Gaza war in 2014 to conduct a study of the war, to identify lessons learned. They wrote a report. You can find it. It's JINSA, J-I-N-S-A, the JINSA Gaza report. If you Google it, you'll find the report. There's a lot of analysis in there of the legal equation related to Israel's use of force in Gaza.

One of the generals, Retired General Jones, Mike Jones, who had been the chief of staff for our Central Command, he made a comment at a briefing like this that I'd never heard before, but it really got to the heart of the difficulty. He said, “When I was a tank officer, as a junior officer in the Army, information was a supporting effort to combat, like engineering, or intelligence, or signal. What I learned about Hamas is that for them, combat is a supporting effort to their information campaign.” In other words, they don't care about causing civilian casualties. They don't care even about losing the tactical battle, because what their end state is is to delegitimize the IDF and Israel writ large, and they know the way to do that is to increase the unavoidable consequence of combat when you intermingle your vital assets with the civilian population.

They're fighting at an information strategic level, so they get advantaged no matter what. Because if they commingle their vital assets with civilians, at the tactical level they get the advantage of hesitation on the part of the IDF, and at the strategic level they get the advantage of

an information advantage because so many people in the international community don't understand how the law actually assigns responsibility for civilian casualties in war. If you really want to understand why this effort is so important, you have to understand that we're dealing with enemies who are too sophisticated now for us to ignore the fact that they know they reap advantage from causing civilian casualties, while we're on the other end of the spectrum going through this process to try and mitigate that risk.

DUBOWITZ: All right, Geoff. That's very helpful. Orde, I want to move from the conceptual level and just pick up on some of the examples that Geoff has raised. Interesting, terrorist organizations whose primary objective is informational warfare, where combat is actually a supporting role to that. Your book, which is in the back by the way. If folks haven't picked up a free copy, please do. It's *Lawfare: Law as a Weapon of War*, from Oxford University Press. Orde, in that book, you describe how several terrorist organizations have used human shields against the United States and our allies. Geoff just gave an example of Hamas and the IDF. Can you talk about which groups are using this tactic, and really expand on Geoff's very good analysis on the question of why?

KITTRIE: Sure. Thanks, Mark. U.S. and other coalition armed forces have repeatedly been faced with the use of human shields by groups including the Islamic State, the Taliban, Al Qaeda. Don't just take it from me. A senior UN official in March 2017 referred to ISIL's strategy of using children, men, and women to shield themselves from attack. The senior UN official called this strategy "cowardly and disgraceful," noting that it "breaches the most basic standards of human dignity and morality." Under international humanitarian law, that's another term for the law of war, the UN official noted "the use of human shields amounts to a war crime." That's against the U.S. There are also plenty of examples of Al Qaeda and Hezbollah—Al Qaeda and the Taliban using human shields against the United States.

In addition, Hamas and Hezbollah have regularly used human shields against the Israeli military. For example, Hamas was roundly criticized for its use of human shields during the 2014 Gaza war. Don't just take it from me. The EU, the European Union, announced that it, quote, "strongly condemns the calls on the population of Gaza to provide themselves as human shields." President Obama said at the time, "Hamas acts extraordinarily irresponsibly when it's deliberately siting rocket launchers in population centers, putting populations at risk because of that particular military strategy." That's Hamas.

Hezbollah used human shields during its 2006 conflict with Israel, the last major conflict between Hezbollah and Israel. Jan Egeland, the UN Under-Secretary General for Humanitarian Affairs at the time, said, "Hezbollah must stop this cowardly blending among women and children." In addition, as you can see from the press, Hezbollah's clearly preparing to rely heavily on the use of human shields in the rumored future conflict with Israel.

Why do these groups use human shields? As Geoff noted, our enemies use human shields for a couple of primary reasons. First, to cause our armed forces to self-impose restraints that would render them less effective. Second, to erode the will to fight of us and our allies, and to spur anger at us and our allies by generating civilian casualties, for which they can blame our forces.

DUBOWITZ: All right. Laurie, I wonder if you could just pick up on that some. You've written numerous leading studies describing how and why the international community has failed so egregiously in holding terrorist organizations accountable for their use of human shields. You certainly have some very specific recommendations about what can be done about that. Can you give us an overview of this, and some practical suggestions on how to counter it?

BLANK: Sure, and thanks very much for having me today. Just to build on some of what's been discussed, when we think about the core objective, or one core objective of the law of war is to protect civilians during conflict. This is primarily, or the centerpiece of this objective, is the principle of distinction, which requires that those who are fighting distinguish when they're targeting, as Geoff said, identifying military objectives, you have to distinguish between civilian persons and military persons, civilian objects, military objects.

The obligation goes beyond that active obligation to one that you might call a passive obligation, which is that you must distinguish yourself, if you are fighting, from the civilians around you. Why? To make it so the other side can also implement their distinction obligation, and to protect those civilians so that they are not caught up in the conflict.

Here is where efforts have fallen short in terms of condemning, identifying, and hopefully ultimately holding accountable those who are violating the law in this manner. I want to pick up on Orde's comment that the use of human shields is a war crime. Sometimes you might hear people describe the use of human shields as an inconvenience. In essence, the way they talk about it is an inconvenience. "It's just so difficult when the other side is co-locating among the civilian population, and hiding in a hospital, and firing from schoolyards, etc." It's not just a tactic that makes life difficult. It is in fact a violation of the law, and that's an important starting point here to think about.

