

Protecting innocents in combat



A proposed new **Act** to sanction and deter
foreign actors from using human shields

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Foreword

by Sarah Teich and David Matas

We can forgive the Arabs for killing our children. We cannot forgive them for forcing us to kill their children. We will only have peace with the Arabs when they love their children more than they hate us. – Golda Meir

This paper discusses the use of humans as shields: that is, the use of innocent civilians, by terrorist groups and other rights-violating actors, to shield military objects from attack. Using human shields is a war crime, but it is still pervasive and used with impunity. This paper discusses the phenomenon, outlines recent efforts to combat its use, and proposes domestic legislation Canada should consider implementing.

The legislation proposed involves naming and shaming, and sanctions, to deter any warring group from using human shields. We are proposing this because it is a useful place to start, and because sanctions are an important tool to address impunity for atrocity crimes. It is essential that Canada do its part to contribute to the global effort to combat the use of human shields and do its part counter the impunity that has allowed this war crime to flourish – but this is not where our efforts should end.

Combatants who use humans as shields are giving priority to defeating the perceived enemy over protecting their own civilian population. The combatants are making the statement that hatred of the perceived enemy means more to them than the lives of their own people. Combatting the use of human shields means combatting this hatred.

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Executive Summary

Various combatant groups have employed the warfare tactic known as “human shields,” in which civilians are used to protect military objectives from attack. Terrorist groups have used tens of thousands of civilians, and indeed entire population centres, for this purpose.

The Islamic State, for example, exploited human shields in Iraq, particularly in Mosul, Ramadi, and Fallujah, prolonging the battles for each of those cities and extending its hold on the territory it had captured. The Taliban regularly places military assets around or within hospitals, religious sites, and schools and, like the Islamic State, is still a present-day threat. In southern Lebanon, Hezbollah blends its fighters amongst civilian women and children, converting thousands of schools, hospitals, and homes into military quarters and weapons stores. In fact, in 2018, Israel released satellite images showing underground missile production factories located on three civilian sites in Beirut. Hamas, too, is known to use human shields – in its case, in the Gaza strip. These four groups are not alone. The Houthi rebels in Yemen, various groups fighting in the Syrian Civil War, Boko Haram, Al-Shabab, the Moro National Liberation Front in the Philippines, militias in the Central African Republic, the Myanmar Armed Forces, and militias in the Democratic Republic of the Congo have all used humans as shields at one time or another.

Under international law, including international humanitarian law, the prohibition against the use of human shields is absolute. This is a practice that is unequivocally barred, and yet, its use is widespread and pervasive.

Tactically, the use of human shields impedes the efficacy of militaries that are bound by democratic norms and laws as they try to contend with those who are using civilians as shields. Militaries of democratic, rights-respecting states will be more reticent to target a bomb or rocket launcher if it is housed inside a preschool, for example – and rightfully so. Terrorists who use civilians as human shields know and take advantage of this reticence.

It is obvious that the use of human shields can lead to the killing of innocents. However, the killing of civilians is not considered a violation of the

laws of war where the killing would not be excessive in relation to the military advantage anticipated. In other words, when humans are used as shields, killing them might be lawful, so long as the response is not excessive. That legality makes the death of human shields even more likely.

Indeed, from a strategic perspective, terrorists who use civilians as human shields may have an incentive to maximize the death toll of these civilians, because doing so can enable them to move the war from the battlefield to the courtroom. By pursuing legal action, or “lawfare,” those deploying human shields can further the war by trying to hold others accountable for any human shield-related deaths – shifting the blame from themselves and manipulating democratic legal systems in an effort to undermine, defame, and delegitimize the counterterrorism or military efforts of democracies.

Using civilians as human shields is therefore a strategic “win-win” for terrorists, and a “lose-lose” for democratic states. This likely explains why terrorists and other rights-violating groups continue to use human shields, despite the unequivocal prohibition to do so.

The international law that prohibits using civilians as human shields can be found in the Geneva Conventions of 1949, in the 1998 Rome Statute of the International Criminal Court, and in customary international law, which means it is binding on all states. Furthermore, the UN Security Council has explicitly condemned the use of human shields, as has the UN General Assembly and NATO. In fact, NATO has launched an initiative to spotlight and counter the use of human shields.

In December 2018, then-President Donald Trump signed into law the United States’ *Sanctioning the Use of Civilians as Defenseless Shields Act* (“*US Human Shields Act*”). Canada should demonstrate its leadership as a human rights advocate on the world stage by heeding NATO’s call to action and implementing domestic legislation to combat and counter the use of civilians as human shields. It could do so relatively straightforwardly by adapting the existing *US Human Shields Act*. In fact, the authors of this report have drafted the proposed legislation and included it as an appendix to this paper as something for Canadian lawmakers to consider.

Sommaire

Divers groupes de combattants ont employé la tactique de guerre connue sous le nom de « boucliers humains ». Elle consiste à utiliser des civils pour protéger les objectifs militaires contre les attaques. Les groupes terroristes se sont servi de dizaines de milliers de civils, voire de villes entières, à cette fin.

L'État islamique, par exemple, a exploité les boucliers humains en Irak, notamment à Mossoul, Ramadi et Falloujah, prolongeant ainsi les combats dans chacune de ces villes et renforçant son emprise sur le territoire dont il s'était emparé. Les talibans placent régulièrement leur matériel militaire autour ou à l'intérieur d'hôpitaux, de sites religieux et d'écoles et, à l'instar de l'État islamique, ils sont encore aujourd'hui une menace. Au sud du Liban, le Hezbollah mêle ses combattants aux femmes et aux enfants, transformant des milliers d'écoles, d'hôpitaux et de maisons en quartiers militaires et en magasins d'armes. En fait, en 2018, Israël a publié des images satellites montrant des usines souterraines de production de missiles situées sur trois sites civils à Beyrouth. Le Hamas, lui aussi, est connu pour utiliser des boucliers humains – dans son cas, dans la bande de Gaza.

Ces quatre groupes ne sont pas les seuls. Les rebelles Houthis au Yémen, divers groupes de combattants dans la guerre civile syrienne, Boko Haram, Al-Shabab, le Front Moro de libération nationale aux Philippines, les milices de la République centrafricaine, les forces armées du Myanmar et les milices de la République démocratique du Congo ont tous utilisé des humains comme boucliers à un moment ou à un autre.

Selon le droit international, le droit humanitaire international en particulier, l'interdiction d'utiliser des boucliers humains est absolue. Cette pratique est interdite sans équivoque, et pourtant, son usage est répandu et omniprésent.

Sur le plan tactique, les armées assujetties à des normes et des lois démocratiques sont moins efficaces contre les opposants qui font usage de boucliers humains. Les armées des États démocratiques et respectueux des droits hésiteront à cibler une bombe ou un lance-roquettes logé dans une école maternelle, par exemple –, et ce à juste titre. Les terroristes qui se servent de

civils comme boucliers humains connaissent cette réticence et en tirent parti.

Bien évidemment, l'usage de boucliers humains peut donner lieu à la mort de civils innocents. Or, ces morts de civils ne sont pas réputées violer les lois de la guerre lorsqu'elles ne sont pas démesurées par rapport aux gains militaires anticipés. En d'autres termes, tuer des civils utilisés comme boucliers humains peut être légal, pour autant que la riposte ne soit pas excessive. Cette légalité rend les pertes de vie humaine liées à l'usage des boucliers humains encore plus probables.

Par ailleurs, d'un point de vue stratégique, les terroristes faisant usage de boucliers humains pourraient avoir tout intérêt à maximiser le nombre de ces morts de civils lorsque cela leur permet de transporter la guerre du champ de bataille devant les tribunaux. En livrant une guerre juridique, « le lawfare », ceux qui déploient les boucliers humains peuvent continuer la guerre en tentant de faire porter à d'autres la responsabilité des morts conséquentes – se dégageant de la faute en manipulant les systèmes de droit démocratiques dans le but de saper, de diffamer et de délégitimer les efforts antiterroristes ou militaires des démocraties.

L'usage de civils comme boucliers humains constitue donc une stratégie gagnante à tous points de vue pour les terroristes, tandis que les États démocratiques y perdent sur toute la ligne. C'est probablement pourquoi les terroristes et d'autres groupes continuent de violer les droits en faisant usage des boucliers humains, malgré l'interdiction sans équivoque.

