

# Chained to cannons or wearing targets on their T-shirts: human shields in international humanitarian law

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## **Abstract**

*This article examines the legal problems associated with human shields. The author begins by discussing the absolute nature of the prohibition on their use and goes on to consider the precautions to be observed by the party being attacked. A violation of the ban on use of human shields by the attacked party is not an act of perfidy and does not release the attacker from his obligations. Because human shields are civilians, they are not legitimate objects of attack, even where they are acting in a voluntary capacity, as they are not taking direct part in hostilities. Among the attacker's obligations to take precautions, the proportionality principle applies in the classic way, even in the case of voluntary human shields.*



## **Introduction**

Although the phenomenon of the 'human shield' is not new, it has become familiar to the general public in recent years as a result of widespread media coverage.

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It also seems to have taken on new forms in today's conflicts, as is borne out by numerous examples.

### From forced human shields ...

During 'Operation Iraqi Freedom' in 2003, human shields were commonly used as a counter-targeting technique. 'Iraqi forces, especially the paramilitary Fedayeen, not only took cover (or hid) in locations where civilians were present, but also forcibly used civilians to physically shelter their own actions. In some cases, they hid behind women and children.'<sup>1</sup> During the 1991 Gulf War, Iraq announced publicly its intention of using prisoners of war as human shields in order to ward off attacks on strategic sites. Foreign hostages were also placed near dams, oil refineries and steel mills in order to protect them.<sup>2</sup>

However, Iraq is by no means the only theatre of conflict where this has been done. Other examples are the Afghan,<sup>3</sup> Chechen<sup>4</sup> and Israeli–Palestinian conflicts,<sup>5</sup> the conflict in the former Yugoslavia<sup>6</sup> and the conflict in Lebanon in summer 2006.<sup>7</sup> The reality behind the human shield phenomenon is complex, as *voluntary* human shields also form a significant part of the picture.

### ... to voluntary ones

Many people will recall Serbian civilians taking up positions on the bridges of Belgrade to prevent them from being bombed during the NATO campaign to protect Kosovo in 1999,<sup>8</sup> or Palestinian civilians surrounding Yasser Arafat's headquarters in Ramallah in 2003 to forestall a threatened attack by Israeli forces.

1 Michael N. Schmitt, 'The conduct of hostilities during Operation Iraqi Freedom: an international humanitarian law assessment', *Yearbook of International Humanitarian Law*, Vol. 6 (2003), p. 99.

2 Paolo Fusco, 'Legal status of human shields', Corso in diritto umanitario internazionale Comitato Internazionale della Croce Rossa e dalla Croce Rossa Polacca Varsavia, Pubblicazioni Centro Studi per la Pace, 2003, available at <http://studiperlapace.it/>, p. 6 (last visited 13 October 2007).

3 Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2002, p. 267. In 1997, in connection with the conflict in Afghanistan, the UN General Assembly urged the Afghan parties to put an end to their use of human shields.

4 Fusco, above note 2, p. 10. There have been many allegations of use of human shields in the conflict in Chechnya, both by the Russian forces and by Chechen independence fighters.

5 Roland Otto, 'Neighbours as human shields? The Israel Defense Forces' "Early Warning Procedure" and international humanitarian law', *International Review of the Red Cross*, Vol. 86, No. 856 (2004), p. 771. From 2002 onwards, the 'early warning procedure' allowed the Israel Defense Forces to obtain assistance from Palestinian neighbours in evacuating houses occupied by wanted people and convincing these people to give themselves up.

6 Michael Skerker, 'Just war criteria and the new face of war: human shields, manufactured martyrs, and little boys with stones', *Journal of Military Ethics*, Vol. 3 (2004), p. 29. In 1995, during the siege of Sarajevo, Serbian forces chained UN observers to military objectives in order to deter the international forces from carrying out air strikes.

7 The use of human shields by Hezbollah in that conflict appears to have been common currency. One consequence was the deaths of four UN observers when their observation post in South Yemen was bombed by Israeli forces.

8 Jean-François Quéguiner, 'Precautions under the law governing the conduct of hostilities', *International Review of the Red Cross*, Vol. 88, No. 864 (2006), p. 815.

Pacifist activists who went to Iraq in 2003 before the start of 'Operation Iraqi Freedom' were encouraged by the Iraqi government to take up positions on or near military targets<sup>9</sup> such as oil refineries and power stations.<sup>10</sup> However, as these volunteers from abroad had gone there essentially to protect civilian property, they rapidly left the country.<sup>11</sup>

The concept of human shield can cover a wide range of situations. The technique is used with some degree of frequency in asymmetric armed conflicts where there is a major discrepancy between the weaponry available to the two sides. Can a flagrant imbalance between the belligerents justify this practice, prohibited as it is by international humanitarian law? Where people are used as human shields, what is the status of those people and what protection are they entitled to from the point of view of conduct of hostilities and after they are captured? Those who use human shields and those who choose to act as such do so with the aim of forestalling an attack against a military target. Is their reasoning legally valid? Where a military objective is protected by a human shield, is the attacker obliged to refrain from attacking it? To answer these questions, I shall examine the issues successively from the points of view of the party under attack, the human shield and the attacker.

## The ban on use of human shields

The term 'human shield' as used in international humanitarian law means a civilian placed in front of a military objective so that his civilian status will deter the enemy from attacking that objective.<sup>12</sup> The use of human shields is absolutely forbidden. The law also places obligations on the party under attack to take precautions against the effects of attacks.

### An absolute prohibition

#### *Scope of the prohibition*

The problem of human shields in an international armed conflict is addressed in a number of provisions of the Geneva Conventions.<sup>13</sup> The ban on using

9 Fusco, above note 2, p. 7.

10 Josiane Haas, 'Voluntary human shields: status and protection under international humanitarian law', in Roberta Arnold and Pierre-Antoine Hildbrand (eds.), *International Humanitarian Law And The 21st Century's Conflicts: Changes and Challenges*, Editions interuniversitaires suisses – Edis, Lausanne/Berne/Lugano, 2005, p. 191.

11 Schmitt, above note 1, p. 100.

12 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), 8 June 1977 (hereinafter: Protocol I), Art. 51(7).

13 In the case of prisoners of war, Art. 23(1) of the Third Geneva Convention explicitly addresses the question of human shields. It provides that the presence of a prisoner of war may not be used 'to render certain points or areas immune from military operations'. Art. 28 of the Fourth Geneva Convention repeats the same wording as Art. 23(1) of the Third in respect to 'protected persons'. As explained in the Commentaries, the term 'military operations' has the advantage of covering a wide range of situations, from aerial bombardments to hand-to-hand fighting, either by regular armies or by groups such as

civilians for this purpose was picked up and extended in 1977 by Article 51(7) of Protocol I:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

Whereas in 1949 the ban was limited to the scope of the Third and Fourth Geneva Conventions and therefore concerned only prisoners of war and ‘protected persons’, Article 51(7) of Protocol I concerns and consequently protects the civilian population as a whole. The scope of the ban on human shields is thereby extended or clarified not only *ratione personae* but also *ratione materiae*. The ‘presence’ of civilians being used as human shields covers two types of situation: those where civilians are placed on or close to military objectives and those where military objectives are placed in the midst of civilians. Article 51(7) also covers cases where ‘movements’<sup>14</sup> of the civilian population are used to cover military operations.<sup>15</sup>

Finally, in the 1998 Rome Statute of the International Criminal Court, the use of human shields during an international armed conflict is classified as a war crime (Article 8(2)(b)(xxiii)).