If it's a violation of the law, why is not much being done about it? We don't see a lot of accountability for violations of what I would call a passive distinction obligation, which is to distinguish yourself, to not commingle with civilians, to not use them as a shield, to not pretend to be a civilian or other protected person when you're fighting.

I think there's a number of reasons why. One may be quite simplistic and almost glib-sounding, which is that we have a lot, a lot, a lot of atrocities and violations of the law that are more obvious, that are easier to identify, to quantify. Deliberate attacks on civilians, easier to identify than this seemingly more complicated question of how people are conducting themselves when they're fighting. It may be as simple as international tribunals, UN investigations, commissions of inquiry, all these different types of groups that are identifying violations are pretty tied up with identifying things like crimes against humanity, genocide, deliberate attacks on civilians, and so on.

The effect, however, of both a failure of accountability and even a failure of condemnation and stigmatization is to encourage this conduct, to enable it, to facilitate it. We can think about this in our more ordinary law enforcement existence. Think about something like drunk driving. If we simply condemned accidents that hurt people, but didn't focus on the fact that there was drunk driving involved, yes, we would be trying to limit harm to pedestrians and

other drivers, but we wouldn't be identifying one critical cause of it. We would not have stigmatized, we would not have condemned driving while intoxicated.

This is the same sort of idea. If you condemn suicide bombers for attacking civilians, that's good. We want to condemn that, but also condemn them for launching attacks while feigning civilian status, because that's what enables. That's another violation that enables them to do that. We don't see that. We see, in essence, a failure to address a violation of really one of the core objects and purposes of the law. We see a loss of moral sanction in this respect.

One of the real problems here is that so much of the focus of discourse about military operations, about the application of the law, focuses on the attacking party. This is important. The attacking party is the one that's launching munitions, launching attacks, and as Geoff said, attackers have an exhaustive set of obligations in terms of making decisions when launching attacks, but they are not the only ones who have obligations under the law.

The defending party also has obligations, and the issue of human shields falls under the obligations of the defending party to protect the civilians in their area, to take precautions to minimize harm to civilians. When we focus only on what the attacker is doing, we essentially eliminate an entire component of the law of war's system for protecting civilians. We also inevitably end up putting too much weight on things like the proportionality obligations and issues like that that can only hold so much of the weight of the law's requirement to protect civilians.

It makes it easier for these de-legitimization campaigns, for the information warfare to go on, because you're essentially only looking at what one side is doing. The consequence, of course, is that future harm to civilians is simply more likely, because if you don't condemn an actor in an armed conflict—and it's not just non-state actors that use human shields, unfortunately. We have many examples of states doing this, as well. If that's not condemned, then of course it will continue because it has a very effective information campaign effort, a de-legitimization campaign effort. The consequence is just that we will see more and more harm to civilians during conflict, which of course is exactly what the law is seeking to prevent.

When we look at whether it's human shields, whether it's co-locating military objectives with civilian objectives, or civilian objects. When we look at things like perfidy, which is feigning civilian or other protected status in order to attack. If those are not condemned as such, then they will continue because they will no longer be seen, they will not be identified as violations in and of themselves.

Just a couple of examples. Perfidy, to name one. We have a number of examples of crimes. Srebrenica is a perfect example. Those of you who are familiar with some of what happened in Srebrenica, Bosnian Serb soldiers at one point during the genocide and crimes against humanity committed against Bosnian Muslim boys and men, they disguised themselves as UN peacekeepers. They then, when they gathered them up, they said, "You'll be safe. We're going to transport you to a location." Then of course, they gathered them all together, did transport them to a location, and then shot them.

No mention of, in essence, the feigning of, “I don't pose a threat to you, so therefore you can be safe with me. Now I'm going to use that comfort level that you've gained because you think I am someone who doesn't pose a threat, and I'm going to use that in order to attack.” Of course, the crimes in Srebrenica were condemned. They were condemned as genocide. Many actors were held accountable, but no mention of that particular aspect of the conduct. To me, that's highly problematic because if you don't condemn it, okay, that actually worked pretty well. Next time let's just not get caught, is the answer for some.

Another example is the Goldstone report from the 2009—I think we'll end up talking about this a little bit more, but just one example. The Goldstone report notes that Hamas and other militants fought in civilian attire. That's a failure of the obligation to distinguish yourself. There's no rule that says, “You must constantly walk around in uniform,” but if you're fighting, you must distinguish yourself. If you use civilian attire to make yourself look like a civilian, and then you attack, then you are violating the law.

They don't condemn it. They simply note it. “Yes, there are lots of examples of Hamas and other fighters fighting in civilian clothing. Gee, how unfortunate.” They don't condemn it. Therefore, if you are Hamas or another militant, and you look at that, you go, “All right, that doesn't seem to have gone off too badly.” We see again this failure to stigmatize.

Human shielding, one last point, we have had a few prosecutions for the use of human shields at the ICTY, the Yugoslav Tribunal, for the use of peacekeepers as human shields, for the use of civilian detainees as human shields, but in all cases, it was prosecuted as inhuman treatment. It is inhuman treatment. Chaining a Dutch peacekeeper to a tank or something else in order to protect the tank from being attacked, that is inhuman, whether you want to look at it as a legal definition or a moral definition. I don't have any trouble with that, but they didn't call it the war crime of human shields. Again, we see a failure to be precise, to be specific, to address these questions. I think that over time what this does is degrade and emasculate the force of these types of legal prohibitions.

