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## **LEGAL STATUS OF HUMAN SHIELDS\***

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## **Introduction**

Since the second half of the seventeenth century, the international community has tried to limit the suffering caused by armed conflicts, elaborating rules on the conduct of the hostilities through *ad hoc* international treaties.

The greatest steps forward in defining the *jus in bello* have always been taken after major conflicts, with public opinion and the governments horrified by the tremendous consequences of the changes in the warfare's nature. Especially after World War II and its immense devastation, which particularly affected civilian populations, the treatment of civilians during armed conflict has become one of the most important issues of international agreements defining the law of war.

The main historical source of these rules is Rule 22 of the Annex to the Hague Regulations of 1907: "The right of belligerents to adopt means of injuring the enemy is not unlimited", but the most pertinent treaties are the Geneva Convention IV, on the protection of civilian persons in time of war, and the Protocol I Additional to the Geneva Conventions, on the protection of victims of international armed conflicts. The Geneva Conventions have been ratified by almost all states, while only 150 states (excluding France and United States, e.g.) have ratified Protocol I.

However, many of its rules are considered a codification of the customary practice of nations and, therefore, binding on all<sup>1</sup>: the prohibition of infliction of harm upon civilians is a universally accepted principle, and is part of customary international law, considering the fact that the Hague Regulations, the source of this principle, themselves form part of customary international law<sup>2</sup>.

One of the cornerstones of these treaties, as well as of international humanitarian law, is the principle of distinction<sup>3</sup> between civilian persons and objects, and military objectives: parties of a conflict shall take all the possible measures to spare civilians from the atrocities of war. This principle shall affect all combatants' decisions on whether to attack or not, on where and how conduct the attack, on which weapons to use and how. All with the purpose of reducing at the minimum the loss of civilian lives and the damage of civilian objects: a war shall be conducted

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<sup>1</sup> See, e.g., Independent International Commission on Kosovo, *The Kosovo Report*, available at <http://www.reliefweb.int/library/documents/thekosovoreport.htm> ; Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, *Final Report to the Prosecutor*, available at <http://www.un.org/icty/pressreal/NATO061300.htm>; United States: Department of Defence, *Report to Congress on the Conduct of the Persian Gulf War - Appendix on the Role of the Law of War* (Apr. 19, 1992), reprinted in 31 I.L.M. 612 (1992).

<sup>2</sup> See Gross Emanuel, *Use of civilians as human shields: what legal and moral restrictions pertain to a war waged by a democratic state against terrorism?*, in 16 *Emory Int'l L. Rev.* 445, 2002.

<sup>3</sup> For a wider analysis of the subject, see Schmitt Michael N., *The Principle of Discrimination in 21<sup>st</sup> Century Warfare*, in *The Yale Human Rights & Development Law Journal*, Vol. 2, 1999.

between armies and soldiers with the least possible involvement of civilians.

Therefore, another fundamental rule is given by the principle of proportionality: military actions that involve damages to civilian population or objectives are prohibited, unless the “collateral damage” is justified by the military advantages deriving from those actions.

Despite the presence of these general principles and of other particular rules, civilian populations are still involved in conflicts and horrendous crimes continue to be committed against non-combatants. One of these crimes is the use by parties in conflict of civilians as human shields, to shelter military objectives from the attacks of the counter-parts.

### **Relevant cases**

The practice of using human shields is not as new as one might think. In recent history, we have news<sup>4</sup> of hostages used as “prophylactic hostages” since the American Civil War: under order of a unionist commander, e.g., “preachers and leading men of the churches” were placed on board of trains to prevent attacks from unauthorized combatants.

Similar practices persisted during the South African Boer War, the Franco-Prussian War and both World Wars. Until the Geneva Conventions, it remained unclear how these practices should be

considered, whether lawful or unlawful, especially in cases of unlawful attacks by illegal combatants. Indeed, shielding legitimate objectives with non-combatants was considered not “a commendable practice”<sup>5</sup>, while using hostages to shelter a target subject to unlawful attacks was considered a legally permissible act: the taker of the hostages couldn’t be held responsible for the consequences of an illegal act by third parties.