To demonstrate the existence of a constant and uniform practice and an *opinio juris* within the international community, one possible source is the jurisprudence from the war crimes tribunals that followed the Second World War.<sup>16</sup> A more recent source is the case of *Prosecutor v. Radovan Karadzic and Ratko Mladic* before the International Criminal Tribunal for the former Yugoslavia<sup>17</sup> (ICTY). One may also refer to the military manuals of certain states, which outlaw the practice, as well as the domestic law of some countries and to a number of official

resistance movements, which are placed in the same category as the regular armed forces under Art. 4 of the Third Geneva Convention. The wording ‘certain points or areas’ indicates that the prohibition applies to small sites as well as to wide areas. However, although the scope of the prohibition *ratione loci* covers the belligerents’ own territory as well as to occupied territory, its application *ratione personae* is limited to ‘protected persons’ in the meaning of Art. 4 of the Convention.

- 14 These movements may be spontaneous or provoked by a party to the conflict or an occupying power.
- 15 Protocol I also prohibits the use of medical units (Art. 12(4)) and medical aircraft (Art. 28(1)) in an attempt to shield military objectives from attack. The expression ‘[U]nder no circumstances’, used in Art. 12(1), indicates that the prohibition is *absolute*. The absolute nature of this prohibition is not limited to the use of patients or staff of medical units as human shields but applies to the general prohibition on use of human shields, be they civilians or prisoners of war, which brooks no exception. Legal experts seem to agree that it is an absolute obligation of result. See Quéguiner, above note 8, p. 811.
- 16 Nuremberg Military Tribunal, *The United States of America v. Wilhelm Von Leeb (The German High Command Trial)*, 28 October 1948; British Military Tribunal, *Student Case*, decision of 10 May 1946.
- 17 On 11 July 1996, after reviewing the indictments, the Trial Chamber confirmed all counts set out by the Prosecutor, among them several concerning the use of human shields: the use of civilians held in Bosnian Serb camps as ‘human shields’ and the taking hostage of UN peacekeepers, some of whom were subsequently used as human shields, ‘physically secured or otherwise held ... at potential NATO air targets’. This last count is categorized as a war crime.

statements by states, and by the ICRC, condemning it, which carry a certain weight in the absence of any contrary practice.<sup>18</sup>

There is no treaty-based rule that expressly prohibits the use of human shields in non-international armed conflicts. Article 5(2)(c) of Additional Protocol II simply provides, as does Article 19 of the Third Geneva Convention in the case of international armed conflict, for the evacuation of persons deprived of their liberty from combat areas so that they are not exposed to danger. In addition to that provision, the ban on using human shields could be covered by the scope of Article 13(1) of Protocol II, which stipulates that the civilian population and individual civilians must enjoy 'general protection against the dangers arising from military operations'. However, it is customary law that provides the best basis for asserting that the use of human shields is also prohibited in non-international armed conflicts. The prohibition follows from the fundamental obligations to distinguish between combatants and civilians and to take the relevant precautions. Moreover, the use of human shields is often placed on the same footing as hostage-taking, which is forbidden by customary law and also by Article 4(2)(c) of Protocol II.<sup>19</sup> Under the Rome Statute, use of human shields in an international armed conflict can be prosecuted as a war crime. However, this is not the case where the act is committed in a non-international armed conflict.

There is no provision of international human rights law that expressly forbids the use of human shields outside situations of armed conflict. However, it seems logical that such prohibition would fall within the scope of the core fundamental rights such as the right to life or the prohibition of torture and other cruel, inhuman or degrading treatment.<sup>20</sup> The physical and mental suffering inflicted, and particularly the fact that such a person is awaiting near-certain and imminent death,<sup>21</sup> can also serve as a basis for this assertion. Moreover, although the accused in question were being tried for war crimes, the ICTY has also expressed the view

18 Louise Doswald-Beck and Jean-Marie Henckaerts, *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005, I (hereafter the Study), pp. 337 ff.

19 The prohibition on the use of human shields in non-international armed conflicts is also affirmed by the above study (*ibid.*, p. 337), and in Anthony P. V. Rogers and Paul Malherbe (eds.), *Fight It Right: Model Manual on the Law of Armed Conflict for Armed Forces*, International Committee of the Red Cross, Geneva, 1999, pp. 169–70, para. 2119.

20 This is the position adopted by the European Court of Human Rights in *Demiray v. Turkey*, against the background of clashes between the Turkish state and the Kurdistan Workers' Party (PKK). European Court of Human Rights, *Demiray v. Turkey*, Judgment of 21 November 2000, Application No. 27308/95. Eric David has also taken the view that inhuman treatment includes the use of human shields, which can also be regarded as humiliating or degrading treatment. David, above note 3, pp. 680, 683. Finally, in a judgment on the subject of the 'early warning procedure', the High Court of Justice of Israel held – admittedly in a situation of international armed conflict – that 'Pictet correctly noted that the use of people as a "human shield" is a "cruel and barbaric" act'. High Court of Justice of Israel, *Adalah – The Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF*, Judgment of 6 October 2005, p. 11, para. 21, available at [http://elyon1.court.gov.il/Files\\_ENG/02/990/037/a32/02037990.a32.pdf](http://elyon1.court.gov.il/Files_ENG/02/990/037/a32/02037990.a32.pdf) (last visited 15 October 2007). In this same judgment a judge of the Court also expressed the view that the use of someone as a human shield violated 'his dignity as a human being'. *Ibid.*, p. 17.

21 See European Court of Human Rights, *Soering v. United Kingdom*, Judgment of 7 July 1989, Application No. 14038/88, in which the expectation of certain death was described as characteristic of the 'death-row phenomenon' which the Court deemed to be inhumane treatment.

on several occasions that the use of human shields constituted ‘inhumane treatment’ and ‘cruel treatment’.

### *Recurring questions*

As we have seen, although the prohibition on the use of human shields is plainly set out, it is nevertheless frequently breached. The question as to how such breaches are to be categorized has arisen on a number of occasions. Moreover, although the prohibition is clear, some of the legal problems associated with it, particularly those concerning the phenomenon of voluntary human shields, appear to be rather less so.

Using human shields seems to be a very ‘treacherous’ practice, but does it qualify as an act of perfidy in legal terms? Some experts hold that, in unbalanced armed conflicts, the weaker party is naturally prompted to hide in more densely populated areas so as to make it more difficult or impossible for the adverse party to identify military objectives.<sup>22</sup> However, ‘if the civilian population is intentionally used as a kind of shield to protect defending units, there is no longer any question of permitted deception: this clearly amounts to prohibited perfidy’.<sup>23</sup> The commentaries to Article 28 of the Fourth Geneva Convention could also be interpreted as asserting the same thing, as they contain a lengthy passage distinguishing the use of protected persons as human shields from a ruse of war.<sup>24</sup> Yet, traditionally, ruses of war are always opposed to acts of perfidy.

In the present author’s view, despite the absolute prohibition on the use of human shields, to apply the term ‘act of perfidy’ to such acts is not legally appropriate, considering the definition given to the term ‘perfidy’ in international humanitarian law. This definition contains three elements. Two of them are subjective, namely an appeal to the opponent’s good faith and the intention to deceive that good faith. The third, objective, element is that the deceit must concern the existence of a protection granted by international humanitarian law.<sup>25</sup> The use of human shields does indeed rely on the protection accorded to civilians or prisoners of war by international humanitarian law, but the enemy is not deceived. The protected status of the people so used is not feigned but genuine. Moreover, for an

22 Frédéric de Mulinen, ‘Distinction between military and civilian objects’, in Christian Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment*, Martinus Nijhoff Publishers, The Hague, 2002, p. 113.

23 Ibid.

24 Jean S. Pictet, *Commentary on the Fourth Geneva Convention, Article 28*, International Committee of the Red Cross, Geneva, 1958, p. 208.