DUBOWITZ: Geoff, pick up on some of those points. Laurie's effectively saying that our failure to condemn implicitly legitimizes these tactics. Certainly the U.S., British, Israeli, other militaries, we're democracies. We have an obligation to fight with one hand tied behind our back, but not two hands tied behind our back.

CORN: It's interesting. I actually think that narrative is a little bit over-asserted, that democracies are fighting constrained. The reality is that the law provides the authority you need to deal with an enemy that's using human shields. This is the reality. It doesn't immunize the target.

Let's be very clear. The law does not absolve an attacking force of its responsibility to mitigate civilian risk even if it knows the enemy is violating the law in the violation of these passive precautionary obligations to separate from the civilian population. We constantly have the obligation to mitigate risk, but the fact that the enemy is engaging in these tactics impacts what a commander would determine is going to be a proportionate civilian harm calculation. There's no way around it.

I think the real difficulty here is the general inability for the public, for diplomats, for legislators, for politicians to simply rely on the visual effects of an attack to assign culpability for the consequence of that attack. I've written an article talking about the difference between what I call cause and responsibility. I teach criminal law, and I know all sorts about the rules about causation and proximate cause.

In its general concept, what I'm suggesting is, when a U.S. drone fires a missile, it's very easy to attribute the cause of the destruction. The cause of the destruction, the immediate cause, was the missile. The question that we need to be asking is, if that results in civilian casualties, where does responsibility for those casualties fall? That's where what Laurie was talking about, about the failure to comply with your own obligation to mitigate civilian risk, becomes so critical. In most cases, if we really do the hard work of recreating the situation the commander confronted at the time the attack was authorized, what we start to realize is that the responsibility for the civilian casualty falls at the feet of the enemy, because they're the ones who complicated the attack decision-making process.

By the way, I'm not naïve enough to believe that if we do a more credible job of identifying and condemning the use of human shields, that these enemies are suddenly going to stop doing it. The root of the problem is they don't really care about the consequence to the civilians that they're endangering, whether they're on our side of the forward edge of the battle area or their own side of the forward edge of the battle area.

I think there's an element of this when we talk about condemnation that is often overlooked, and that's moral clarity. I was in the Army for 21 years, and for 21 years, I believed that I was doing the right thing, that I was in the business of doing the right thing, and that the commanders who were in charge of me would only ask me to use violence if we made a decision that it was morally and legally justified. I think one of the aspects of the failure to do what Laurie's talking about, which is to more credibly and aggressively condemn the enemy's use of human shields, is that it corrodes the moral clarity of our own forces. They start to wonder. If all they ever hear is that they're the villains, they're the ones who are causing the problem, they start to question the morality of their own uses of force. They start to question the legitimacy of their own leadership.

I spoke about that Gaza report at the Human Rights Commission in Geneva when they issued their report. I was at a dinner the night before, and somebody said to me, "You know that your report and your statement isn't going to have any impact. You're in Geneva. You're in front of the Human Rights Commission, and you're talking about the legitimacy of Israeli operations." I thought about it for a minute, and my response was, "If it has no impact on them, if one Israeli lieutenant who fought in the dirt, and the mud, and the dust, and the heat, and the blood of Gaza hears somebody saying, 'What you did was lawful, because the enemy made it so complicated for you to avoid the consequence,' then I've achieved something, because that clarity is important for our own forces."

When we think about legislative efforts to raise the profile of human shields violations, we shouldn't simply throw up our hands and say, "It's not going to make any difference. We're probably never going to get the chance to prosecute one of these people." The differences it

makes is for our own young men and women who are called upon to fight in those miserably complicated situations, when they have no choice other than to use their combat power to the risk of the civilian population, and they've got to live with it for the rest of their lives.

These are moral people. I was a JAG officer. When I was in JAG, there was a very small percentage of people in the Army I thought were sociopaths, because I prosecuted some of them. The vast majority of the men and women that I served with were moral and honorable, and they wanted to do the right thing. If we don't make it clear that sometimes it's the enemy's fault why you had no option other than to produce that casualty, we are undermining that moral clarity, and I think that's tragic.

DUBOWITZ: Orde, pick up on that point. Both Laurie and Geoff have talked really about issues relating to operational legitimacy, the extent to which the enemy uses human shields to undermine operational legitimacy, and therefore in doing so, in some cases, undermines the military objectives that the United States, the U.K., or Israel, or others are trying to achieve.

We now have a potential upcoming flashpoint for the use of human shields, with the potential for the next war between Israel and Hezbollah, or more broadly, Israel and Iran on the northern front. Can you talk a little bit about what you see coming based on some of the history between Israel and Hezbollah, Israel and Hamas, the statements that have been made by Hezbollah, and Israeli officials, and Iranian officials? What do you see coming, and again, practically, what can we do about it?

KITTRIE: Sure. Hezbollah is clearly preparing to rely heavily on the use of human shields in the future conflict, a third Lebanon war that is looming between it and Israel. Hezbollah currently has some 130,000 rockets and missiles ready to fire at Israel. Many of them are hidden amongst civilian infrastructure. Hezbollah has little to no ability to seize Israeli territory, but those rockets and missiles are valuable to Hezbollah because they give it the ability to kill a lot of Israeli civilians and wreak havoc on the Israeli economy.