Le droit international interdisant l'usage des boucliers humains a été codifié dans les Conventions de Genève de 1949, dans le Statut de Rome de 1998 créant la Cour pénale internationale, ainsi que dans le droit international coutumier – ce qui signifie qu'il lie tous les États. En outre, le Conseil de sécurité des Nations Unies a explicitement condamné l'usage de boucliers humains, tout comme l'Assemblée générale des Nations Unies et l'OTAN. En fait, l'OTAN a lancé une initiative visant à braquer les projecteurs sur cette pratique et à la contrer.

En décembre 2018, le président Donald Trump, a promulgué la loi des États-Unis intitulée Sanctioning the Use of Civilians as Defenseless Shields Act (« US Human Shields Act »), loi qui sanctionne l'usage de boucliers humains. Le Canada devrait démontrer son leadership en tant que défenseur des droits de la personne sur la scène mondiale, en répondant à l'appel à l'action de l'OTAN et en mettant en œuvre une législation nationale pour combattre et contrer l'usage de civils comme boucliers humains. Il pourrait le faire de manière relativement simple en adaptant la loi américaine existante. En fait, les auteurs du présent rapport ont rédigé une proposition de loi et l'ont incluse en annexe de ce document afin que les législateurs canadiens puissent l'examiner.

Introduction

Some combatants have employed the warfare tactic known as “human shields,” in which civilians are used to protect military objectives from attack. This tactic has been employed pervasively by terrorist groups like the Islamic State, the Taliban, Hezbollah, and Hamas, which have used tens of thousands of civilians, and indeed entire population centres, for this purpose. Under international law, including international humanitarian law, the prohibition against the use of human shields is absolute. This is a practice that is unequivocally barred, and yet, its use is widespread and pervasive.

The war crime of “shielding” is a central cog in the terrorist arsenal and has exponentially amplified the impact of terrorist violence. Tactically, using human shields impedes the efficacy of militaries that are bound by democratic norms and laws in contending with actors who use civilians as human shields. Strategically, those using human shields have an incentive to incur the greatest possible death toll on the civilians they’ve seized because it enables them to asymmetrically transpose warfare from the battlefield to the courtroom. Human shield practitioners see “lawfare” as a different way to pursue warfare because it seeks to hold others accountable for human shields-related deaths when they occur. In other words, they manipulate democratic legal systems in an effort to undermine, defame, and delegitimize counterterrorism efforts. In this sense, using civilians as human shields is a strategic “win-win” for these actors, which is highly problematic for rights-respecting, democratic states that seek to combat terrorism and protect human life.

Until recently, democratic states have not taken effective action to hold terrorist groups and their sponsors accountable for using human shields. But in December 2018, the US passed the *Sanctioning the Use of Civilians as Defenseless Shields Act*. This Act imposes sanctions on terrorists and other foreign persons using human shields. The legislation and the international consensus it embodies generated the first-ever resolution by the UN General Assembly that specifically and generally condemns the use of human shields. NATO was also inspired to act. In March 2019, the NATO Supreme Allied Commander sent a letter urging all NATO member states to take steps to counter the use of human shields.

Canada should respond to NATO's call to action, act on this international consensus, and pass legislation to deter and sanction the use of human shields. Canada can and should act as a model for other democracies in taking substantive action to curtail the use of this tactic. This report ultimately proposes draft legislation, written by the authors for the purposes of this report, for Parliament to consider.

Part I: The Problem – Widespread and Illegal Use of Human Shields

Documented use by terrorist groups

Human shields have been regularly used by a variety of terrorist groups, including the Islamic State, the Taliban, Hezbollah, and Hamas. The use of human shields by these groups is well-documented and broadly representative of the various strategic applications of this tactic. These groups have used tens of thousands of civilians, and indeed entire population centres, for this purpose. The terrorist entities listed below serve as a broad template in considering the need for human shields legislation.

The Islamic State

The Islamic State exploited human shields in Iraq, particularly in Mosul, Ramadi, and Fallujah, prolonging the battles for each of those cities and extending its hold on the territory it had captured. In June 2017, the UN refugee agency United Nations High Commissioner for Refugees (UNHCR) reported on the use of human shields, stating that approximately 100,000 civilians remained trapped as human shields in the Old City of Mosul, which at the time was the northern Iraqi stronghold of the Islamic State (Nebehay 2017). In another incident, Islamic State combatants fleeing Manbij, Syria, in August 2016, placed civilians in each of their 500 vehicles in order to escape destruction as they retreated – knowing that the United States would be hesitant to fire on vehicles containing civilians.

As stated in a *New York Times* article in 2015, “Islamic State troops ... appear to be taking advantage of the restrictions” the US military had imposed on itself to minimize civilian harm, “as the militants increasingly fight from within civilian populations to deter attack” (Schmitt 2015). US and allied troops avoided “striking significant – and obvious – Islamic State targets out of fear that the attacks will accidentally kill civilians” (Schmitt 2015). The Islamic State took advantage of this reticence to conquer cities and massacre the civilians captured in them.¹ In March 2017, a US military spokesperson stated that the Islamic State was trying to bait US and allied forces into killing civilians,

calculating that rising civilian death tolls would restrain US and allied forces from using airstrikes to recapture Mosul (Gordon 2017). US spokesperson for the US-led taskforce, Colonel Joseph E. Scrocca, stated that “ISIS is smuggling civilians so we won’t see them and trying to bait the coalition to attack” (Gordon 2017).

The Islamic State is not merely a historic threat – it is demonstrably growing, and there is no indication that the group will be changing its *modus operandi* regarding the use of human shields. According to a UN Security Council Committee report dated January 20, 2020, the Islamic State has begun to re-establish itself in Iraq and Syria, and has been “mounting increasingly bold insurgent attacks, calling and planning for the breakout of ISIL fighters in detention facilities and exploiting weaknesses in the security environment of both countries” (United Nations Security Council 2020). This was noted as especially concerning in light of the reduction of US forces in the region, where at least 100,000 Islamic State members are currently detained in “precarious... holding arrangements” (United Nations Security Council 2020). In fact, 2019 saw “an acceleration of the reconstitution of [the Islamic State] as a covert network in the Syrian Arab Republic, mirroring what had happened in Iraq since 2017... freed of the responsibility of defending territory, there was a notable increase in attacks in previously quiet areas held by the Government of the Syrian Arab Republic around the country” (United Nations Security Council 2020). In assessing future risk, the committee made the provisional assessment that the group’s strategic direction is unlikely to change under Abu Bakr al Baghdadi’s successor, Abu Ibrahim al Hashimi al Quraishi (United Nations Security Council 2020). If al Quraishi follows in al Baghdadi’s footsteps, there is every indication that the Islamic State’s widespread use of human shields will continue.

The Taliban

The Taliban regularly places military assets around or within hospitals, religious sites, and schools. Australian Foreign Minister Alexander Downer stated in 2007 that “the Taliban... make every effort to cause civilian casualties and to create situations where we might not be able to avoid civilian casualties” (Khan 2007). US Secretary of Defence Robert Gates stated in 2009 that “a principal strategic tactic of the Taliban” is “provoking or exploiting civilian casualties” (United States, Department of Defense 2009). US Major General Charles Dunlap Jr., who acted as Deputy Judge Advocate General of the US Air Force until 2010, explained that the Taliban learned to “shield themselves from air attack by violating the law of armed conflict through embedding themselves among civilians” (Dunlap 2010). In this sense, the Taliban created “a substitute for conventional military weaponry” (Dunlap 2010). The Taliban did not need to “build conventional air defenses; rather, just by operating amidst civilians they enjoy[ed] a [sanctuary] that is as secure as any fortress bristling with anti-aircraft guns” (Dunlap 2010).

Like the Islamic State, the Taliban is still a present-day threat. Despite the continuation of peace talks with the United States, the Taliban continues to launch attacks. In fact, the Taliban is presently considered to be “stronger now than at any point in the last nineteen years” (Maizland 2021).

Hezbollah

In southern Lebanon, Hezbollah blends its fighters amongst civilian women and children, converting thousands of schools, hospitals, and homes into military quarters and weapons stores. In 2006, UN Undersecretary-General for Humanitarian Affairs Jan Egeland stated that “Hezbollah must stop this cowardly blending... among women and children” (Vries 2006). Egeland stated that “they were proud because they lost very few fighters and that it was the civilians bearing the brunt of this... I don’t think anyone should be proud of having many more children and women dead than armed men” (Vries 2006). Israeli officials have also expressed concern, especially that the use of this terrorist tactic will only grow in the future. In 2018, Israel Defense Forces (IDF) Spokesman Brigadier-General Ronen Manelis stated that “one in every three or four houses in southern Lebanon is a headquarters, a post, a weapons depot or a Hezbollah hideout” (quoted in Ahronheim 2018).