25 Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, with the collaboration of Philippe Eberlin, Hans-Peter Gasser, Sylvie-Stoyanka Junod, Jean S. Pictet, Claude Pilloud, Jean de Preux, Yves Sandoz, Christophe Swinarski, Claude F. Wenger and Bruno Zimmermann, International Committee of the Red Cross/Martinus Nijhoff Publishers, Dordrecht, 1986, p. 435. Generally speaking, acts considered as ruses of war are contrasted with acts amounting to perfidy, as in Art. 37 of Protocol I. Art. 37(1) defines and illustrates the concept of perfidious acts, which are strictly prohibited, whereas Art. 37(2) deals with ruses of war, which are not prohibited. The reader might be led to conclude that, according to the Commentaries, the use of protected persons as human shields is not a ruse of war and is therefore an act of perfidy.

act to fall within the definition of perfidy as prohibited by Article 37 of Protocol I, it must have been committed with the intention of killing, wounding or capturing an enemy.<sup>26</sup> Some authors go even further, stating that 'if it is used solely for combat against military objects, for example, without affecting any enemy combatant, it is permissible'.<sup>27</sup> In the case of human shields, the aim is not to kill, wound or capture the enemy, but to *defend* military objectives against attack. It would therefore appear that the use of human shields does not fit the definition of an act of perfidy and still less that of an act of perfidy as defined in Article 37 of Protocol I and the customary rule codified therein.

The problem of *voluntary* human shields was not explicitly addressed by the drafters of the Conventions and their Additional Protocols. Does that mean that voluntary human shields are not covered by the prohibition on human shields? That seems unlikely. The party benefiting from their presence does not necessarily need to have gone looking for them and stationed them forcibly in front of a military target. Nor is it required that the people used as human shields should be unaware of the fact.<sup>28</sup> On the contrary, it appears that this prohibition 'applies both when the civilians are hostages and when they have volunteered to shield military targets'.<sup>29</sup> The essential element in the prohibition on use of human shields is rather the intention to use the presence of humans as shields to shelter a military objective. This is corroborated by the International Criminal Court's Elements of Crimes.<sup>30</sup> The material element there is moving or taking advantage of the location of protected persons; the mental element is the intention to shield a military objective from attack or to shield, favour or impede military operations. There is no trace of any requirement that there be ignorance on the part of the people concerned or that they be constrained. However, the criterion of intention is always tricky. How can one be certain that tolerance or inaction in relation to people who have voluntarily stationed themselves on strategic sites should be understood as an intention to take advantage of their presence to shield a military objective from attack? However, a finding of intention can often be arrived at inductively on the basis of the factual circumstances.<sup>31</sup>

26 Ibid., p. 436, para. 1491; Michael Bothe, Karl Josef Parsch and Waldem A. Solf, *New Rules for victims of armed conflicts*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1982, pp. 203–4; Stefan Oeter, 'Methods and means of combat', in *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, New York, 1995, p. 201. This ban has customary law status in both international and non-international armed conflict, irrespective of any doubt there may be as to the customary nature of the 'capture' factor. Doswald-Beck and Henckaerts, above note 18, pp. 221, 225.

27 Oeter, above note 26, pp. 201–2.

28 Quéguiner, above note 8, p. 815.

29 Haas, above note 10, p. 207.

30 Elements of Crimes, adopted by the Assembly of States Parties to the ICC, 9 September 2002.

31 Quéguiner, above note 8, p. 816: 'For example, where civilians gather on a bridge of military value in order to protest against the enemy's earlier destruction of other similar bridges will probably not imply an intention on the part of the belligerent. However, if, on the same bridge, civilian demonstrators set up camp for a long period of time and the authorities take no action to remove them, then this inaction will lead to a clear presumption that the authorities intend to use the civilians' presence to shield the bridge from an enemy attack. An even clearer presumption of intention will arise where the civilian volunteers are briefed by the armed forces on which military sites are to be "protected".'

If the authorities allow such a thing to happen without taking any action, that could be considered all the more revelatory of an intention to use human shields, since, in addition to the absolute negative obligation never to do so, the authorities also have positive obligations, albeit relative ones this time, to take various precautionary measures, including keeping civilians away from military targets.

### The relative obligation under Article 58<sup>32</sup>

Article 58 of Protocol I, entitled ‘Precautions against the effects of attacks’, sets out obligations incumbent on the party under attack which, while not absolute, are directly linked to the question of human shields and further bolster the prohibition on their use:

The Parties to the conflict shall, to the maximum extent feasible:

- 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.<sup>33</sup>

32 It should be noted that there is debate as to whether or not Art. 58 represents customary law, particularly in a non-international armed conflict. According to the recent study on customary international humanitarian law, the obligations contained in this provision are indeed customary law, at least in an international armed conflict. Cf. Doswald-Beck and Henckaerts, above note 18, pp. 68, 71, 74; see also Jean-Marie Henckaerts, ‘The conduct of hostilities: target selection, proportionality and precautionary measures under international humanitarian law’, in Netherlands Red Cross, *Protecting Civilians in 21st-Century Warfare*, 2001, p. 20. However, the Study considers that there is a good case for saying that these rules form part of the fabric of general international law applicable in non-international armed conflicts. Doswald-Beck and Henckaerts, above note 18, Vol. I, pp. 71, 74. Without these precautionary measures, the general protection accorded to the civilian population by Art. 13(1) of Protocol II against the dangers arising from military operations would remain a dead letter. However, not everyone shares this view. For J. Gardam, although Art. 51(7), which is complementary to Art. 58, is a customary rule, Art. 58 itself is a ‘new development’. Judith G. Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, p. 156. According to M. Sassòli and L. Cameron, only the United States and Iraq have ever claimed that the obligation not to place military targets in densely populated areas was customary, and only the prohibition on the use of human shields is truly customary. Marco Sassòli and Lindsey Cameron, ‘The protection of civilian objects – current state of the law and issues *de lege ferenda*’, in Natalino Ronzitti and Gabriella Venturini (eds.), *Current Issues in the International Humanitarian Law of Air Warfare*, Eleven, Utrecht, 2006, pp. 72, 73.

33 For further details on the obligations, positive and negative (abstention), under Art. 58, see Sandoz, Swinarski and Zimmermann, above note 25, p. 710, para. 2244; *ibid.*, p. 711, paras. 2246, 2247; *ibid.*, p. 712, paras. 2250, 2251, 2254, 2256, 2257. See also Bothe, Partsch and Solf, above note 26, p. 372, para. 2.4.2.; *ibid.*, p. 373, para. 2.5.; *ibid.*, p. 374, para. 2.8; Doswald-Beck and Henckaerts, above note 18, Rule 22, p. 70, pp. 73–4; Quéguiner, above note 8, p. 819; Jean-François Quéguiner, ‘Le principe de distinction dans la conduite des hostilités, un principe traditionnel confronté à des défis actuels’, doctoral thesis, Université de Genève, 2006, p. 403; Frédéric de Mulinen, *Manuel sur le droit de la guerre*



These obligations bind any party having control over the civilian population concerned, be they members of its own population or foreigners, refugees or any other persons. Any territory under the *de facto* authority of the party must have the benefit of these precautions. This applies to occupied territories as well as national ones.<sup>34</sup> The fact that the law imposes on states the obligation to take measures they would have to apply on their national territory was perceived by some states as interference with their sovereignty.<sup>35</sup> To answer their concerns, the words ‘to the maximum extent feasible’ were added to qualify these obligations. Unlike the prohibition on the use of human shields, these obligations are therefore not absolute. However, they are not mere pious recommendations, as some commentators affirm,<sup>36</sup> but genuine legal obligations of means which bind states. Removing civilians from the vicinity of military objectives, avoiding the location of military objectives within or near densely populated areas and taking the necessary precautions to protect civilians are therefore an overarching aim to be achieved if possible, whereby the circumstances, feasibility and military advantage will be taken into account.<sup>37</sup> As regards the obligation to take the necessary precautions to protect civilians, soldiers may be employed to that end.<sup>38</sup> As they can be legitimate objects of attack, however, their very presence is a risk factor for the civilians they are supposed to be protecting. The attacker must therefore comply with the obligation to take precautions, particularly those arising from the proportionality principle, in order to provide human shields with the protection to which they are entitled. This protection arises first and foremost from the legal status enjoyed by human shields.