You just have to look back to the very beginning of the second Lebanon war in 2006, when Lebanon had about 15,000 rockets and missiles, some 10% of what it has today. On the first day of that second Lebanese war in 2006, the Israeli Air Force launched a preemptive bombing campaign which destroyed most of Hezbollah's longer-range rockets and missiles before Hezbollah could use them.

This time, Hezbollah has far more rockets and missiles, some ten times more, and they've hidden more of them in homes and other civilian infrastructure. There was an interesting quote in January 2018. An Israeli Defense Forces spokesman, Brigadier General Ronen Manelis published an op-ed in Arabic in several Lebanese news outlets. He said, and I quote, "One in every three or four houses in southern Lebanon is a headquarters, a post, a weapons depot, or a Hezbollah hideout. Hezbollah is using the people." That's what he had to say.

Hezbollah is using the people who live in these homes as human shields, putting Israel to a choice. If Israel again launches a preemptive bombing campaign to destroy Hezbollah's rockets and missiles, Hezbollah will spur international condemnation of Israel for killing the Lebanese

civilians who live in those houses where the rockets and missiles are hidden. If, in contrast, Israel holds back, Hezbollah will launch the 130,000 rockets and missiles at Israel, killing hundreds of Israeli civilians, and severely damaging Israel's morale and economy.

Currently, because, as Laurie and Geoff mentioned, terrorist groups like Hezbollah are not accountable for their use of human shields, currently Hezbollah has every incentive to put Israel to that difficult choice, because it's not going to be held accountable for its use of human shields. We need to find a way to change Hezbollah's calculus, to hold it accountable for the use of human shields.

DUBOWITZ: Okay. Before we get to that, and I know this is going to come up in some of the Q and A, so Laurie, you've talked already about I guess there were two reports. There was the Goldstone report of 2009, and then there was this UN Human Rights, at the time, Council report, this commission of inquiry on the 2014 conflict between Israel and Hamas. You touched upon it briefly, but can you just give us again some deeper insight into what the reports said and what they didn't say? Also, I'd like you to pivot off that and really talk about, practically speaking, what can the United States Congress and the executive branch do to start to really deal with this problem of a tactic that is being effectively, by not being condemned, it's being legitimized?

BLANK: Sure. Both of those reports are good examples of what some of us—I think a commonly used term is effects-based analysis of military operations, which is basically, “Wow, a lot of people died over there, so somebody—There must be war crimes.” Naturally, the party that launched the missile, the rocket, the artillery must be responsible for that, as Geoff was saying.

What we see is the two reports that you mentioned essentially, in some way, mirror and put a legal gloss on what we see in the public discourse in terms of, “A lot of civilians died, so therefore there must have been war crimes.” Both the Goldstone report and the 2014 UN report essentially focus on the effects of Israeli military operations as the primary source of identifying responsibility for the harm that was caused, but I think I want to just note briefly how they both address human shields, because we see—The Goldstone report is extraordinarily long, so it takes a long time to talk about all the various issues in there, but I just want to note a couple things about the way they both look at human shields, because I think it highlights some of this discussion.

It was evident in the 2009 Operation Cast Lead conflict that Hamas and other groups were using human shields. Orde has noted a number of examples. The Goldstone report almost doesn't mention this at all. It mentions it maybe in one paragraph, and it correctly notes that for the violation of using human shields, there is an intent aspect to it. The law says that it is prohibited to use the civilian population, or the movement of the civilian population, or individual civilians to render a military objective immune or to shield, favor, or impede military operations. It means you're doing it. You are choosing to use the civilians in this manner.

It notes that, but then it essentially makes it impossible to satisfy the standard that it seems to set out, because even a direct statement from a Hamas official saying, “Our elderly, our women, and children are using their bodies to shield our rockets, our headquarters, etc. from

Israeli attacks,” and praising that, noting that this is a great tactic that we have. That wasn't sufficient to even merit further discussion of human shields, let alone actual, “Hey, that is the use of human shields,” an actual pinning of that. That's actually, to me, quite staggering, because I don't know what more you would need beyond an official saying, “Hey, good job doing this. Let's keep doing this. It's working.” That seems to be a pretty strong statement that they are doing it.

In the 2014 report, it couches it a little bit more. I think the authors of that report learned something from the Goldstone report and the reaction to it in some quarters, and I think attempted to be less problematic. What we see in the UN 2014 report are conditional statements, even in the face of direct evidence, again statements by Hamas officials praising civilians for going up on roofs and etc. to shield objectives. There was a Hamas tactical manual that was found that specifically talked about using civilians as human shields. In the face of that, what the report says is, “If someone does this, it would amount to human shields. It maybe could be seen as if they actually directed people.” Again, it creates this very, very high bar. It dilutes the law's objective of protecting civilians, and it encourages this type of conduct by disproportionate condemnation of the attacker for the harm that resulted from attacks, and in all sense, essentially plays right into the information operation goals.