One specific example of this tactic is the placing of missile production factories in dense urban areas in Beirut. Israel released satellite images in 2018, marking on the map underground missile production factories located on three civilian sites in Beirut (Gross 2018, Zitun 2018, Reuters 2018). All three sites were marked in close proximity to the Beirut International Airport. One site was under a soccer stadium in the area, used by a Hezbollah-sponsored team; another site was just north of the airport; and the third site was underneath a residential neighbourhood approximately 500 metres from the airport’s tarmac (Gross 2018, Zitun 2018, Reuters 2018). Israeli Prime Minister Benjamin Netanyahu accused Hezbollah of “deliberately using the innocent people of Beirut as human shields” (Gross 2018, Zitun 2018, Reuters 2018). A few days following the Israeli announcement, the Lebanese Foreign Minister escorted various foreign diplomats to two of the three alleged sites; the diplomats expressed to the *Washington Post* following the tour that it “seemed inconclusive” (Sly and Haidamous 2018).

Hamas

Hamas is similarly known to use human shields – in its case, in the Gaza strip. The most striking recent example was the multiweek March of Return, where thousands of Gazan civilians rioted at the Israel-Gaza border. Groups of armed Gazan fighters used these riots as an opportunity to attempt a breach of the border. Hamas’s leader in Gaza, Yahya Sinwar, brazenly admitted to using human shields in this situation – stating that the March of Return was designed to sacrifice “that which is most dear to us – the bodies of our women and chil-

dren” (Dubowitz and Kittrie 2018). Mahmoud Al-Habbash, Supreme Shariah Judge and Advisor to Palestinian Authority (PA) President Mahmoud Abbas, made a similar acknowledgement regarding the March of Return, when he stated on Official PA television on April 6, 2018, “you Palestinians, our people, go and die, so that we’ll go to the TV and media with strong declarations” (Official Palestinian Authority TV 2018).

US Ambassador to the UN Nikki Haley quickly condemned Hamas for “us[ing] Palestinian civilians as human shields at the boundary fence” as part of the March of Return (Haley 2018). The European Parliament also condemned the March of Return, passing a resolution on April 19, 2018, stating that it “strongly condemns the persistent tactic of Hamas of using civilians for the purpose of shielding terrorist activities” (European Parliament 2018). UN Secretary-General Antonio Guterres repeatedly called on “all concerned to refrain from any act that could... place civilians in harm’s way, especially children” (United Nations Secretary-General 2018a).²

Hamas faced similar condemnation for its use of human shields during the 2014 Gaza war. The European Union resolved at that time that it “strongly condemns calls on the population of Gaza to provide themselves as human shields” (Council of the European Union 2014). US president at the time, Barack Obama, stated that “Hamas acts extraordinarily irresponsibly when it is deliberately siting rocket launchers in population centers, putting populations at risk because of that particular military strategy” (The White House, Office of the Press Secretary 2014). UN Secretary-General at the time, Ban Ki-Moon, stated regarding Hamas, “we condemn the use of civilian sites – schools, hospitals, and other civilian facilities – for military purposes” (United Nations Secretary-General 2014).

Other groups

The “shielding” tactic has proven effective and it is now a central weapon in the terrorist arsenal. Beyond the groups singled out above, many others have also used human shields as a tactic, including the Houthi rebels, various groups fighting in the Syrian Civil War, Boko Haram, Al-Shabab, the Moro National Liberation Front, Central African Republic (CAR) militias, the Myanmar Armed Forces, and Democratic Republic of the Congo (DRC) militias.

Houthi Rebels: *The Final Report of the Panel of Experts on Yemen Established Pursuant to Security Council Resolution 2140 (2014)* stated in January 2016 that “at least three United Nations and international non-governmental organization staff told the Panel that Houthi-Saleh forces had more than once housed African migrants and refugees as human shields in unused buildings in Aden previously targeted by air strikes, or where weapons caches were claimed to be stored” (United Nations Security Council 2016). Further, the UN High Commissioner for Human Rights stated that “credible reports in-

dicate that Houthi-affiliated snipers shot at families attempting to flee their homes in Houthi-controlled areas – suggesting the use of human shields” (Office of the UN High Commissioner for Human Rights 2017a).

Syria: A 2014 UN report from the Office of the Special Representative of the Secretary-General for Children and Armed Conflict on the Syrian civil war found that “government forces used children as human shields” (2014). Similarly, the same office stated in 2013 that “the office of the Special Representative has received and continues to get verified reports that Syrian children are... used as human shields” (2013a). The UN Secretary-General’s Annual Report for 2011 on children and armed conflict asserted that children in Syria were “used by soldiers and militia members as human shields, placing them in front of the windows of buses carrying military personnel” (United Nations General Assembly Security Council 2012).

Boko Haram: The UN High Commissioner for Human Rights reported on Boko Haram in 2015 that “boys and girls were increasingly used as human shields and to detonate bombs, a pattern that has intensified since 2014” (United Nations General Assembly 2015). Similarly, the UN Special Representative of the Secretary-General for Children and Armed Conflict, Leila Zerrougui, stated in April 2015 that Boko Haram uses children as human shields (2015).

Al-Shabab: The UN High Commissioner for Human Rights stated in 2009 that “the Al-Shabab militant group has been using human shields” (United Nations Political Office for Somalia 2009). The US Department of State found the same, stating in its *2017 Trafficking in Persons Report* that “Al-Shabab used children for combat and other support functions... serving as human shields during incursions” (United States, Department of State 2017).

Moro National Liberation Front: The UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict stated that “children were used as human shields” by the Moro National Liberation Front in the Philippines (2013b).

Central African Republic (CAR): The UN Multidimensional Integrated Stabilization Mission in CAR stated that “MINUSCA undertook a fact-finding mission in January 2018 that confirmed the deliberate targeting of civilians at the Ippy hospital... The attackers then forced a group of civilians – primarily women and children – to accompany the combatants as they retreated towards the town by foot... MINUSCA reminds the leaders... that using civilians as human shields are grave violations of international human rights law” (United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic 2018). Further, the UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict stated in 2016 that “the UN documented cases of children used as human shields or

to lure international forces into ambushes.”

Myanmar: The UN Special Rapporteur on the human rights situation in Myanmar stated as part of a 2017 report that “there have been numerous reports of killings, torture, even the use of human shields by the Tatmadaw [the armed forces of Myanmar], allegedly in some cases accompanied by threats of further violence if incidents are reported” (Office of the UN High Commissioner for Human Rights 2017b).

Democratic Republic of the Congo (DRC): The UN Office for the Coordination of Humanitarian Affairs stated as part of a 2017 report that “the protection situation stands alarming, with 500 girls and boys being used as combatants or ‘human shields’ by militias... since the beginning of the crisis in August 2016.” (United Nations Office for the Coordination of Humanitarian Affairs 2017).

The challenge for rights-respecting states

The use of civilians as human shields has only been growing, and this is a real challenge for rights-respecting, democratic states that aim to combat terrorism while protecting and safeguarding human life.

Tactically, the use of human shields impedes the efficacy of militaries that are bound by democratic norms and laws as they try to contend with those who are using civilians as shields. Militaries that are so bound will be more reticent to target a bomb or rocket launcher if it is housed inside a preschool, for example – and rightfully so. Terrorists who use civilians as human shields know and take advantage of the norms and laws that bind the militaries of democratic, rights-respecting states.

Interestingly, the laws of war do not strictly prohibit the killing of human shields. Protocol I to the Geneva Conventions on the Laws of War states in Article 51:

5. Among others, the following types of attacks are to be considered as indiscriminate:
 - b. an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. (ICRC 1977a)

Article 57 similarly states:

1. In the conduct of military operations, constant care shall

be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:
 - a. those who plan or decide upon an attack shall...
 - iii. refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” (ICRC 1977b)

Thus, the killing of civilians is not considered a violation of the laws of war where the killing would not be excessive in relation to the concrete and direct military advantage anticipated. In other words, when humans are used as shields, killing them might be lawful, so long as the response is not excessive.