## Status and protection of human shields

The protection to which a person being used as a human shield is entitled will depend to a large extent on that person’s legal status. Both status and protection have given rise to controversy, particularly on account of divergent interpretations of certain fundamental concepts in the law that governs the conduct of hostilities in international armed conflicts. These concepts also pose problems when we attempt to transpose them into internal situations of armed conflict.

*pour les forces armées*, ICRC, Geneva, 1989, p. 108, para. 439; *ibid.*, p. 109, paras. 443–444; *ibid.*, p. 109, para. 445; de Mulinen, above note 22, p. 111; Oeter, above note 26, p. 167; Rogers and Malherbe, above note 19, p. 78, para. 1201.5.b., 1205.5.c; Hans-Peter Gasser, ‘Protection of the civilian population’, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, New York, 1995, pp. 223–4.

34 Sandoz, Swinarski and Zimmermann (eds.), above note 25, p. 712, para. 2255. Occupying powers may not ‘ignore the fate of the population of the occupied territory and only take into account the fate and the safety of their own troops’.

35 Cf. Bothe, Partsch and Solf, above note 26, p. 372, para. 2.3.

36 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 129.

37 Bothe, Partsch and Solf, above note 26, p. 372, para. 2.4.2.

38 Gasser, above note 33, p. 224.

## The legal status of a human shield: civilian or not?

This is not simply a matter of ‘sticking a label’ on someone for the sake of legal ‘tidiness’. Defining the legal status of a human shield, that is, determining whether that person is a combatant or a civilian, has certain consequences. The first consequence arises in connection with the conduct of hostilities. In application of the fundamental principle of distinction, only military objectives can be attacked.<sup>39</sup> Civilians<sup>40</sup> cannot be attacked in any circumstances, provided that they do not take direct part in hostilities.<sup>41</sup> If the human shield is a civilian, he therefore enjoys the protection associated with civilian status and cannot be targeted during an attack. If the human shield is considered to be a combatant, however, he becomes a legitimate object of attack. The same applies to civilians who take direct part in hostilities, for as long as they do so.<sup>42</sup> A second consequence arises in connection with detention options. In the case of a combatant who falls into enemy hands, the enemy can detain him for the duration of the conflict without the need for any reason other than his combatant status. If a human shield is a civilian, however, reasons are needed to detain him.<sup>43</sup> A number of guarantees should also apply.<sup>44</sup> During his detention a combatant will enjoy the highly regulated status of a prisoner of war (see the Third Geneva Convention of 1949). Finally, a combatant can in no circumstances be prosecuted for the simple fact of having taken part in hostilities, that is, for lawful acts of war he has performed. In contrast, a civilian who has taken a direct part in hostilities can be prosecuted not only if he has committed war crimes but also for the very fact of taking up arms.

In international humanitarian law, everyone is either a civilian or a combatant. The person who is held and positioned in front of a military objective against his will can of course hardly be considered a combatant. However, the question does arise in connection with voluntary human shields. In some people’s view, a person who deliberately places himself in front of a military objective in order to protect it from attack is a combatant. However, human shields do not fit the definition of a combatant as set out either in Article 4 of the Third Geneva Convention or in Article 43 of Protocol I. They do not belong to the armed forces of a party to a conflict and, even if they are persuaded by a party to the conflict to

39 Protocol I, Arts. 48 and 52(2).

40 Protocol I, Art. 51(2), and Protocol II, Art. 13(2).

41 Protocol I, Art. 51(3), and Protocol II, Art. 13(3).

42 Ibid.

43 In occupied territories, protected persons can only be interned ‘for imperative reasons of security’. GCIV, Art. 78. Elsewhere than in occupied territories, ‘internment ... of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary’. GCIV, Art. 42.

44 Regular procedure and competent body, even if organized by the occupying power, right of appeal, speedy processing and periodic review of the decision on internment, if possible every six months. Art. 78. ‘Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.’ GCIV, Art. 43. ‘The court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit’. Ibid.

serve as human shields for its benefit, it is hard to imagine them belonging to an organization under a command responsible to that party, *a fortiori* where they are volunteers as in Iraq. A distinctive sign is a possibility, but its purpose will not be to distinguish them from the civilian population, but, on the contrary, to indicate that they are members of the civilian population. After all, the whole point of a human shield is to play on the enemy's concern not to take the risk of killing or wounding civilians, in order to ward off military attack. If the shield can be regarded as belonging to an organized group, for example a pacifist non-governmental organization (NGO), he is not armed or carrying arms openly.

A civilian's status generally determines the protection to which he is entitled. However, the case of voluntary human shields does raise questions. The extent of the protection afforded to a civilian does vary depending on whether or not he takes direct part in hostilities. We may also consider the extent to which acting as a voluntary human shield could be considered a crime.

### What protection does a human shield enjoy?

Every civilian should enjoy general protection against the effects of hostilities and may not be an object of attack.<sup>45</sup> The same therefore applies to human shields. However, this protection enjoyed by civilians goes hand in hand with a prohibition on taking direct part in hostilities.<sup>46</sup> If civilians take direct part in hostilities, their protection ceases for such time as they do so and they can be the object of a lawful attack. In the case of *voluntary* human shields, the question arises in the following terms: if we can consider that the volunteer is taking direct part in hostilities, he loses his protection as a civilian for as long as that state of affairs lasts. If captured, he could be prosecuted simply for having taken part in hostilities, as we have seen above. If we are to understand the real risks run by a voluntary human shield, we must therefore determine whether his acts can be regarded as taking direct part in hostilities. At the same time, it may be interesting to examine the phenomenon of voluntary human shields in the light of the fact that the use of human shields is categorized as a war crime.

### *The difficulty to consider acting as a voluntary human shield as tantamount to taking direct part in hostilities*

Experts are very divided on the question of whether or not acting as a voluntary human shield is tantamount to taking direct part in hostilities.<sup>47</sup> Nevertheless, there are a number of jurists who do take the view that acting as a voluntary human

45 Protocol I, Art. 51.

46 Protocol I, Art. 51(3).

47 Summary Report, Second Expert Meeting, Direct Participation in Hostilities under International Humanitarian Law, Co-organized by the International Committee of the Red Cross and the TMC Asser Institute, The Hague, 25–26 October 2004, p. 6.

shield – that is, deliberately trying to ward off an attack on a military objective – is indeed tantamount to taking direct part in hostilities.<sup>48</sup> It follows from this that voluntary human shields lose their protection as civilians because they are taking direct part in hostilities.<sup>49</sup> According to this analysis, human shields are acting in exactly the same way as anti-aircraft defence systems, only more effectively.<sup>50</sup> The High Court of Justice of Israel took a similar position in a recent judgment on targeted killings of ‘terrorists’, in which it examined the question of what the law is regarding civilians serving as a ‘human shield’. The Court found that ‘if they do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking direct part in the hostilities’.<sup>51</sup> Others do not share this view, claiming that it would be incorrect to state that people who place themselves voluntarily in front of a legitimate target are taking direct part in hostilities.<sup>52</sup>

Hostile acts do not necessarily involve the use of weapons and taking direct part in hostilities includes ‘attacks’.<sup>53</sup> Attacks include offensive and defensive acts.<sup>54</sup> It would therefore be possible to consider that voluntary human shields who place themselves unarmed in front of military objectives in order to ward off an attack, in other words to defend it, are taking direct part in hostilities.