I want to come back to something that Geoff said in terms of helping to impose some moral clarity on the situation, which I think is very important. I want to look at it from the other side, which is that the importance of identifying these violations, human shields and other similar violations, is actually also playing an important role in trying to undo the clarity, a different clarity, that the terrorist groups, the non-state actors, the users of these tactics are creating. They are creating a clarity of discourse that the more powerful actor in the conflict, whether it's the IDF against Hamas or Hezbollah, whether it's the U.S. against ISIS, or Al Qaeda, or other groups, that they are the reason, the party responsible for all civilian deaths in the conflict, for all harm, for all destruction. They are using these tactics, these information operations, to create a very clear message, to create a clarity that it must be those very powerful, the more powerful in this asymmetric conflict, they are the ones killing all the people who are dying unnecessarily.

The challenge here is to actually, while creating the moral clarity that Geoff talking about, actually to take away from the clarity they are trying to create of that message, to recast the story. I just want to note one thing. There's an old expression. I think it's often attributed to Winston Churchill, but I'm not sure if he actually is the source of this, which is that, “A lie gets halfway around the world before the truth even gets its boots on.” You may have heard this before. This is exactly what we see with the immediate effect of the visual pictures, video of what happens after an attack, and immediate claims, civilian harm.

Civilian harm is always bad. It's always tragic. It's always horrible. It's not always a crime, as we learned from what Geoff was explaining at the beginning of our discussion. It's a real challenge when you ask what can be done about this. We have to think very effectively, innovatively about how to deal with the fact that there is an immediate discourse about what happens when we have military operations and attacks that is not actually the facts about what happened, but it's based on what we see, it's based on the immediate effects, and it's harder for those who are trying to put out the accurate information. You can't do it as quickly as someone

who just immediately tweets a cell phone video of, “Look at these horrible things that happened.”

It's a real challenge for militaries, for democratic governments, and others to think about how do we get accurate information out in an effective manner, but we can't do it instantaneously, because we actually have to check. We need to know what happened. This is a really big challenge, and I think one that still requires a lot of thinking in this regard.

DUBOWITZ: Okay. With that in mind, we've got a couple minutes, and then we're going to go to questions. There are a lot of Hill staffers here, a lot watching this on livestream. Orde, I want to ask you specifically, what can be done? I think Laurie and Geoff have both talked about the information piece of this, the information warfare piece of this. Clearly, once conflict breaks out, it's often too late, because I think as Laurie has underscored, the terrorist organizations seize the initiative. As Geoff and Laurie have both said, the visual imagery is so powerful that it often just overwhelms any kind of legal analysis or thoughtful argumentation. It's just the emotional value of that video and those images that overwhelms everything.

That's what the United States military, the IDF, the British military, etc. have had to face. Okay, so with that in mind, very practically to these Hill staffers, what has been done, what can be done, and please offer some very practical recommendations.

KITTRIE: Sure, thanks. I think it's a very important issue, and I think there are things that folks on the Hill can do. There's some very good legislation out there. H.R. 3542, the Hamas Human Shields Prevention Act, which passed the House by a vote of 415 to zero on February 14th, 2018. Unfortunately, it focuses just on Hamas and not also Hezbollah, but it's a bill which focuses the spotlight on the use of human shields. It makes clear that it's U.S. policy to vigorously counter the use of human shields. The bill encourages the president to direct the U.S. ambassador to the UN to initiate a UN Security Council resolution to counter the use of human shields. The bill would impose sanctions on those involved with the use of human shields. The bill finally would have the administration report to Congress on what it's doing to counter the use of human shields.

It seems to me these are all very good objectives, and a way that Congress can hold groups like Hamas and Hezbollah accountable for the use of human shields. As was mentioned, we, I favor holding both state militaries and also non-state armed forces accountable for any war crimes, including those that harm or endanger civilians. The U.S. and its allies, including the United Kingdom and Israel, already have rigorous mechanisms for investigating and prosecuting alleged war crimes by their personnel. In contrast, Hamas, Hezbollah, the Islamic State, the Taliban, Al Qaeda make no effort whatsoever to hold their personnel accountable for war crimes. Instead, they often adopt a war crime, the use of human shields, as a standard tactic. We need to hold them accountable for the use of human shields, and there are ways, including that bill, which Congress can do that.

DUBOWITZ: Okay.

CORN: Can I just make a quick point? I think we have to also recognize the issue here is not just that there are international lawyers who understand the law, and it's the law is misunderstood. The issue is also a misunderstanding of basic military doctrine. If we are going to engage in discussions, we're going to have studies, reports, we have to have the right people involved. You listen to General Jones when he spoke at the Human Rights Commission, and his basic premise, his problem with McGowan Davis was they entered an equation of one plus I don't know equals three. The I don't know was the military aspect of the operations, because they did not have military operational experts as part of that inquiry.

For him, that was very problematic, because if you're going to condemn a military commander for an attack decision, you have to know so much about what was going on in that decision-making process. I think one of the things that we can do, in addition to the bills that are working through, is make sure that when the United States has the opportunity to demand that the right experts be engaged in these types of inquiries, that they are included, and if they are not included, that we emphasize very clearly that it undermines the legitimacy of any report that's going to come out. This is not just a legal issue. This is an operational issue. You have to understand war to be able to write a report about whether something was or was not legitimate in war.

DUBOWITZ: You obviously haven't spent enough time, Geoff, in Washington, because we write lots of reports without any domain experts involved. This is not as surprising. I would note as well, Orde mentioned the Hamas human shields bill. There is also a Hezbollah human shields bill, which passed unanimously in the House a few months ago. There's two legislative vehicles. Both of them have passed unanimously in the House, and I know folks in the Senate are now starting to take a look at it.