Even after the introduction of specific rules against the use of human shields<sup>6</sup>, this practice continued on and seems to be a common warfare practice in today’s conflicts. Similar cases were reported during the Iran-Iraq war<sup>7</sup>, the Gulf War<sup>8</sup>, the NATO campaign in the former Federal Republic of Yugoslavia<sup>9</sup>, the Russia-Chechnya conflict<sup>10</sup>, the Second Gulf War and the Palestinian conflict<sup>11</sup>.

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<sup>4</sup> See Elliott H. Wayne, *Hostages or prisoners of war: war crimes at dinner*, in *149 Mil. L. Rev.* 241, 1995.

<sup>5</sup> Ibid, citing British War Office, *Manual of military practice*, 1914.

<sup>6</sup> Art. 28, IV Geneva Convention, 1949 (see below).

<sup>7</sup> See *Mission d’inspection dans les zones à caractère civil d’Iran et d’Irak ayant fait l’objet d’attaques armées, Rapport du Secrétaire général*, reprinted in Sassòli M. – Bouvier A., *Un droit dans la guerre?*, CICR, 2003.

<sup>8</sup> See CIA, *Putting Noncombatants at Risk: Saddam's Use of "Human Shields"*, available at [http://www.cia.gov/cia/reports/iraq\\_human\\_shields](http://www.cia.gov/cia/reports/iraq_human_shields).

<sup>9</sup> See Amnesty International, *"Collateral Damage" or Unlawful Killings?*, available at [www.amnesty.org/ailib/intcam/kosovo/docs/NATO\\_all.pdf](http://www.amnesty.org/ailib/intcam/kosovo/docs/NATO_all.pdf).

<sup>10</sup> See Hollis Duncan B., *Accountability in Chechnya*, in *36 B. C. L. Review* 793, 1995.

<sup>11</sup> See Adalah Organization, *The Use of Palestinian Civilians as Human Shields by the Israeli Army*, available at [http://www.adalah.org/features/humshields/03\\_07\\_humshields\\_briefing.doc](http://www.adalah.org/features/humshields/03_07_humshields_briefing.doc).

It's probably useful to describe some of the recent episodes, when civilians or prisoners of war have been used to shield military objectives and take unlawful advantage during conflicts.

During the first Gulf War, Iraqi forces captured several foreign citizens<sup>12</sup> and treated them as hostages. Many of them, together with Iraqi citizens, were used as human shields, placed at or near likely military and strategic facilities to deter attacks. The Iraqi soldiers used to form groups of eight to ten foreigners, using them as shelters for places like dams, refineries, steel factories, changing the composition of the groups and moving them to different facilities every three or four days.

None of them was told what the Iraqi government was planning to do. Anyway, they were treated fairly well, since the Iraqi President considered them as “special guests”: televised meetings between him and some hostages had been organised, and Saddam Hussein even wrote and publicised a letter to their families, stating that they were used to “promote peace” in the region. Later on, Iraq started to release hostages on humanitarian grounds, such as taking care of age or health problems, and on the basis of their nationality, in order to convince countries not to intervene in the war. Such use of foreigners as human shields lasted for

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<sup>12</sup> United Nations Security Council Resolution 664 (18 august).

about a month after the start of the so-called “Operation Desert Storm”, and then all of them were released unconditionally.

This practice was a part of a “war tactic” which involved the movement of Iraqi civilians (defined as “volunteers”) near military targets and the positioning of military assets nearby densely populated civilian neighbourhoods, civilian buildings and historical sites.