It is obvious that the use of human shields can lead to the killing of innocents, and that it is a behaviour that must be combatted. However, unless someone is familiar with Article 51(5)(b) and Article 57(2)(a)(iii) of Protocol I to the Geneva Conventions, it would not be obvious that the killing of human shields may be legal. That legality, at least in certain circumstances, makes the death of human shields even more likely.

Indeed, from a strategic perspective, terrorists who use civilians as human shields may have an incentive to maximize the death toll of these civilians, because doing so can enable them to move the war from the battlefield to the courtroom. By pursuing legal action, or “lawfare,” those deploying human shields can further the war by trying to hold others accountable for any human shield-related deaths – shifting the blame from themselves and manipulating democratic legal systems in an effort to undermine, defame, and delegitimize the counterterrorism or military efforts of democracies.

Using civilians as human shields is therefore a strategic “win-win” for terrorists, and a “lose-lose” for rights-respecting, democratic states. This likely explains why terrorists and other rights-violating groups continue to use human shields, despite an unequivocal prohibition to do so under international law.

Established illegality in international law

It is settled international law that using civilians as human shields is prohibited. The precedents for this can be found in the Geneva Conventions, and in the Rome Statute of the International Criminal Court. The prohibition against

the use of civilians as human shields is also a recognized feature of customary international law.

The Geneva Conventions

The Geneva Conventions of 1949 were ratified by 196 states, including every member of the United Nations. The Geneva Conventions, and the additional protocols of 1977, make clear that the use of human shields is prohibited under international law. Article 51 of the first protocol prohibits parties to a conflict from “direct[ing] the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations” (ICRC 1977a, 7).

Further, Article 58 requires parties to a conflict to

- (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; (c) 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. (ICRC 1977c)

The Rome Statute

The Rome Statute, adopted in Rome on July 17, 1998, designates the use of human shields as a war crime. Specifically, it prohibits individuals from “utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations” (ICC 1988). This is contained in article 8, section 2 (b) (xxiii).

In December 2019, the International Criminal Court prosecutor articulated that she would be investigating the use of human shields as part of her investigation into the situation in Palestine. The prosecutor found as part of her preliminary examination that there is a “reasonable basis to believe” this war crime has been committed.

The fact that the use of human shields is a war crime under the Rome Statute means that individuals can be prosecuted for this crime at the International Criminal Court in The Hague. It also may mean that some domestic jurisdictions could prosecute these crimes pursuant to the principle of universal jurisdiction. The possibility of domestic prosecutions depends on the particular domestic jurisdiction. In Canada, pursuant to our *Crimes Against Humanity and War Crimes Act*, foreign nationals can be prosecuted for war crimes and crimes against humanity as these crimes are defined in the Rome Statute. This

means that Canadian criminal courts can prosecute individuals who allegedly committed the war crime of using civilians as human shields if they are ever found physically present in Canada.

Customary international law

The prohibition against the use of human shields is also a feature of customary international law, which means it is binding on all states. State practice and *opinio juris* have established this rule as a customary international law norm applicable to both internal and international armed conflicts (International Committee of the Red Cross 2020a).

The widespread state practice that underlies this determination is explained in detail in the International Committee of the Red Cross' customary law database (International Committee of the Red Cross 2020a and 2020b).

Condemnations by the United Nations

The UN Security Council has explicitly condemned the use of human shields in a variety of contexts. Until recently, however, most have focused on the Afghan conflict. Eighteen different resolutions by the UN Security Council specifically condemned the use of human shields by the Taliban and other extremist groups relating to the Afghan conflict. In addition, the council condemned the use of human shields in a resolution relating to the Syrian conflict, and in another relating to the Sudanese conflict.

On June 26, 2018, the UN General Assembly broke its pattern of largely ignoring the use of human shields outside of the Afghan conflict by condemning the use of human shields in general in an unanimously adopted resolution. The resolution states that the General Assembly “strongly condemns the use of civilians to shield military objectives from attacks” (UNGA 2018).

The UN has ramped up its condemnations of the use of human shields in recent years, with other UN bodies and officials outside of the council publishing their own condemnations and the council president issuing at least two presidential statements on the topic.

The UN Security Council condemnations of the use of human shields in the international arena include the following:

- i. The preambles to UNSCR 1776 (2007) and UNSCR 1833 (2008) both state: “condemning further the use by the Taliban and other extremist groups of civilians as human shields”
- ii. The preambles to UNSCR 1890 (2009) and UNSCR 1943 (2010) both state: “condemning further the use by the Taliban, Al-Qaida and other

extremist groups of civilians as human shields”

- iii. The preambles to Resolution 2011 (2011), Resolution 2069 (2012), and Resolution 2120 (2013) (Afghanistan) all state: “condemning further the use by the Taliban, Al-Qaida and other violent extremist groups and illegal armed groups of civilians as human shields”
- iv. Paragraph 12 of UNSCR 1806 (2008), paragraph 12 of UNSCR 1868 (2009), paragraph 18 of UNSCR 1917 (2010), paragraph 17 of UNSCR 1974 (2011), paragraph 28 of UNSCR 2041 (2012), paragraph 28 of UNSCR 2096 (2013), paragraph 28 of UNSCR 2145 (2014), and paragraph 28 of UNSCR 2210 (2015) all state: “condemns... the use by the Taliban and other extremist groups of civilians as human shields”
- v. Paragraph 32 of UNSCR 2274 (2016) states: “condemns... the use by the Taliban and other violent and extremist groups of civilians as human shields”
- vi. Paragraph 21 of UNSCR 2344 (2017) states: “condemns... the use by the Taliban, including the Haqqani Network as well as Al-Qaida, ISIL (Da’esh) affiliates, and by other terrorist groups, violent and extremist groups, and illegal armed groups of civilians as human shields”
- vii. Paragraph 23 of UNSCR 2405 (2018) states: “condemns further the use by the Taliban, including the Haqqani Network as well as Al-Qaida, ISIL (Da’esh) affiliates, and by other terrorist groups, violent and extremist groups, and illegal armed groups of civilians as human shields, and underlines the need to hold perpetrators, organizers, financiers and sponsors of such acts accountable and bring them to justice, and urges all states, in accordance with their obligations under international law and relevant Security Council resolutions, to cooperate actively with the Government of Afghanistan and all other relevant authorities in this regard”
- viii. Regarding Sudan, in the preamble of UNSCR 1828 (2008): “demanding an end to... the use of civilians as human shields”
- ix. The preamble to UNSCR 1882 (2009) states: “deeply concerned that children continue to account for a considerable number of casualties resulting from killing and maiming in armed conflicts including as a result of... use of children as human shields”
- x. Regarding Syria, in paragraph 1 of UNSCR 2139 (2014): “strongly condemns... all grave violations and abuses committed against children in contravention of applicable international law, such as... use as human shields, as described in the United Nations Secretary-General’s report

on children and armed conflict in Syria (S/2014/31)”

- xi. In paragraph 2 of Resolution 1894 (2009) (on children and armed conflict): “Reiterates its condemnation in the strongest terms of attacks in situations of armed conflict directed against civilians as such and other protected persons or objects as well as indiscriminate or disproportionate attacks *and the utilisation of the presence of civilians to render certain points, areas or military forces immune from military operations, as flagrant violations of international humanitarian law and demands that all parties immediately put an end to such practices*” (emphasis added)
- xii. In paragraph 10 of Resolution 2139 (2014) (Syria): “Further demands that all parties demilitarize medical facilities, schools and other civilian facilities and avoid establishing military positions in populated areas and desist from attacks directed against civilian objects”
- xiii. In the preamble of Resolution 2143 (2014) (on children and armed conflict): “Expressing deep concern about the military use of schools by armed forces and non-State armed groups in contravention of applicable international law, including those involving their use as military barracks, weapons storage facilities, command centres, detention and interrogation sites and firing and observation positions.”
- xiv. In paragraph 18 of Resolution 2143 (2014) (on children and armed conflict): “Expresses deep concern at the military use of schools in contravention of applicable international law, recognizing that such use may render schools legitimate targets of attack, thus endangering children’s and teachers’ safety as well as children’s education and in this regard:
 - a. urges all parties to armed conflict to respect the civilian character of schools in accordance with international humanitarian law;
 - b. encourages Member States to consider concrete measures to deter the use of schools by armed forces and armed non-State groups in contravention of applicable international law;
 - c. urges Member States to ensure that attacks on schools in contravention of international humanitarian law are investigated and those responsible duly prosecuted;
 - d. calls upon United Nations country-level task forces to enhance the monitoring and reporting on the military use of schools.”