Let me go to Q and A. We've got about 20 minutes or so, so hopefully you have a lot of questions. Folks who are watching this via livestream, I'm going to turn on my phone, so if you can either tweet at me, I'm @mdubowitz, at M-D-U-B-O-W-I-T-Z, or you can send FDD @FDD a question, as well. My friend here, my colleague here, will get that as well. Hopefully, we can hear from folks who are out there in the ether in their pajamas drinking coffee.

Okay, questions. We don't have a microphone, so you're going to have to project. Yeah, sir.

MARTONE: Hi. I'm James Martone from Sky News Arabia. Thank you for this very interesting event. I wanted to ask you, I feel like yesterday there was a bill being discussed somewhere related to this. Maybe it was the Foreign Affairs Committee. Just a comment. Orde, I want to ask you about I know the U.S. is funding the Lebanon military. I'm wondering if that's a contradiction. Lebanon is hosting, whether they want it or not, Hezbollah is there. Is that a contradiction? Is that a problem? I wanted to ask Laurie, you mentioned the suicide attacks, and how horrible they are. I felt like you were saying the people who are engaging in those should be condemned, which they should be.

Is it realistic to think that a person who is going to blow themselves up is thinking in those terms. As a reporter who worked in the Middle East for a long time, and mostly on the

Palestinian-Israeli conflict, often these suicide bombers would kill themselves, and then there was always a discussion, “Oh, but the problem is the way they're treated.” Could you speak to that, the problem of the social aspect and combining, explaining that?

KITTRIE: Thanks for your question. With regard to legislation, there are two bills that have been passed, as Mark mentioned. H.R. 3542, the Hamas Human Shields Prevention Act, passed the House by a vote of 415 to zero on February 14th, 2018. My understanding is there hasn't been any action since then. It's passed the House, and now these bills go on to the Senate as a matter of course. In October 2017, H.R. 3342, Sanctioning Hezbollah's Illicit Use of Civilians as Defenseless Shields Act, passed the House by voice vote. Those are the two bills. I happen to think the Hamas bill is a bit better worded, phrased.

With regard to I note you said you're from Sky News Arabia. That's based where, in Saudi?

MARTONE: No, in the UAE.

KITTRIE: The UAE, so it's worth noting that our allies in the Gulf are also facing the challenge of human shields use. UN bodies have several times asserted that Yemen's Houthi rebels have used human shields. For example, the Final Report of the Panel of Experts on Yemen stated as follows in January 2016. At least three UN and international NGO staff told the panel that “Houthi-Saleh forces had more than once housed African migrants and refugees as human shields.” In addition, the Office of the UN High Commissioner for Human Rights stated that, “Credible reports indicate that the Houthis used civilians as human shields.” This is an issue that our allies, the Saudis, and others with regard to the Houthis are also facing, the use of human shields. It's not just a U.S., Israel, U.K. phenomenon.

CORN: The Lebanese Army issue, we've been on visits up to the Lebanese border. I think it's a wild card for the IDF. Ideally, their hope would be that the Lebanese National Army would intervene to prevent the use of their national territory to conduct attacks against Israel. I don't think realistically they believe they're strong enough to do it, but I don't think it's necessarily a contradiction if we're supporting the Lebanese National Army with the ideal or the hope that in the future they're capable of asserting control over the entirety of their territory.

BLANK: Just on the suicide bomber question, obviously you're right. There's an enormous social issue involved there, and there's of course, you can't really hold someone accountable after they've self-detonated. There's a practical problem there, but suicide bombers don't act alone, right? The person who actually is the suicide bomber is oftentimes one of the exploited persons in this scenario. There is many others who are involved who could be held accountable. It's not just somebody wakes up in the morning, figures out how to build a suicide vest, figures out their targeting, goes all by themselves. We know they're often, as I said, they're taken advantage of and exploited. There's a lot more in terms of how do you condemn it, how do you hold accountable, and so on.

CORN: Yeah. The bills don't just target the individual using human shields. It targets those who encourage or support the use of human shields, which is obviously important, because oftentimes it's the leadership that's directing that illicit tactic.

DUBOWITZ: Actually, that's a great segue to a question that came out from someone who's watching the livestream. Can the panelists discuss possible strategies to make civilian populations aware that they're being used as a human shield? Maybe Geoff or any of you, specifically as you reference the legislation, what are the tools and instruments that are in that legislation that are specifically designed to get at this question of what I would call the human shields ecosystem, the human shields industry? Because I think as Laurie said, there's the suicide bomber, but there's a suicide bomber ecosystem around that, that actually enables and facilitates that final act. What does the ecosystem look like? What does the legislation do to bring attention to that, and to the question here, how do we make these civilian populations aware that they're actually being used as human shields? Because some may be witting, some may be unwitting participants in this.

CORN: I think obviously one of those precautionary measures that is routinely implemented is warning civilians of pending attacks. If you think about it, that always will have some compromise on the effectiveness of your operation, because you can't warn the civilian population without warning the enemy. Nonetheless, it is done routinely.

Unfortunately, in many cases, the civilians are caught between two elephants that are fighting. They're the grass, because the entity that has control over their area will punish them if they try and get out of the area. The bill ideally not only prohibits the use of human shields to shield your area from attack, but sometimes these illicit groups use human shields because they actually deliberately want those civilians to be attacked. We have to be very clear that it's not just that you're using it to get a tactical advantage. Sometimes you do it, you don't let them leave, which should be condemned as well.