However, ‘hostile acts’ and taking ‘direct part’ in hostilities can be defined as ‘acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces’ of the enemy.<sup>55</sup> If we adopt this definition of taking direct part in hostilities, the actions of the voluntary human shield do not fit it very well. The voluntary human shield does not strike the enemy forces; he merely protects by a passive attitude the personnel or hardware of his own armed forces. One could extrapolate and say that he strikes the enemy forces indirectly, since by protecting his own military hardware and personnel, he preserves them and enables them to strike the enemy. However, this interpretation does not square with the use of the word ‘actual’ and still less with the Commentaries, which describe direct participation in hostilities as acts that ‘present an immediate threat to the [adverse] party’.<sup>56</sup> Even if it could be said that human shields present a threat to the adverse party because they protect military targets that themselves present such a threat, this threat is not immediate. Although

48 Dinstein, above note 36, p. 130.

49 Schmitt, above note 1, p. 100.

50 Michael N. Schmitt, ‘Targeting and humanitarian law: current issues’, *Israel Yearbook on Human Rights*, Vol. 34 (2004), p. 95.

51 High Court of Justice of Israel, *The Public Committee v. The Government of Israel*, Judgment, 14 December 2006, para. 36, available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf) (last visited 10 October 2007).

52 Laurent Colassis, cited by Ludovic Monnerat, *Le problème des boucliers humains volontaires dans les opérations contemporaines*, CheckPoint, information site of the Swiss military, 15 March 2003, available at [www.checkpoint-online.ch/CheckPoint/Monde/Mon0047-ProblemBoucliersHumains.html](http://www.checkpoint-online.ch/CheckPoint/Monde/Mon0047-ProblemBoucliersHumains.html) (last visited 10 November 2008).

53 Sandoz, Swinarski and Zimmermann, above note 25, p. 633, para. 1943.

54 Protocol I, Art. 49.

55 Sandoz, Swinarski and Zimmermann, above note 25, p. 633, paras. 1942, 1944.

56 Bothe, Partsch and Solf, above note 26, p. 301, para. 2.4.1.

it could certainly contribute to a state's 'war capabilities', the human shield's participation is only indirect. The voluntary human shield cannot therefore be regarded as taking direct part in hostilities.

However, the degree of actualness or immediacy a threat must possess in order to count as direct part in hostilities can be difficult to define. The High Court of Justice of Israel<sup>57</sup> has taken the view that 'the "direct" character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take "direct part". The same goes for the person who decided upon the act, and the person who planned it'. This notwithstanding, '[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.'<sup>58</sup> The essential difficulty, however, is to determine the intensity required to create this causal relationship. It would seem important not to take too broad an approach: to interpret it too loosely would lead to voluntary human shields easily being placed on the same footing as people taking direct part in hostilities, which would mean, as some experts have pointed out, that they could be attacked 'during their preparation, namely when moving towards the military objective to be shielded by their presence'.<sup>59</sup> There is, however, no military necessity to attack them when they are not protecting a military target. Nor is there any point in targeting the human shield himself in addition to the military target he is trying to protect!<sup>60</sup> If the causal relationship is stretched too far, just about anything could be seen as taking direct part in hostilities, including the attitude of the general civilian population, because by undermining the morale of the population, it is possible to weaken its allegiance to the state, and hence the state itself. In that case the fundamental principle of distinction would disappear and we would be giving carte blanche to total war. Finally, as some experts point out, the causal relationship should not be read too broadly because the law must be applicable on the ground.<sup>61</sup>

At all events, we can safely say that the acts of voluntary human shields do not square easily with what we can consider as taking direct part in hostilities. Moreover, to argue the contrary seems utterly self-defeating. The whole point of human shields is that their civilian status, that which makes them 'unattackable', is used to protect a military objective. However, if they were taking direct part in hostilities, they could themselves be an object of attack. Their presence in front of a military target would therefore be entirely pointless. In that case,

57 *The Public Committee v. The Government of Israel*, above note 51, para. 37. See also William J. Fenrick, 'The targeted killings judgment and the scope of direct participation in hostilities', *Journal of International Criminal Justice*, Vol. 5, No. 2 (2007), p. 336.

58 Sandoz, Swinarski and Zimmermann, above note 25, p. 522, para. 1679.

59 Summary Report, Second Expert Meeting, above note 47, p. 6.

60 Schmitt, above note 50, p. 96.

61 Summary Report, Third Expert Meeting on the Notion of Direct Participation in Hostilities, Co-organized by the International Committee of the Red Cross and the TMC Asser Institute, Geneva, 23–25 October 2005, p. 30, available at [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2005\\_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf) (last visited 24 September 2007).

no one would voluntarily position himself in front of a potential target! At the same time, one can have the feeling that, from the point of view of direct participation in hostilities, there are voluntary human shields and voluntary human shields. There seems to be little common ground between a human shield on the roof of a missile launching pad and, to take an example cited by an expert, ‘a Somali woman who walked across the street holding her arms up and hiding behind her one or two fighters, who would fire their weapons from behind her flowing white gown’.<sup>62</sup> The ICTY in the *Tadić* case adopted a case-by-case approach:

It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual’s circumstances, that person was actively involved in hostilities at the relevant time.<sup>63</sup>

We cannot therefore affirm in general and absolute terms that a voluntary human shield is or is not taking direct part in hostilities. This can only be ascertained by an appraisal *in concreto* of the way in which the human shield indeed tries to protect the military objective in question.

When it comes to determining whether a voluntary human shield, in defending a military objective, is or is not taking part in hostilities, the criterion of the real, *physical* shield he constitutes against a potential attack seems to be an interesting avenue of approach. For example, some minimum fighting would be required from an infantry division to get through a crowd of people standing between it and a military objective. In contrast, a small number of human shields standing near a military objective to protect it from an air strike do not constitute a real obstacle for the attacking party in the *material* sense of the word. In this case, the presence of a human shield is only a *legal* obstacle for the attacker, who hesitates to attack only out of fear of violating international humanitarian law with the attendant political and media impact. It would therefore seem overbold to declare an obstacle of that nature to be direct participation in hostilities.

### *The inherent risk run by the voluntary human shield*

As a voluntary human shield cannot in most cases be regarded as taking direct part in hostilities, he retains the full protection due to a civilian status. It is plain, however, that his position in front of a military objective makes his situation more dangerous than that of a civilian who is nowhere near any potential military targets. His condition can be compared with that of workers working in armaments

62 Summary Report, Second Expert Meeting, above note 47, p. 7.

63 ICTY, *The Prosecutor v. Dusko Tadić*, Judgement, 7 May 1997, Case No. IT-94-1-T, para. 616.

or munitions factories.<sup>64</sup> As civilians who take only an indirect part in the hostilities, these workers continue to enjoy protection.<sup>65</sup>

The idea of the 'ordinary' risk to which these civilians are exposing themselves is also to be found in the writings of Frédéric de Mulinen: 'Les personnes civiles se trouvant à l'intérieur d'un tel objectif [d'un objectif militaire] ou dans son environnement immédiat partagent le danger auquel il est exposé.'<sup>66</sup>

In the specific case of voluntary human shields, Josiane Haas seems to be of the same opinion:

[A]lthough VHS [voluntary human shields] do not lose their right to protection as civilians, they may lose *de facto* protection by staying close to a military target. Like journalists embedded in military units, VHS lose the protection granted to civilians not participating directly in hostilities because of their proximity to a lawful target, provided, of course, that the attack is not indiscriminate. They thus act at their own *risk*.<sup>67</sup>

She goes on to say that the attacker is, of course, always bound by the principles of distinction and proportionality. In short, human shields do not lose their protection as civilians. They are simply close to a military objective and, as a result, 'these civilians will bear the risk of falling victim to a legitimate attack on the shielded object'.<sup>68</sup>

64 Human Rights Watch, 'International humanitarian law issues in a potential war in Iraq', 20 February 2003, available at <http://hrw.org/backgrounders/arms/iraq0202003.htm#1> (last visited 29 September 2007).