Such a policy was adopted again before and during the second Gulf War, with some “formal” innovations: Iraqi civilians and foreign pacifists were encouraged (and coerced) to serve as volunteer human shields for strategic sites during periods of crisis and increased tension and their presence was described as a “voluntary, popular movement that expresses the real feelings of the Iraqis.”<sup>13</sup>

During the first Gulf War, probably for the first time in history, a party in conflict explicitly adopted a policy of using unlawful means for preventing attacks from parties which are sensitive to humanitarian issues, communicating this policy to the mass media and using it as a form of propaganda.

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<sup>13</sup> Wedeman Ben, *Iraq fortifies with human shields, sandbags*, available at <http://www.cnn.com>.

Since those events, almost every conflict has seen similar practices carried out by parties, especially to avoid air bombings and prevent long-distance missiles attacks.

During the campaign in Yugoslavia, NATO forces used to bomb military objectives from high altitudes, often incurring collateral damages, like the destruction of non-military facilities and the killing of non-combatants. Many of the civilian deaths were attributed to the use of human shields by the Serbian forces. Two particular episodes, involving the alleged presence of human shields, were brought to the public opinion by the media: the attack on the Djakovica Convoy on the 14<sup>th</sup> of April 1999 and the attack on Korisa Village on the 13<sup>th</sup> of May 1999.

The 14<sup>th</sup> of April an attack was conducted by NATO aircrafts against a convoy moving on the road between Prizrena and Djakovica, a very important route for the resupply and the reinforcement of Yugoslavian forces. In that period, the nearby area was subject to raids by the Serbian forces against the Kosovo Albanian population, with forcible displacement of persons, ethnic cleansing operations and burnings of villages. The Airborne Command Control and Communications identified the convoy as a military convoy (claiming that there were “definitely



military vehicles in there”<sup>14</sup>) participating in those operations and decided to attack it.

As a result of the attack, around 70 persons were killed and approximately 100 injured. Most of them were civilians. The Federal Republic of Yugoslavia Ministry of Foreign Affairs Report reported that it was a convoy of Albanian refugees<sup>15</sup>, but NATO has always claimed that several military vehicles were in that convoy. The civilian casualties produced by the attack were attributed by various reports to the Yugoslavian authorities’ practice of accompanying convoys of internally displaced persons with military material and personnel, “a practice which may have been motivated by the desire to protect such equipment during its movements”.<sup>16</sup> In such cases, civilians could have not realised that they were used to shelter military assets.

A similar event took place in Korisa. It once used to be a village populated by more than 4000 inhabitants, mostly Albanians, but then Serbian forces conducted a series of raids in the area and most of the villagers attempted to escape in the nearby woods, if not to Albania. The

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<sup>14</sup> Brigadier General Leaf, as cited in Amnesty International, “*Collateral Damage*” (supra note 9).

<sup>15</sup> As cited in *The Kosovo Report* (supra note 1).

<sup>16</sup> *An analysis of the human rights findings of the Kosovo Verification Mission: October 1998 to June 1999*, Organisation for Security and Cooperation in Europe, available at <http://www.osce.org/kosovo/documents/reports/hr/part1/ch13.htm>.

village was used by Serbians as a military camp and a command post for the operations in the area.

On the night between May 13 and 14 1999, NATO decided to conduct an air attack on the village, which resulted in the death of more than eighty civilians and the wounding of sixty. These casualties were probably to be attributed to the fact that Serbian forces established their headquarters in a block of residential apartments, in a zone not completely cleared of civilians. Some reports affirmed that many civilians were permitted to live there, if not sent back to the village by the police<sup>17</sup> and this could lead to the conclusion that they were used as human shields.

Similar acts are allegedly being committed in Chechnya, by both Russian Army forces and Chechen rebels.<sup>18</sup>

Particularly interesting are the facts that recently happened in Palestine, where a democratic state's forces have reportedly used civilians as human shields: Israeli soldiers have been accused of using Palestinian civilians as shelters and hostages during military operations against al-Aqsa Intifada in 2002.