Unfortunately, if you don't have control over the area, you don't have the ability to ensure the evacuation or the sheltering of civilians. What the bill has to do is make sure that it's targeting not only the immediate tactical use of the civilian, but the leadership and those involved in the decision-making process that encourage that tactic.

DUBOWITZ: Right. Orde, do you want to talk specifically about the role of designations? Is there an opportunity here that's enabled by the legislation for the administration to specifically designate individuals and entities that enable and facilitate the human shields industry, as it were, and why that would be important?

KITTRIE: Sure. The bill, and I have in front of me the Hamas bill that passed 415 to zero, obviously with bipartisan support by definition, and it does exactly that. It not only sanctions members of Hamas who are directly involved in the use of human shields, but also those who knowingly order and control, or otherwise direct or are complicit in the use of human shields. It also sanctions each foreign person, or each agency or instrumentality of a foreign state, that the president determines has significantly facilitated, directly or indirectly, the use of human shields.

If you are, for instance, a Lebanese mayor who maybe isn't a member of—If this bill is broadened to include Hezbollah, and you are a Lebanese mayor who may be isn't a member of Hezbollah, but has basically allowed Hezbollah to do this in your town, then you could be held accountable pursuant to this.

Or you look at the example of the Hamas spokesman that Laurie referred to. In 2014, there was a Hamas spokesman who talked about the Hamas policy of encouraging civilians to stand on the roof of a targeted building. He praised it. He said, “We encourage civilians to do this in order to prevent the Zionist occupation's warplanes from targeting the building.” He said, “The policy of people confronting the Israeli warplanes with their bare chests in order to protect their homes has proven effective.” He said, “We in Hamas call upon our people to adopt this policy.”

He wasn't maybe himself exactly herding the civilians onto the roof, but he was a Hamas spokesman that was praising the policy and encouraging this. He's the sort of person who really needs to be held accountable. He's not maybe the suicide bomber himself that is willing to give his life, but he's someone who's encouraging other people to give their lives as human shields. He's the sort of person who really needs to be held accountable and discouraged from doing this in the next conflict.

DUBOWITZ: Okay. You could imagine mayors, you can imagine those who are providing the permits that allowed a room to be built under a hospital that is used to fire missiles, or the construction company that actually built the room, or the insurance companies that insure it, or the financial institutions that finance it. If we think about this, Laurie, as an industry, because it sounds like it is, industries require enablers. Enablers, the U.S. government I think has done a pretty good job over the years in using specific sanctions and designations to target at a very granular level those who are actually responsible for malign conduct. Do you think that kind of approach is effective and worthy of support? Again, at what I'd call the micro-targeting level, where this is really actually happening?

BLANK: I want to look at that in context of one piece of the question that was asked, which is, how do you get this information out to the civilian population in terms of the use of human shields? This in essence is messaging by sanction, I guess is maybe how I would describe it. Most of the individuals who are in the position of shielding an objective—We have examples of people doing it voluntarily, absolutely, but I would say in most cases it's not. Most people don't wake up in the morning and think, “I am going to go shield this, use my back, my whatever, my body to protect this objective from attack.” It doesn't have longevity as a general plan for your daily life.

As Geoff said, these individuals are caught. They're not really often living in any place where they have a lot of free will. Obviously, living under ISIS is the extreme example, but living under Hamas is not exactly, again, there's not a lot of free will and choice in that society. The messaging that they are getting from those in charge of the area where they live is that they are doing something good for the cause, that they are contributing.

What this does, what any condemnation of human shielding does, in legislation, in sanctions, in reports, in court cases, etc., is to disturb that messaging that they're getting, and to begin to get through the message that, "No, actually, you're the victim of a crime by your own side, by those who appear to be praising you for your contribution to the cause. In fact, what they're doing is they are exploiting you. They are committing a crime by what they are doing."

How many people does that get through to? I think it gets through as a trickle to begin with. It's not like all of a sudden everybody wakes up in Gaza and is like, "Wait a minute, wow. We just got this great message." No, it takes time. A little bit gets through, but even a little bit is effective. I think that in terms of the civilian population, that's essentially the way the messaging is going to get through.

DUBOWITZ: Okay, great. Any questions? Comments? Disagreements? We welcome argumentation. All right. Let me then go to the questions that are coming in from folks who are watching livestream. Geoff, let me just pivot off that. There's a question here specifically about the value of internationalizing this because we've talked a lot about legislation. We've talked a lot about what the United States can do. The question that we have here is, what can the international community do in order to impose a global ban on the use of human shields? Is this something that could be done at the United Nations? Is this something that we could do through multilateral institutions to more effectively multilateralize it? I think that's what the questioner is getting at.

CORN: To be clear, there is already a global ban on the use of human shields. It is illegal, full stop. It's complicated. Let's be honest, you can watch a movie like Saving Private Ryan, and you know that when you're defending a town, you may find it necessary as a commander to militarize a civilian building. You may have to put your machine gun position or your sniper position at the top of the highest point, which is a church tower.