65 At first sight, Dinstein does not appear to share this opinion: 'These civilians enjoy no immunity while at work.' Dinstein, above note 36, pp. 124–5. However, there are grounds for supposing that Dinstein is not referring to the loss of legal immunity, but only to a *de facto* loss. He goes on to say, 'If the industrial plants are important enough (munitions factories being the paradigm), civilian casualties – even in large numbers – would usually come under the rubric of an acceptable collateral damage.' Ibid. So if Dinstein's workers are no longer protected, it is only after the proportionality calculation has been made and turned out in their disfavour, that is to say the commanders have taken the view that the military advantage is such that the collateral damage is acceptable (I shall return to questions of proportionality), rather than in a general way, simply because they are inside a military objective. 'Upon leaving the factories, civilian labourers shed the *risk* of being subject to attack' (emphasis added), or, more accurately, subject to the risk of an attack on the military objective being decided on (after a proportionality appraisal) and of suffering the consequences. Ibid. I hope that this interpretation of Dinstein's words is the correct one, as he goes on to say that '[s]hould the workforce live within the 'target area', civilian labourers are not protected in their homes!' Ibid. Moreover, he extends this vision of things to other civilians such as those who accompany armed forces and those who approach military targets such as major transport routes: 'When civilians are travelling in wartime on a major motorway, taking a mainline train, going to an airport etc., they are running a discernible *risk* in case of an air raid' (emphasis added). Ibid. It would certainly seem that Dinstein is speaking of a *de facto* risk and not a loss of legal protection, as he again refers to the proportionality principle: 'Given the significant military advantage that can generally be gained from the destruction of a strategically located bridge, relatively high civilian casualties would ordinarily be deemed a reasonable collateral damage' (it should be borne in mind that the proportionality calculation is a test to be applied *in concreto*, depending on 'the circumstances ruling at the time'). Ibid.

66 De Mulinen, above note 33, p. 14, para. 56.

67 Haas, above note 10, p. 210 (emphasis added).

68 Quéguiner, above note 8, p. 817.

### *Is the voluntary human shield a war criminal?*

As we have seen, using human shields is one of the acts classified as a war crime by the Rome Statute of the International Criminal Court (Art. 8(2)(b)(xxiii)). We may therefore ask ourselves whether a person who places himself in front of a military objective is also committing a war crime, as that person is after all mis-using his status as a civilian.

According to Elements of Crimes, adopted in 2002, the elements of the war crime of using protected persons as shields are:

1. The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict.
2. The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The three last conditions can perfectly well be met by a voluntary human shield. However, the first element poses a problem. It is fairly clear from the wording that the drafters were referring to people who had moved or taken advantage of the presence of protected persons to shield a military objective, and, in the case of voluntary human shields, not the shields themselves. The elements of this crime suggest that the prohibition refers to taking advantage of *other* civilians or exposing them to danger. It should be borne in mind that the principles of criminal law are to be interpreted restrictively and that reasoning by analogy is not allowed. Moreover, if a civilian taking direct part in hostilities is not *ipso facto* a war criminal, we may ask ourselves *a fortiori* why a human shield who, as we have just seen, can scarcely be regarded as taking direct part in hostilities, should be regarded as such.<sup>69</sup>

### Human shields in non-international armed conflicts

In both non-international and international armed conflicts, civilians may not be the object of attack unless they are taking direct part in hostilities.<sup>70</sup> For such time as they do so, they become legitimate targets. The meaning of taking direct part in hostilities is the same whether the conflict is of an international or a non-international nature. We may therefore consider that the conclusions we arrived at concerning the status and protection of human shields, be they voluntary or

69 The question of the complicity of voluntary human shields in war crimes committed by the belligerent taking advantage of their presence could also arise.

70 Protocol II, Art. 13(3).



otherwise, can be transposed into the framework of an internal armed conflict. Civilians used by a party to a conflict to shelter military hardware or personnel can still be regarded as civilians, and those who voluntarily act in the same way should not be regarded as taking direct part in hostilities. The attacker is under an obligation not to target human shields.

## The attacker's obligations vis-à-vis human shields

The party under attack has an absolute obligation not to use human shields. But if the attacked party violates this ban, the question may arise as to how the attacker who is aware of this fact should react. In other words, can it attack the military objective despite the presence of human shields protecting it, and, if so, how?

### The possibility to attack a military objective protected by human shields, or the use of a classic proportionality test?

One question that may arise at the outset is whether the fact that the adverse party has violated its obligations under international humanitarian law by using human shields releases the other party from some of its own obligations. However, this cannot be so in view of the unanimously accepted non-application of the *tu quoque* principle (principle of reciprocity) when it comes to international humanitarian law.<sup>71</sup> Article 51(8) of Protocol I states that '[a]ny violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.' The obligation incumbent on a belligerent state to spare the civilian population and take the measures prescribed to that effect does not therefore depend on the adversary's compliance with the ban on using human shields. However, although the attacking party is under a constant obligation to spare civilians, including human shields, that does not mean that it must in all cases abstain from attacking a military objective protected by human shields. Just as the presence of military objectives in an area occupied by the civilian population does not rob those people of their civilian status,<sup>72</sup> an 'objectif militaire demeure un objectif militaire même si des civils se trouvent à l'intérieur'<sup>73</sup> or in its immediate vicinity. Military objectives protected by human shields do not cease to be legitimate targets for attack simply because of the presence of those shields.

It follows that when a commander asks himself whether or not he can attack such a military objective, he must reason as in the case of any other

71 This is reflected in Art. 60(5) of the 1969 Vienna Convention on the Law of Treaties, which rules out suspension of a treaty for wrongful conduct of a party in the case of 'provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.

72 Protocol I, Art. 50(3).

73 De Mulinen, above note 33, p. 14.

legitimate military objective an attack on which runs the risk of causing collateral damage to civilians who, in this case, are the human shields protecting the target. An attack will be possible if and only if the potential damage to civilians is not 'excessive in relation to the concrete and direct military advantage anticipated'.<sup>74</sup> This means that the expected civilian losses must be weighed against the size of the concrete military advantage to be anticipated if the military objective is neutralized.<sup>75</sup> The attacker is also obliged to take precautions as required by Article 57 of Protocol I.<sup>76</sup> The presence of human shields will not therefore systematically prevent an attack – even if conducting an attack despite their presence may have a considerable media and political impact. This is something that should be made widely known, particularly to potential voluntary human shields.