The Security Council president has also issued at least two presidential statements in recent years condemning the use of human shields:

- i. October 31, 2017: “The Security Council expresses *grave concern* at the scale and severity of the violations and abuses committed against children in 2016, as documented in the report of the Secretary-General (S/2017/821) on children and armed conflict, which included alarming levels of killing and maiming of children, recruitment and use of children, *including by the use of children as human shields and the increasing use of children as suicide bombers*, and, in certain situations, denial of humanitarian access to children” (United Nations 2017) (emphasis added).
- ii. November 2, 2016: “The members of the Security Council condemn the use of human shields and call on all parties to take feasible precautions with the view to avoiding harm to civilians and civilian objects in accordance with international humanitarian law” (United Nations 2016).

UN bodies besides the Security Council have also on multiple occasions condemned the use of human shields by specific groups, especially the Islamic State. These condemnations include:

- i. The UN High Commissioner for Human Rights at the time, Zeid Raad Al Hussein, stated in March 2017: “ISIL’s strategy of using children, men and women to shield themselves from attack is cowardly and disgraceful. It breaches the most basic standards of human dignity and morality. Under international humanitarian law, the use of human shields amounts to a war crime... I do not underestimate the enormity of the challenges facing the Iraqi Security Forces and their Coalition partners as they try to dislodge ISIL from their last strongholds in Mosul, and the immense difficulties they face in trying to save civilians from their nightmare existence under ISIL control... This is an enemy that ruthlessly exploits civilians to serve its own ends, and clearly has not even the faintest qualm about deliberately placing them in danger” (Office of the UN High Commissioner for Human Rights 2017c).
- ii. The UN High Commissioner for Human Rights’ Representative in Iraq, Bruno Geddo, stated in June 2017: “these civilians [the approximately 100,000 civilians trapped by the Islamic State in Mosul] are basically held as human shields in the Old City” (Moore 2017).
- iii. UN spokeswoman Ravina Shamdasani stated in October 2016: “ISIL’s depraved, cowardly strategy is to try to use the presence of civilian hostages to render certain points, areas or military forces immune from military action, essentially using tens of thousands of men, women and children as human shields [in Mosul]” (Quoted in Hawramy and Graham-Harrison 2016).

Related concern: child soldiers

As discussed, those employing human shields have found they can compromise the military capacities of democratic states. Reticent to use military force when civilians have been placed deliberately in harm's way, the militaries of rights-respecting, democratic states are effectively hamstrung when placed in a situation where they must defend themselves against hostile forces employing human shields.

Democratic states contending with terrorists who use child soldiers face a similar challenge. In fact, penalties for the use of child soldiers could arguably be captured under legislation that punishes the use of human shields. Placing armed children in conflict zones is in effect one sub-type of human shields use, and perhaps is one of the more lethal and effective forms of shielding.

The protected status of children under international and domestic laws reflects a universal and deeply engrained sensibility in democratic states regarding the moral turpitude associated with the violent targeting of children. Thus, the quandaries and consequences generated by using human shields are greatly heightened when children are the civilian shields involved. But in the case of child soldiers – the equation is radically more lethal. The ensuing ethical and tactical dilemmas are far more crippling. Child soldiers can be fully capable of inflicting mortal harm on the military forces they face. In this respect they are not just shields, used defensively to shield an asset and incapacitate a reticent adversary. The child soldier is different. He or she is also an “offensive shield,” acting to deter while concomitantly and proactively presenting an immediate and lethal danger to the soldiers involved. The reticence of rights-respecting militaries, unwilling to fire on child soldiers, can have deadly consequences for those troops. The possible consequences for the children are just as dire. Their deployment as “offensive shields” renders them far more likely to suffer grievous harm than “ordinary” human shields who are not active combatants and present no active threat in and of themselves. The probability of such harm is obviously severely escalated when child soldiers are deployed against military forces representing certain state or non-state entities who, as a matter of policy, would not hesitate to respond to offensive actions by children with lethal force.

The use of child soldiers as a tactic is well documented, widespread, and growing. According to a 2018 Canadian military briefing note, “child soldiers... are likely to be encountered on an increasing basis” by Canadian troops, especially in the Middle East and North Africa region (Fife and Chase 2017). In February 2020, Palestinian Media Watch presented a report to UNICEF outlining the continued widespread use of child soldiers in Palestine (Hirsch and Marcus 2020). In 2018, Canada expressed hesitation to even deploy peacekeeping troops to Mali, understanding the elevated risks to Canadian troops of deploying to a state where the use of child soldiers is pervasive.³

Part II: Summary of actions taken so far to deter and sanction human shields use

The *US Human Shields Act* (December 2018)

Although the use of human shields has been prohibited since at least 1949 when the Geneva Conventions were adopted, the first legislation specifically sanctioning the use of human shields was only passed in December 2018. The United States' *Sanctioning the Use of Civilians as Defenseless Shields Act* ("*US Human Shields Act*") was signed into law by then-President Donald Trump in December 2018, after previously passing both the House and the Senate unanimously. The *US Human Shields Act* condemns the use of civilians as human shields and imposes sanctions on foreign people who are responsible. It specifically targets Hamas and Hezbollah for mandatory sanctions and allows for permissive sanctions (i.e., at the discretion of the government) on all other foreign people who use or support this tactic. This section summarizes the *US Human Shields Act*, which is reproduced in full in Appendix I below.

The *US Human Shields Act* begins by articulating the mechanisms for imposing sanctions and differentiating between mandatory and permissive sanction schemes.⁴ It mandates that the US president submit annual lists of persons who fit the criteria for both sanction schemes. Specifically, the following are subject to mandatory sanctions and must be included on the president's annual list:

1. Each "foreign person"⁵ who is a member of Hezbollah or knowingly acting on behalf of Hezbollah, and who "knowingly orders, controls, or otherwise directs the use of civilians... to shield military objectives from attack"
2. Each "foreign person" who is a member of Hamas or knowingly acting on behalf of Hamas, and who "knowingly orders, controls, or otherwise directs the use of civilians... to shield military objectives from attack."
3. Each foreign person or agency or instrumentality of a foreign state that knowingly and materially supports, orders, controls, directs, or otherwise engages in any such act by a person described above (i.e., a member of Hezbollah or Hamas or someone knowingly acting on behalf of Hezbollah or Hamas).

In addition, according to Section 3(c) of the *US Human Shields Act*, the following people are subject to permissive sanctions: each foreign person that "knowingly orders, controls, or otherwise directs the use of civilians protected

as such by the law of war to shield military objectives from attack, excluding foreign persons included in the most recent [mandatory sanctions] list.”

In other words, members of Hamas, Hezbollah, and anyone knowingly acting on their behalf are sanctioned if they knowingly order, control, or otherwise direct the use of human shields. Also subject to mandatory sanctions are each foreign person or agency or instrumentality of a foreign state that knowingly and materially supports, orders, controls, directs, or otherwise engages in the use of human shields by members of Hamas, Hezbollah, or anyone knowingly acting on their behalf.

Besides those particular people and entities, any foreign person that knowingly orders, controls, or otherwise directs the use of civilians as human shields may be sanctioned.

The *US Human Shields Act* defines the term “foreign person” to include both foreign individuals and foreign entities. Therefore, the Islamic State and the Taliban, who have both used human shields extensively in recent years, could be listed pursuant to the “permissive” provisions, as could their relevant officials.

Once these persons are on these lists, the specific sanctions imposed are (a) blocking of property, and (b) visa sanctions:

Blocking of property: Property-blocking sanctions come from the presidential powers conferred by the *International Emergency Economic Powers Act* (50 U.S.C. 1701 et seq.). The president is directed to exercise all powers conferred to the extent necessary to block and prohibit all transactions in property and interests in property of the foreign person if such property or interests in property come within the US, or within the possession or control of a US person.

Visa sanctions: In addition, all persons listed are inadmissible to the US, ineligible to receive a visa or other documentation to enter the US, and ineligible to be admitted or paroled into the US or to receive any other benefit under the *Immigration and Nationality Act* (8 U.S.C. 1101 et seq.). Beyond that, any visa already issued, is revoked, and these persons are denied admission to the US. The only exception to the imposition of these visa sanctions is an exception to comply with the UN headquarters agreement, “or with other applicable international obligations” (that are not specified).