What we see over and over again is that you will find situations where these enemies have an option. They need to set up a firing position in a courtyard, and there's one courtyard in a kindergarten, and across the street there's a courtyard that's not in a kindergarten. They put it in the kindergarten. There's only one rational inference you can draw from that. It's that they chose the kindergarten because they knew it was going to create a much more difficult attack decision, and if it is attacked, it's going to create a much more significant informational value.

While it is complicated, because war is becoming increasingly urban, populations are urban, and there's no way around it. There are going to be situations where there's going to be legitimate use of civilian structures in a military campaign. What we have to do is we have to focus on incidents like that to expose the fact that the use is illicit. It is illegal already.

Internationalizing it goes back to Laurie's point. If we ignore it, if we characterize it is a humane treatment violation, if we say in the McGowan Davis report, "If this happened, it could be problematic," then what we're doing is we are nullifying the moral condemnation of that behavior.

I think one of the problems is that there's this instinct in the international community to say, "It's not a fair fight. It's the U.S. against a non-state group like the Taliban or ISIS, or it's Israel against Hamas or Hezbollah, so they've got to do this stuff to make it fair." War is not supposed to be fair. There are rules of war, and they have to be followed. There's no necessity exception. Let's make that clear. There's no exception that says, "If my enemy is more powerful than me, then I'm somehow allowed to do something to civilians that I would otherwise not be allowed to do." It does not exist.

That point has to be made over and over. If you choose to take up arms against another state, or your own state, you're bound by certain rules. You have to accept those rules, and when you don't, the condemnation has to be consistent, and it has to be unequivocal. I think one of the big problems in the international community today is there's equivocation when it comes to condemning the use of human shields, because in most cases it's being used by the party to the conflict that is perceived as tactically or operationally inferior. There's this, "We have to forgive it a little. What else were they going to do?"

No. What else were they going to do? They were going to use the compound that was not the kindergarten. That's what they should have done. Had they done that, we can say, "Okay, we understand there was a legitimate tactical reason for doing it, perhaps," but when it's the kindergarten, when it's the UN compound, when it's the basement of the hospital, there's no explanation other than the fact that you're trying to exploit the victimization of the civilian population. That has to be uniformly, consistently, and internationally condemned.

DUBOWITZ: Geoff, is it fair to say, and I'd like Laurie and Orde to jump into this as well, in that under laws of war, our sense of who is the superior power is defined in very conventional terms, in terms of conventional military terms rather than asymmetrical terms?

CORN: Yeah.

DUBOWITZ: Because you could argue, actually, in our confrontation with Al Qaeda, or ISIS, the Taliban, Hezbollah, Hamas, all these terrorist organizations, the Revolutionary Guards of Iran is a classic example, that asymmetrically actually they have the advantage over what we do.

CORN: Absolutely, and that was my point when I started, where I said you cannot understand this unless you understand the contemporary strategic and operational domain of military action. By the way, it's not just now. I'm reading Mark Bowden's book on the Battle of Hue in Vietnam. In that battle, although they fought a tremendously superior capability, the Viet Cong and the North Vietnamese were able to create isolated pockets of peer-to-peer equality and sometimes advantage.

If you read reports like the JINSA report on the Gaza conflict, that's what the general are focusing on. They're focusing on the fact that there's a myth that it's a David versus Goliath fight that's going on. In fact, what these enemies are adept at doing is using the full range of capabilities, terrorism, conventional fighting, unconventional warfare to create isolated pockets of peer-to-peer capability. That makes this even more complicated, because then you're fighting

an enemy in an urban area where they've created an equality tactically, but the international community assumes that if you're using the full range of your combat capability, that's somehow unfair. That's tremendously illogical and unrealistic in the current threat environment. I absolutely agree with you.

DUBOWITZ: Okay, all right. We've got a couple minutes left. Laurie, do you want to say anything?

BLANK: Just a couple of quick points. When you ask what can the international community do, the international community can be more sophisticated in how it talks about war and military operations. We have seen an incredible surge of discussion about the law of war, about rules during wartime. When the Yugoslavia conflict broke out, you would never have seen Geneva Conventions in the newspaper at all. You would not have seen law of war or anything like that.

That is good, that we have a lot of international attention on it. However, the discourse is not at a sophisticated enough level. That's partly due to a very important focus on protecting civilians during conflict. That's critical. We need advocacy groups to be doing that. We need governments to be doing that. We need to be thinking about protecting civilians during conflict, but we can't allow that overarching imperative to whitewash every discussion so that we end up with this effects-based type of analysis that we've mentioned.

The objective of protecting civilians doesn't mean that the party that launched the attack is automatically the one who is responsible for any harm, for example. Obviously, that's what human shields challenges. It does require that we think in a more discerning manner.

I want to just also echo Geoff's point about what the law requires. The law, in essence, does not require a fair fight. It requires that you fight fairly. It does not require that the parties be equal. When you think about U.S. military doctrine, you think about Colin Powell's idea of overwhelming force. You don't want to fight an enemy that is symmetrical with you. Of course you want to overpower your enemy, absolutely. That's how you win, but you must fight fairly. That's what the law requires.

DUBOWITZ: I think that's a great way to end it. Folks, thank you very much. Great insights. You've made us more sophisticated in our understanding of this issue. Thanks, everybody who attended. Thanks for everybody on the livestream. I'm sure you and your bosses will be hearing a lot more about this issue on the Hill, and we look forward to engaging. Thank you.

CORN: Thank you, Mark.

BLANK: Thank you.