### *The case of involuntary human shields*

If the concrete and direct military advantage anticipated proves sufficiently significant in relation to the potential damage to the human shields, the attack may take place. The appraisal must be *in concreto* and must always take into account the military advantage, which can shift, for example over time (a bridge of fundamental importance one day may have little strategic significance the next day depending on where the front line lies at the time), and the extent of collateral damage that will be caused to civilians. The extent of that damage may depend, among other things, on the number of civilians likely to be affected. A particular

74 Protocol I, Art. 51(5)(b).

75 Protocol I, Art. 52(2).

76 However, according to E. David, the primacy of the principle of protection of civilians should cause the attacker not to go ahead with the attack. David, above note 3, p. 268. The author considers this position to be dangerous at a number of levels. David seems to believe that human shields have a privileged status in relation to other civilians. This could give the impression that the status of civilians is not uniform but carries variable degrees of protection, and that there is therefore a hierarchy among civilians. In international humanitarian law, a person either is or is not a civilian, and all civilians enjoy identical protection by virtue of that status. Moreover, a systematic prohibition on launching an attack on a military objective protected by human shields would be tantamount to rewarding violation of international humanitarian law, as the party in violation of the ban on use of human shields would benefit from the effective immunity from attack it has succeeded in giving the protected military objective. Violating international humanitarian law by using human shields would therefore become a veritable 'force multiplier'. Michael Newton, 'Human shields: can abuse of the law of war be a force multiplier?', Discussion, in Andru E. Wall (ed.), *Legal and Ethical Lessons of NATO's Kosovo Campaign*, US Naval War College, International Law Studies, Vol. 78, 2002, p. 298. As such, it would constitute a temptation to ignore the law and could ultimately jeopardize the very principle of distinction, which is one of the fundamental pillars of international humanitarian law. Finally, this line of reasoning also calls into question the whole principle of proportionality. If we accept the premise that a military objective protected by human shields cannot be attacked, the principle of humanity automatically prevails over military necessity. In absolute terms, that would not of course be a bad thing, as it would be in the victims' interests. However, it would be totally incompatible with the realities of war, which the proportionality principle, as a pragmatic compromise, takes into account. David also seems to be aware of the questionable nature of his position, as he remarks that 'it will probably be argued that the right to attack military objectives close to concentrations of civilians should be transposed to apply to the present hypothesis', which would subordinate the possibility of attack to respect for the principles of proportionality and precautions in attack. David, above note 3, p. 268.

military advantage may thus be regarded as sufficiently important to justify an attack on a military objective protected by five people being used as human shields. However, if the object is protected by five hundred human shields, the outcome of the deliberation may change. In practice then, there is no doubt that in certain cases, the attacked party can effectively protect the military objective by placing sufficient human shields on or around it! Some authors understandably reject this conclusion, which they consider shocking, and recommend human shields not be taken into account by a commander applying the proportionality principle while preparing for or deciding on an attack.<sup>77</sup> For example, the commander could apply the proportionality test in such a way as to comply *a priori* with Articles 57(2)(a)(iii) and 51(8) of Protocol I, but the human shields would simply not be taken into account on the side of the equation concerning damage to civilians. However, I do not consider this interpretation to be correct. Civilians, whether they are human shields or not, cannot simply *be left out* of the equation. The fact that civilians are close to a military objective because the attacker has breached his obligations makes no difference. It would be against both the spirit and the letter of Article 51(8) if civilians were to ‘pay’ for the wrongs of a belligerent party.<sup>78</sup>

### *The case of voluntary human shields*

According to Michael N. Schmitt, since voluntary human shields are to be regarded as taking direct part in hostilities, they lose their protection as civilians and can themselves be an object of attack. Accordingly, ‘voluntary shields ... are excluded in the estimation of incidental injury when assessing proportionality’.<sup>79</sup> However,

77 Schmitt, above note 50, p. 91.

78 According to Dinstein, ‘the principle of proportionality remains prevalent’. Dinstein, above note 36, p. 131. But he goes on to say, ‘However, ... the actual test of excessive injury to civilians must be relaxed. That is to say, the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that ... civilian casualties will be higher than usual.’ Ibid. If we suppose that human shields must be taken into account in an appraisal of proportionality, it is hard to understand why the fact that more civilian losses are anticipated should be used to weaken the importance of civilian losses in the equation! By analogy, the fact that there are more civilians living close to a military objective, so that there will potentially be greater damage to civilians, does not reduce the weight given to the ‘civilian losses’ side of the equation in relation to the ‘military advantage’ side; on the contrary, it gives it greater weight. Why would it be otherwise in the case of human shields, who are fully fledged civilians? To apply such reasoning would be tantamount to ‘punishing’ the civilians acting as human shields for the violation of the law committed by the attacked party. On this point, it is also possible to disagree with J.-F. Quéguiner, who considers that the wrong committed by the attacked party should be taken into account in the appraisal of proportionality: ‘authors have submitted that the enemy party’s fraudulent conduct may be taken into account in the attacking commander’s assessment of collateral damage versus military advantage. This approach ... can indeed be considered appropriate.’ Quéguiner, above note 8, p. 814. This reasoning leads to the same result as Dinstein’s: the human shield should be taken into account in the appraisal of proportionality, but less than any other civilian. I would tend to share the opinion expressed by Schmitt: ‘there is no *de jure* relaxation of the proportionality standard’. Schmitt, above note 50, pp. 92–3. Simply, the fact of being used as a human shield increases *de facto*, as we have seen earlier, the ‘chances’ of a civilian being part of collateral damage because he is on or near to a military objective.

79 Schmitt, above note 1, p. 100.

the same author remarks that there is no military necessity to attack the human shield *per se*. The necessity is attached only to the military objective he is protecting. Accordingly, ‘the only practical impact of their willingness to serve as shields is that they need not be included in proportionality calculations’.<sup>80</sup> As we have already seen, I do not think that a voluntary human shield should be regarded as taking direct part in hostilities. Schmitt’s statement nevertheless raises an interesting question, namely whether the voluntary nature of their presence can have an impact on the appraisal of proportionality. Intuitively, one could indeed have the feeling that a human shield who is in front of a military objective by his own choice should not count in the same way as someone chained to a military objective against his will. However, if we were to take into account the voluntary nature of a human shield’s action, it would be tantamount to assigning a lesser value to voluntary human shields. In mathematical terms, in an equation that balances military advantage and damage to civilians, a lower coefficient would be applied to the weighting of the civilian side of the equation. An approach based on the human shield’s willingness or otherwise would also run the risk of dangerously eroding civilian protection. If a human shield should have less weight in the equation because he has chosen to guard a military objective, a civilian who remains close to a military objective despite warnings should also weigh more lightly in the balance. The same would apply to a civilian who lives close to an obvious potential military objective such as a military barracks but who has chosen not to leave his home. There would be a real risk of this approach being abused by the attacker, who could be tempted to classify all civilians close to a military objective he is targeting as voluntary human shields, if as a result he could make his proportionality appraisal on a more flexible basis.

Furthermore, could not we consider that this method of taking a civilian’s willingness into account should be regarded as contrary to the principle of inalienability of rights, enshrined in Article 8 of the Fourth Geneva Convention, for example, which states that protected persons ‘may never renounce ... the rights secured to them’ by that Convention. Would this not include the principle that subtends those rights, namely the fact that civilians may not be attacked unless they are taking direct part in hostilities? To conclude on this point, I would refer to another practical element that pleads in favour of treating human shields the same way, whether they are voluntary or not. For the commander faced with the reality on the ground, it is not always easy to distinguish civilians placed in front of a military objective against their will from those who are standing there of their own volition. Except in cases where the voluntary nature of the human shield’s action has been given media coverage, or at least brought to the attacker’s attention, how is he to distinguish between a willing human shield and an unwilling one? It is very difficult to determine whether the human shield is really in front of the military objective of his own volition. An individual who appears to be acting of his own

80 Schmitt, above note 50, p. 96. The author makes an exception only in the case of children acting as human shields, as their lack of legal capacity negates the voluntary nature of their participation.

free will may turn out to have been simply giving in to pressure.<sup>81</sup> In short, although a distinction based on willingness could have some relevance in a criminal case, it has no place in the conduct of hostilities as it cannot be applied on the ground.