The president may “waive the application of sanctions” under this section if he or she determines and reports to the appropriate congressional committees that such a waiver is in the national security interest of the United States.

The president is permitted to exercise all authorities under sections 203 and

205 of the *International Emergency Economic Powers Act* (50 U.S.C. 1702 and 1704) for purposes of carrying out this section – these are powers to investigate and prescribe regulations.

If a person knowingly violates, attempts to violate, conspires to violate, or causes a violation of regulations prescribed to carry out this section – that person is subject to civil and/or criminal penalties. Maximum civil liability is the greater of US\$250,000 or “an amount that is twice the amount of the transaction that is the basis of the violation.” Maximum criminal liability is a US\$1,000,000 fine and/or 20 years’ imprisonment.

A pivotal UN General Assembly resolution

As outlined above, there have been many instances when the UN condemned the use of human shields. These instances of condemnation largely came out of the UN Security Council and were related to specific situations of human shields use, mostly by the Taliban in the Afghanistan conflict. There were at least 18 Security Council resolutions specifically relating to the Taliban “and other extremist groups” and their use of human shields in that conflict.

While these resolutions were valuable, the most pivotal international condemnation of human shields came out more recently, on June 26, 2018. For the first time, in an unanimously passed resolution, the UN General Assembly clearly condemned the use of human shields in general. This resolution came less than two weeks after the UN General Assembly voted to denounce Hamas. The precise wording of the June 26, 2018 condemnation was as follows:

33. Condemns the failure to take all feasible precautions to protect the civilian population and civilian objects against the effects of attacks when using civilian objects, in particular schools and hospitals, for military purposes such as launching attacks and storing weapons, *and strongly condemns the use of civilians to shield military objectives from attacks.* (UNGA 2018, emphasis added)

This resolution is significant in its generality. Unlike many prior resolutions, it is not narrowly aimed at one terrorist group or conflict. This resolution came amid an overall trend of increasing condemnations of the use of human shields. It also came amidst the passage of the *US Human Shields Act*: it was adopted after the *US Human Shields Act* was already considered and passed in the House, but before it passed in the Senate.

The NATO call to action

Beyond the UN General Assembly, there is now also a NATO initiative to spotlight and counter the use of human shields. This, too, was reportedly inspired

by the passage of the *US Human Shields Act*. On March 29, 2019, the NATO Supreme Allied Commander strongly encouraged member states to take action at the domestic level to deter and sanction the use of human shields.

In a March 29, 2019 letter, titled “Challenges Regarding the Use of Civilians as Human Shields by NATO’s Adversaries” and addressed to the Secretary-General of NATO, the NATO Supreme Allied Commander identified the issue of human shields as an “important obstacle” to the success of NATO missions.⁶ He stated that the use of civilians as human shields provides NATO’s adversaries “undeniable operational advantages,” notably in the Middle East and North Africa region. The commander encouraged member states to take measures to counter the use of human shields. He stated that NATO is “limited” in its ability to take further actions, and that it is “*essential that further measures be taken at the national level*” to maximize enforcement (emphasis added). As of the time of writing, it is our understanding that no member state has responded to the letter.

Part III: Proposal for Canadian action

Canada should heed NATO’s call to action, and pass domestic legislation to combat and counter the use of civilians as human shields. As NATO’s Supreme Allied Commander has noted, international bodies have only a limited ability to act to deter and sanction the use of human shields. This global problem requires nation states to act. With the US, the UN, and NATO already engaged, it is time for Canada to demonstrate its leadership as a human rights advocate on the world stage by passing comparable legislation to deter and sanction the use of civilians as human shields.

Canada can readily adapt the *US Human Shields Act*, which the authors have done for this report. The proposed legislation (the “*Canadian Human Shields Act*”) is summarized here, and a full first draft, for consideration by Canadian lawmakers, is attached as Appendix II to this report.

The proposed *Canadian Human Shields Act* follows the same overall structure as the *US Human Shields Act*, in that it allows for the imposition of sanctions (specifically property-blocking and visa sanctions) to deter and combat human shields use. However, there are a couple of key differences.

First, the proposed *Canadian Human Shields Act* does not specifically target Hamas and Hezbollah for mandatory sanctions, as the *US Human Shields Act* does. Rather, it targets “listed terrorist entities” that are banned under the Canadian Criminal Code. Specifically, the proposed *Canadian Human Shields*

Act uses the same mandatory and permissive sanction schemes as in the *US Human Shields Act*, but is adjusted as follows:

The mandatory sanctions scheme would cover

- i. Foreign nationals that are members of listed terrorist entities, or are knowingly acting on behalf of listed terrorist entities, who knowingly order, control, or otherwise direct the use of civilians to shield military objectives from attack.
- ii. Foreign nationals, or agencies or instrumentalities of foreign states, that knowingly and materially support, order, control, direct, or otherwise engage in any act described [in the paragraph above] by a person described in that paragraph.

The permissive sanctions scheme would cover

- i. Foreign nationals who knowingly order, control, or otherwise direct the use of civilians to shield military objectives from attack (excluding foreign nationals that are covered by the mandatory sanctions scheme).
- ii. Foreign nationals or agencies or instrumentalities of foreign states that have knowingly and materially assisted, sponsored, or provided financial, material or technological support for, or goods or services in support of, an activity described [in the paragraph above] by a person described in that paragraph.

In other words, foreign nationals that are members of listed terrorist entities, or knowingly acting on their behalf, and who knowingly order, control, or direct the use of civilians as human shields – would be liable to mandatory sanctions. This means that the government would be required to impose sanctions in these circumstances. In contrast, foreign nationals who are not acting on behalf of listed terrorist entities but who otherwise meet these criteria would be liable to permissive sanctions. This means that, in these alternative circumstances, the government is permitted (but does not have to) impose sanctions.

In any case, the *Canadian Human Shields Act* would allow the Governor in Council to “waive the application of sanctions” if he or she determines that such waiver is in the national security interest of Canada – mirroring section 3 (g) of the US legislation.

In terms of the nature of the sanctions imposed, as noted, the *Canadian Human Shields Act* involves property-blocking sanctions and visa sanctions. With respect to property-blocking sanctions, the *Canadian Human Shields Act* would prohibit persons in Canada and Canadians outside Canada from:

1. Dealing, directly or indirectly, in any property, wherever situated, of the listed foreign national;
2. Entering into or facilitating, directly or indirectly, any financial transaction related to a dealing described above;
3. Providing or acquiring financial or other related services to, for the benefit of, or on the direction or order of the listed foreign national; and
4. Making available any property, wherever situated, to the listed foreign national or to a person acting on behalf of the listed foreign national.

These prohibitions mirror those outlined in the *Canadian Justice for Victims of Corrupt Foreign Officials Act* (Sergei Magnitsky Law). Then, in terms of visa sanctions, the proposed *Canadian Human Shields Act* involves amendments to the *Immigration and Refugee Protection Act* (IRPA), so that persons sanctioned under the *Canadian Human Shields Act* would become inadmissible to Canada under section 35 of the IRPA. This also mirrors the visa sanctions imposed under Canada's Sergei Magnitsky Law.

The proposed *Canadian Human Shields Act* includes a safeguard provision to ensure that the legislation is used as intended, targeting only those wrongdoers that are beyond the reach of jurisdictions that Canada recognizes as capable of adjudicating such cases in their own domestic legal systems. This is the second key difference between the Canadian version of the legislation and the *US Human Shields Act*. Nationals of states with whom Canada shares an extradition treaty would be exempt from sanctions under the proposed *Canadian Human Shields Act*. This is because the presence of an extradition treaty indicates that Canada has confidence in that state's legal systems. Former Minister of Justice Irwin Cotler advocated for the use of this type of model in 2012 in an early version of the *Justice for Victims of Terrorism Act*:

I understand the government's desire to prevent frivolous or vexatious lawsuits against our democratic allies. While my bill removes immunity from perpetrators of terrorism and its state sponsors, it seeks to address this concern by providing a limited carve-out for countries with whom Canada has an extradition treaty – that is, those democracies that respect the rule of law, that have an independent judiciary and that provide due process. Accordingly, victims of terrorism could seek redress in those countries precisely because of their democratic character and provision for due process. Given that such recourses would be available to victims with respect to these countries, it is not imperative to remove state immunity entirely. (Cotler 2010)

See Appendix II for a full first draft of the *Canadian Human Shields Act*. Note that this draft legislation is not intended to constitute a final version of legislation. Rather, it is drafted and included as a starting point for discussion and consultation – guided by the principle that Canada must respond to NATO’s call to action, and take concrete domestic action to counter and combat the use of human shields.