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<sup>17</sup> "Their tractors were their homes. Then their tombs", *The Observer* (London), 16 May 1999, "Bombed village was army base, says refugee", *The Times*, 17 May 1999, as cited in "Collateral Damage" or Unlawful Killings? (supra note 1).

<sup>18</sup> See Human Rights Watch, *Russia /Chechnya A legacy of abuse*, available at <http://www.hrw.org/reports/1997/russia2/Russia.htm>.

“The method is the same each time: soldiers pick a civilian at random and force him to protect them by doing dangerous tasks that put his life at risk. For example, soldiers have ordered Palestinians to: enter buildings to check if they are booby-trapped, or to remove the occupants; remove suspicious objects from roads used by the army; stand inside houses where soldiers have set up military positions, so that Palestinians will not fire at the soldiers; walk in front of soldiers to shield them from gunfire, while the soldiers hold a gun behind their backs and sometimes fire over their shoulders”.<sup>19</sup>

After these events, a group of Israeli and Palestinian NGOs field a petition to the Supreme Court of Israel trying to obtain an injunction prohibiting such practices. The Court issued a temporary injunction that was judged unsatisfactory by the petitioners, since the Israeli Army has continued using orders likely to be considered illegal.<sup>20</sup>

## Rules

All the above-mentioned “tactics” are grave breaches of international humanitarian law, since they violate general principles and specific rules.

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<sup>19</sup> Stein Yael, *Human shield, Use of Palestinian Civilians as Human Shields in Violation of High Court of Justice Order*, available at [www.btselem.org](http://www.btselem.org).

<sup>20</sup> Like the “prior warning” order. See Adalah Organization, *The Use of Palestinian Civilians* (supra note 11).

In fact, besides the general principles prohibiting inhuman treatment and violations of the right to life, physical integrity and dignity, the international community has elaborated rules specifically prohibiting the taking of hostages and the use of human shields.

The most important provisions on this issue are contained in the Geneva Convention IV and in the Additional Protocol I. The former provides, at article 28, that “the presence of a protected person may not be used to render certain points or areas immune from military operations” and, at article 34, that “the taking of hostages is prohibited”.

The Additional Protocol I also provides specific prohibitions in order to guarantee the general protection against dangers arising from military operations to be enjoyed by the civilian population and individual civilians<sup>21</sup>.

Article 51(7) states that “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

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<sup>21</sup> Additional Protocol I, art. 51(1).

to attempt to shield military objectives from attacks or to shield military operations”.

Therefore, the unlawfulness and illegality of any practice involving the presence of civilians nearby or on military objects as a means of warfare is evident. Any party at any time is authorised to use such tactics, no matter if the human shields are voluntary or involuntary, and whether the object of the attack is a legitimate target or not.

Moreover, parties in conflict are obliged to minimize risks to civilians, separating military objectives from the civilian population, evacuating the civilian population from near immovable military objects and developing air raid precautions<sup>22</sup>. Article 58 of the Additional Protocol I, clearly states that “the Parties to the conflict shall, to the maximum extent feasible: (a) without prejudice to Article 49 of the Fourth Geneva Convention<sup>23</sup>, 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

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<sup>22</sup> See United States: Department of Defence, *Report* (supra note 1).

<sup>23</sup> Regarding forcible transfers and deportations.

under their control against the dangers resulting from military operations”.

In any case, the unlawfulness of the use of human shields does not permit the other parties to ignore the presence of civilians during their attacks. Once again, parties are always bound to respect the principles of distinction and proportionality, even if the counterparts do not respect their own obligations.

Such duty was reiterated in U.N. General Assembly Resolution 2444<sup>24</sup>, which was adopted by unanimous vote and states: “that the right of Parties to a conflict to adopt means of injuring the enemy is not unlimited; that it is prohibited to launch attacks against the civilian population as such; that a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the later be spared as much as possible”.

Moreover, article 51(8) of the Additional Protocol I, provides that “any 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”. Finally, art. 50(3) states that “the presence within the population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”.