### Other precautions to be taken when attacking a military objective protected by human shields<sup>82</sup>

The precautionary measures to be taken in attack are set out in Article 57 of Protocol I.

#### *The obligation to take constant care to spare civilians when conducting military operations<sup>83</sup>*

Article 57(1) has a broader scope than the subsequent sections, which specifically concern ‘attacks’; paragraph 1 applies to ‘military operations’ in a more general way. The term covers ‘any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat’.<sup>84</sup> Over and above the specific precautions set out in the subsequent paragraphs of Article 57, the parties must therefore also take constant care to spare human shields.

#### *The obligation to verify that the objectives to be attacked are military objectives<sup>85</sup>*

In the case of human shields, we have seen that a sufficiently significant military advantage in relation to the danger to which human shields are exposed could render an attack on a military objective legitimate despite their presence. It is therefore all the more vital to be sure of the military nature of the objective, as attacks on civilians and civilian property are categorically prohibited. The information to be gathered in the course of this verification concerns not only the nature of the target itself but also its environment. As we have seen, even in the presence of a military objective, an attack can prove to be prohibited, for example if far too many civilians are being used as human shields and would be endangered

81 In connection with the ‘prior warning procedure’, whereby the IDF (Israel Defense Forces) send Palestinian civilians into neighbouring houses to tell the occupants suspected of terrorism to leave, the President of the High Court of Justice of Israel, Aharon Barak, noted with good sense, that ‘It is very hard to verify willingness.’ B’Tselem, ‘Human shields’, timeline of events, available at [www.btselem.org/english/Human\\_Shields/Timeline\\_of\\_Events.asp](http://www.btselem.org/english/Human_Shields/Timeline_of_Events.asp) (last visited 10 October 2007).

82 When listing the conditions an attacker must respect when attacking a military objective guarded by human shields, Eric David refers to the principle of proportionality and the other precautions to be taken to avoid harming human shields, but the author also asserts that the attacker must have ‘épuisé tous les moyens licites possibles pour persuader l’attaqué de retirer les “boucliers humains”’. David, above note 3, p. 268. However, even if this measure seems desirable, it is not among the legal obligations incumbent on an attacker under international humanitarian law. Quéguiner, above note 8, p. 815.

83 Protocol I, Art. 57(1).

84 Sandoz, Swinarski and Zimmermann, above note 25, p. 698, para. 2191.

85 Protocol I, Art. 57(2)(a)(i).

by the attack in relation to the size of the military advantage to be derived from it. One particular difficulty is raised by ‘emerging targets’.<sup>86</sup> In contrast with planned operations, an ‘emerging target’ situation calls for an instant determination of the military nature of the target and the conduct to be adopted if it is protected by human shields. The commander is required to ‘do everything feasible’ to verify the nature of the objective, as no one can be obliged to do the impossible.

*The obligation to choose means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects*<sup>87</sup>

For example, to comply with this obligation, and still remain subject to ‘feasibility’, if human shields are not in front of the military objective all the time, an attack should be launched at a time when they are not present. Similarly, where the military objective is protected by human shields, the attacker should use weapons that will destroy the target without harming the human shields around it or will harm them as little as possible. This means that the attacker should try to avoid using ‘missiles and remotely controlled weapons ... (unless the attack uses the new generation of remotely controlled “precision-guided munitions”), since the targeting capabilities of remotely controlled weapons are traditionally extremely bad’.<sup>88</sup> Although this does not mean that the parties have to acquire precision-guided weapons, even if they have the means to do so, if they do have such weapons certain situations require that they use them where it is possible and feasible to do so.<sup>89</sup>

*The obligation to cancel or suspend an attack if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack would be disproportionate*<sup>90</sup>

Unlike Article 57(2)(a), this obligation is addressed not only to those planning or deciding on an attack but also to those carrying it out. It may be difficult for someone carrying out an attack to assess its proportionality, as the part he is carrying out may seem disproportionate while the attack as a whole remains fully in compliance with the proportionality principle. However, when it comes to the obligation set out in Article 57(2)(b), the role of those carrying out the attack remains essential, as there may have been a mistake or fresh information may

86 Quéguiner, above note 8, p. 798.

87 Protocol I, Art. 57(2)(a)(ii): those planning or deciding on an attack must ‘take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of 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’.

88 Oeter, above note 26, p. 166.

89 Quéguiner, above note 8, pp. 802–3; Michael N. Schmitt, ‘Precision attack and international humanitarian law’, *International Review of the Red Cross*, Vol. 87, No. 859 (2005), p. 462.

90 Protocol I, Art. 57(2)(b).

appear and change the original premises. For example, if a pilot has received the order to bomb an objective but he realizes at the last minute that it is protected by a human shield, he should suspend the attack and refer back to his command.

*The obligation to give effective advance warning of attacks which could affect the civilian population 'unless circumstances do not so permit'<sup>91</sup>*

Can this requirement be regarded as met when the attacker issues a general list of the various items of infrastructure he considers to be military objectives?<sup>92</sup> Although it might seem possible to reply in the affirmative, there will be cases when efforts should be made to give a more specific warning. When the military objective is protected by human shields, a warning before an attack on the objective will let the party using the human shields – thinking that they will forestall an attack – know that the stratagem has not worked, and give it a chance to remove the human shields from the target. Voluntary human shields might also discover in this way that their presence will not prevent an attack on the military objective they are guarding and have the time to leave the area. 'Effective advance' warning must be given that is sufficiently in advance to allow the evacuation of civilians, including human shields. However, care should be taken not to give the warning too far in advance. Otherwise civilians may think that the danger has passed, and human shields, or those who have positioned them, may think that their presence has forestalled the attack, whereas the attack will still happen but a little later. Finally, it should be remembered that complying with the obligation to warn does not release the attacker from his duty to take other precautionary measures. He cannot therefore consider an entire area as a military objective simply because he has recommended that it be evacuated. Even if he were to regard any civilians remaining as voluntary human shields, they would, as argued above, still enjoy the same protection as any other civilians.

*The obligation, when there is a choice between two military objectives for obtaining a similar military advantage, to choose the one which may be expected to cause the least danger to civilians<sup>93</sup>*

This rule, referred to as the choice of 'the lesser evil',<sup>94</sup> leaves much to subjective appreciation, particularly as the two targets are legitimate military objectives.<sup>95</sup> A choice of this kind is generally only possible where the military objectives in question are lines of communication. For example, if human shields are positioned on a bridge and the communication line can be broken by attacking another bridge

91 Protocol I, Art. 57(2)(c).

92 Quéguiner, above note 8, p. 808.

93 Protocol I, Art. 57(3).

94 Sandoz, Swinarski and Zimmermann, above note 25, p. 705, para. 2226.

95 Quéguiner, above note 8, p. 805.

that is not surrounded by civilians, the obligation set out in Article 57(3) obliges the attacker to take that option.

## **Conclusion**

It would seem that there is no reason to draw a distinction between voluntary and involuntary human shields, as such distinction would have no legal consequences. Moreover, contrary to what some have claimed,<sup>96</sup> there would not appear to be any real need for new law on the status of human shields, since all cases are already covered by international humanitarian law as it stands. The scenarios that raise questions are not specific to the case of human shields but are linked with two of the greatest challenges that international humanitarian law faces today, namely the proper interpretation of ‘proportionality’ and of ‘taking direct part in hostilities’.

96 Fusco, above note 2, p. 31.