Appendix 1: *US Human Shields Act (Sanctioning the Use of Civilians as Defenseless Shields Act)*

Public Law 115-348

115th Congress

An Act

To impose sanctions with respect to foreign persons that are responsible for using civilians as human shields, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Short title.

This Act may be cited as the “Sanctioning the Use of Civilians as Defenseless Shields Act”.

Sec. 2. Statement of policy.

It shall be the policy of the United States to officially and publicly condemn the use of innocent civilians as human shields.

Sec. 3. Imposition of sanctions with respect to foreign persons that are responsible for the use of civilians as human shields.

a. Imposition of sanctions.—

1. Mandatory sanctions.—The President shall impose sanctions described in subsection (d) with respect to each person on the list

required under subsection (b).

2. Permissive sanctions.—The President may impose sanctions described in subsection (d) with respect to each person on the list described in subsection (c).
- b. Mandatory sanctions list.—Not later than one year after the date of the enactment of this Act, and annually thereafter, the President shall submit to the appropriate congressional committees a list of the following:
1. Each foreign person that the President determines, on or after the date of the enactment of this Act—
 - A. is a member of Hizballah or is knowingly acting on behalf of Hizballah; and
 - B. knowingly orders, controls, or otherwise directs the use of civilians protected as such by the law of war to shield military objectives from attack.
 2. Each foreign person that the President determines, on or after the date of the enactment of this Act—
 - A. is a member of Hamas or is knowingly acting on behalf of Hamas; and
 - B. knowingly orders, controls, or otherwise directs the use of civilians protected as such by the law of war to shield military objectives from attack.
 3. Each foreign person or agency or instrumentality of a foreign state that the President determines, on or after the date of the enactment of this Act, knowingly and materially supports, orders, controls, directs, or otherwise engages in—
 - A. any act described in subparagraph (B) of paragraph (1) by a person described in that paragraph; or
 - B. any act described in subparagraph (B) of paragraph (2) by a person described in that paragraph.
- c. Permissive sanctions list.—Not later than one year after the date of the enactment of this Act, and annually thereafter, the President should submit to the appropriate congressional committees a list of each foreign person that the President determines, on or after the date of the enactment of this Act, knowingly orders, controls, or otherwise directs the

use of civilians protected as such by the law of war to shield military objectives from attack, excluding foreign persons included in the most recent list under subsection (b).

- d. Sanctions described.—The sanctions to be imposed on a foreign person or an agency or instrumentality of a foreign state under this subsection are the following:
1. Blocking of property.—The President shall exercise all of the powers granted to the President under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) to the extent necessary to block and prohibit all transactions in property and interests in property of the foreign person or agency or instrumentality of a foreign state if such property or interests in property are in the United States, come within the United States, or are or come within the possession or control of a United States person.
 2. Aliens ineligible for visas, admission, or parole.—
 - A. Visas, admission, or parole.—An alien who the Secretary of State or the Secretary of Homeland Security determines is subject to sanctions under subsection (a) is—
 - i. inadmissible to the United States;
 - ii. ineligible to receive a visa or other documentation to enter the United States; and
 - iii. otherwise ineligible to be admitted or paroled into the United States or to receive any other benefit under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.).
 - B. Current visas revoked.—Any visa or other documentation issued to an alien who is subject to sanctions under subsection (a), regardless of when such visa or other documentation was issued, shall be revoked and such alien shall be denied admission to the United States.
 - C. Exception to comply with united nations headquarters agreement and other international obligations.—The sanctions under this paragraph shall not be imposed on an individual if admitting such individual to the United States is necessary to permit the United States to comply with the Agreement regarding the Headquarters of the United Nations, signed at Lake Success June 26, 1947, and entered into force November 21, 1947, between the United Nations and the United States, or with other

applicable international obligations.

- e. Penalties.—The penalties provided for in subsections (b) and (c) of section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705) shall apply to a person that knowingly violates, attempts to violate, conspires to violate, or causes a violation of regulations prescribed to carry out this section to the same extent that such penalties apply to a person that knowingly commits an unlawful act described in section 206(a) of such Act.

- e. Procedures for judicial review of classified information.—
 - 1. In general.—If a finding under this section, or a prohibition, condition, or penalty imposed as a result of any such finding, is based on classified information (as defined in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.)) and a court reviews the finding or the imposition of the prohibition, condition, or penalty, the President may submit such information to the court *ex parte* and *in camera*.
 - 2. Rule of construction.—Nothing in this subsection shall be construed to confer or imply any right to judicial review of any finding under this section or any prohibition, condition, or penalty imposed as a result of any such finding.

- g. Waiver.—The President may waive the application of sanctions under this section if the President determines and reports to the appropriate congressional committees that such waiver is in the national security interest of the United States.

- h. Regulatory authority.—
 - 1. In general.—The President may exercise all authorities under sections 203 and 205 of the International Emergency Economic Powers Act (50 U.S.C. 1702 and 1704) for purposes of carrying out this section.
 - 2. Issuance of regulations.—Not later than 180 days after the date of the enactment of this Act, the President shall prescribe such regulations as may be necessary to implement this section.

- i. Rule of construction.—Nothing in this section may be construed—
 - 1. to limit the authorities of the President pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or any other relevant provision of law; or

2. to apply with respect to any activity subject to the reporting requirements under title V of the National Security Act of 1947 (50 U.S.C. 3091 et seq.), or to any authorized intelligence activities of the United States.

Sec. 4. Definitions.

In this Act:

1. Admitted; alien.—The terms “admitted” and “alien” have the meanings given those terms in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101).
2. Agency or instrumentality of a foreign state.—The term “agency or instrumentality of a foreign state” has the meaning given that term in section 1603(b) of title 28, United States Code.
3. Appropriate congressional committees.—In this section, the term “appropriate congressional committees” means—
 - A. the Committee on Banking, Housing, and Urban Affairs, the Committee on Foreign Relations, and the Committee on the Judiciary of the Senate; and
 - B. the Committee on Financial Services, the Committee on Foreign Affairs, and the Committee on the Judiciary of the House of Representatives.
4. Foreign person.—The term “foreign person” means—
 - A. any citizen or national of a foreign state, wherever located; or
 - B. any entity not organized solely under the laws of the United States or existing solely in the United States.
5. Hamas.—The term “Hamas” means—
 - A. the entity known as Hamas and designated by the Secretary of State as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. 1189); or
 - B. any person identified as an agent or instrumentality of Hamas on the list of specially designated nationals and blocked persons maintained by the Office of Foreign Asset Control of the Department of the Treasury, the property or interests in property of which are blocked pursuant to the International Emergency Economic Powers

Act (50 U.S.C. 1701 et seq.).

6. Hizballah.—The term “Hizballah” means—
 - A. the entity known as Hizballah and designated by the Secretary of State as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. 1189); or
 - B. any person identified as an agent or instrumentality of Hizballah on the list of specially designated nationals and blocked persons maintained by the Office of Foreign Asset Control of the Department of the Treasury, the property or interests in property of which are blocked pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.).
7. United states person.—The term “United States person” means any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States.

Sec. 5. Sunset.

This Act shall cease to be effective on December 31, 2023.

Approved December 21, 2018.

Appendix II: Proposed *Canadian Human Shields Act* (draft)

An Act to provide for the taking of restrictive measures in respect of foreign nationals that are responsible for using civilians as human shields, and to make related amendments to the *Special Economic Measures Act* and the *Immigration and Refugee Protection Act*.

Preamble

Whereas human rights and the rule of law are integral to international law and Canada has repeatedly asserted its commitment to promoting international justice and respect for human rights;

Whereas signatory States to international human rights agreements have committed themselves to the obligations and responsibilities set out in those agreements;

Whereas the use of civilians to shield military targets is prohibited in international law, per customary international law, and under the Geneva Conventions of 1949, and the Rome Statute of the International Criminal Court, done in 1998;

Whereas the United Nations General Assembly resolved in 2018 to condemn the use of civilians as human shields, and the North Atlantic Treaty Organization (NATO) recently called on its members to take action to counter the use of human shields;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title

Short title

1. This Act may be cited as the *Human Shields Act*.

Interpretation

Definitions

2. The following definitions apply in this Act.

Canadian means a person who is a citizen within the meaning of the *Citizenship Act* or a corporation incorporated or continued by or under the laws of Canada or of a province. (*Canadien*)

entity means a corporation, trust, partnership, fund, an unincorporated association or organization or a foreign state. (*entité*)

foreign national means an individual who is not

- a. a Canadian citizen;
- b. a permanent resident under the *Immigration and Refugee Protection Act*; or
- c. a national of a country with which Canada is party to an extradition agreement or whose name is set out in the schedule to the Extradition Act, or a country that is designated under subsection 109.1(1) of the *Immigration and Refugee Protection Act*. (*étranger*)

foreign state means a country other than Canada, and includes

- a. any of its political subdivisions;
- b. its government and any of its departments, or the government or any department of any of its political subdivisions; and
- c. any of its agencies or any agency of any of its political subdivisions.
- d. It does not include a country with which Canada is party to an extradition agreement or whose name is set out in the schedule to the Extradition Act, or a country that is designated under subsection 109.1(1) of the *Immigration and Refugee Protection Act*. (*État étranger*)

Minister means the Minister of Public Safety. (*ministre*)

person means an individual or an entity. (*personne*)

prescribed means prescribed by regulation. (*version anglaise seulement*)

Her majesty

Binding on Her Majesty

3. This Act is binding on Her Majesty in right of Canada or a province.

Orders and regulations

Orders and regulations

4. 1) The Governor in Council shall, if the Governor in Council is of the opinion that any of the circumstances described in subsection (3) has occurred,
 - a. make any orders or regulations with respect to the restriction or prohibition of any of the activities referred to in subsection (5) in relation to a foreign national that the Governor in Council considers necessary; and
 - b. by order, cause to be seized, frozen or sequestered in the manner set out in the order any of the foreign national's property situated in Canada.
4. 2) The Governor in Council may, if the Governor in Council is of the opinion that any of the circumstances described in subsection (4) has occurred,
 - a. make any orders or regulations with respect to the restriction or prohibition of any of the activities referred to in subsection (5) in relation to a foreign national that the Governor in Council considers necessary; and
 - b. by order, cause to be seized, frozen or sequestered in the manner set out in the order any of the foreign national's property situated in Canada.

Circumstances

4. 3) The circumstances referred to in subsection (1) are the following:

- a. A foreign national that is a member of a listed terrorist entity or is knowingly acting on behalf of a listed terrorist entity, and knowingly orders, controls, or otherwise directs the use of civilians protected as such by the law of war to shield military objectives from attack.
 - b. A foreign national or agency or instrumentality of a foreign state that knowingly and materially supports, orders, controls, directs, or otherwise engages in any act described in subparagraph (1) by a foreign national described in that paragraph.
4. 4) The circumstances referred to in subsection (2) are the following:
- a. A foreign national that knowingly orders, controls, or otherwise directs the use of civilians protected as such by the law of war to shield military objectives from attack, excluding foreign nationals included in the most recent list under subsection (3).
 - b. A foreign national or agency or instrumentality of a foreign state that has knowingly and materially assisted, sponsored, or provided financial, material or technological support for, or goods or services in support of, an activity described in subparagraph (a).

Restricted or prohibited activities

4. 5) Orders and regulations shall be made under paragraph (1), and may be made under paragraph (2), with respect to the restriction or prohibition of any of the following activities, whether carried out in or outside Canada:
- a. the dealing, directly or indirectly, by any person in Canada or Canadian outside Canada in any property, wherever situated, of the foreign national;
 - b. the entering into or facilitating, directly or indirectly, by any person in Canada or Canadian outside Canada, of any financial transaction related to a dealing referred to in paragraph (a); and
 - c. the provision by any person in Canada or Canadian outside Canada of financial services or any other services to, for the benefit of, or on the direction or order of the foreign national;
 - d. the acquisition by any person in Canada or Canadian outside Canada of financial services or any other services for the benefit of or on the direction or order of the foreign national; and
 - e. the making available by any person in Canada or Canadian outside

Canada of any property, wherever situated, to the foreign national or to a person acting on behalf of the foreign national.

Waiver

4. 6) The Governor in Council may waive the application of sanctions under this section if the Governor in Council determines that such waiver is in the national security interest of Canada.

Tabling of order

5. A copy of each order or regulation made under section 4 must be tabled in each House of Parliament within 15 days after it is made. It may be sent to the Clerk of the House if the House is not sitting.

Termination of Order or Regulation

6. 1) A foreign national who is the subject of an order or regulation made under section 4 may apply in writing to the Minister to cease being the subject of the order or regulation.

Recommendation

6. 2) On receipt of the application, the Minister must decide whether there are reasonable grounds to recommend to the Governor in Council that the order or regulation be amended or repealed, as the case may be, so that the applicant ceases to be the subject of it.

Offences

Offence and punishment

7. Every person who knowingly contravenes or fails to comply with an order or regulation made under section 4
 - a. is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years; or
 - b. is guilty of an offence punishable on summary conviction and is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than one year, or to both.

No civil liability

8. A person who, in relation to any property that is the subject of an order or regulation made under section 4, acts reasonably in taking, or omitting to take, measures to comply with the order or regulation is not liable in any civil action arising from having taken or omitted to take the measures if they took all reasonable steps to satisfy themselves that the property was not property that is the subject of the order or regulation.

Existing equities maintained

9. All secured and unsecured rights and interests in any property that is the subject of an order or regulation made under section 4 that are held by a person, other than the foreign national who is the subject of the order or regulation, are entitled to the same ranking that they would have been entitled to had the order or regulation not been made.

Proceedings not precluded

10. The making of an order or regulation under section 4 does not preclude the commencement of proceedings under any Act of Parliament other than this Act, or any civil proceedings, in respect of any property that is the subject of the order or regulation.

Regulations

11. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act.

Review and report

Review

12. 1) Within five years after the day on which this section comes into force, a comprehensive review of the provisions and operation of this Act must be undertaken by the committees of the Senate and of the House of Commons that are designated or established by each House for that purpose.

Report

12. 2) The committees referred to in subsection (1) must, within a year after a review is undertaken under that subsection or within any further time

that may be authorized by the Senate or the House of Commons, as the case may be, submit a report on the review to Parliament, including a statement of any changes that the committees recommend.

Review

12. 3) Committees of the Senate and the House of Commons that are designated or established by each House for that purpose may conduct a review concerning the foreign nationals who are the subject of an order or regulation made under this Act and submit a report to the appropriate House together with their recommendations as to whether those foreign nationals should remain, or no longer be, the subject of that order or regulation.

Related amendments

Special Economic Measures Act

13. [Amendments]

Immigration and Refugee Protection Act

14. [Amendments]

[Section 35 of the *IRPA* should be amended to read:

35. 1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

...

- e. being a person, other than a permanent resident, who is currently the subject of an order or regulation made under section 4 of the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*.
- f. being a person, other than a permanent resident, who is currently the subject of an order or regulation made under section 4 of the *Human Shields Act*.

About the authors



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Daniel Eisen is a Toronto-based consultant who works with legislatures, NGOs, and other bodies on legislative and policy initiatives related to extremism and terrorism. He is the co-founder of the Canadian Coalition Against Terror (C-CAT), a research and advocacy group comprised of terror victims, counterterrorism professionals, legal experts, and others, dedicated to developing innovative strategies in the battle against terrorism. In recognition of his efforts,

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Legislation

Sanctioning the Use of Civilians as Defenseless Shields Act, Pub. L. No. 115–348, 132 Stat. 5055 (2018).

Endnotes

- 1 See, for example, Pickles (2015) and Miller (2015).
- 2 See also, for example, United Nations Secretary-General (2018b) and United Nations Secretary-General (2018c).
- 3 See, for example Fife and Chase (2017) and Krayden (2018).
- 4 Essentially, under the *US Human Shields Act*, if foreign people meet the criteria laid out under the mandatory sanction scheme, the US government becomes *obligated* to impose sanctions on them. On the other hand, if foreign people meet the criteria laid out under the permissive sanctions scheme, the US government *may* impose sanctions at its discretion.
- 5 Defined in sec. 4 of the *US Human Shields Act* as any citizen or national of a foreign state, or any entity not organized solely under the laws of the United States or existing solely in the United States.
- 6 This letter isn't public, but the information reproduced in this paragraph are from it.

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