#### Distinction and proportionality

Art 57, together with art. 51, is a specification of the principles of distinction and proportionality<sup>25</sup>.

The principle of distinction between civilian objects and military objectives is codified by article 48 of the Protocol I: “in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”. Civilians are all the individuals not taking part in the hostilities and, in case of doubt whether a person is a civilian, that person shall be considered as a civilian<sup>26</sup>.

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<sup>24</sup> Resolution 2444 (XXIII) of the United Nations General Assembly, 19 December 1968.

<sup>25</sup> See Voon Tania, *Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict*, in *16 Am. U. Int’l L. Rev.* 1083.

<sup>26</sup> Art. 50, Additional Protocol I.

Furthermore, art. 51 states that “the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations,” that “the civilian population as such, as well as individual civilians, shall not be the object of attack,” that “acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited” and that “civilians shall enjoy the protection afforded by this Section<sup>27</sup>, unless and for such time as they take a direct part in hostilities”.

Therefore, parties shall avoid to the maximum extent possible the involvement of civilians: once again, “in any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited” and “it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”<sup>28</sup>.

As a concrete application of these rules and principles, art. 51 prohibits indiscriminate attacks: attacks which are not directed at a specific military objective, which employ a method or means of combat which cannot be directed at a specific military objective, and attacks employing a method or means of combat the effects of which cannot be limited as

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<sup>27</sup> Additional Protocol I, Section I – General protection against effects of



required by the Protocol and are consequently of a nature to strike military objectives and civilians or civilian objects without distinction.

In particular, article 51 prohibits any “attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects” and “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”.

In order to avoid indiscriminate attacks, art. 57 requires “those who plan or decide upon an attack” to “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection”, to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”, to “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,

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hostilities.

which would be excessive in relation to the concrete and direct military advantage anticipated”.

The Protocol goes further, requiring that the parties in conflict cancel or suspend any attack if the object is not a military one or if the attack “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”, giving an “effective advance warning” of every attack likely to affect the civilian population and choosing objects the attack on which would cause the less danger to civilians.

Finally, at article 85, the Protocol states that “making the civilian population or individual civilians the object of attack” and “launching an indiscriminate attack” are to be considered grave breaches of the Protocol itself.

In above articles, Protocol I codifies the customary law regarding the principle of proportionality with the intent to minimize the civilian casualties. In both articles 51 and 57 it’s repeated that the consequences of an attack shall not be “excessive in relation to the concrete and direct military advantage anticipated”: there’s a metaphorical balance with

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<sup>28</sup> Art. 35, Additional Protocol I.

civilian deaths, injuries and damages on a size and the military value of the attack on the other<sup>29</sup>.

It's an obvious consequence to the "principle of the military objective"<sup>30</sup>: attacks shall be limited to "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage"<sup>31</sup>, and are not justified if directed to objects or subjects whose presence does not affect the conduct of the hostilities.

But, while it's easy to codify a general principle requiring an abstract proportionality in any war action, the problem is to decide how this principle really applies to concrete situations, where the comparison is often, if not always, between completely different values. In our case, how many human shields' lives is the destruction or the capture of a military objective worth? What shall be considered "excessive"? When is an attack disproportionate?

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<sup>29</sup> See Wright George, *Combating civilian casualties: rules and balancing in the developing law of war*, in 38 *Wake Forest L. Rev.* 129.

<sup>30</sup> See Fenrick William J., *Justice in cataclysm criminal trials in the wake of mass violence: comment: attacking the enemy civilian as a punishable offense*, in 7 *Duke J. Comp. & Int'l L.* 539.

<sup>31</sup> Art. 52(2), Additional Protocol I.

Unfortunately, these questions don't have simple answers: even on a necessary case by case analysis, different persons could give different answers, depending on their values and their points of view. The results of proportionality calculations are completely indeterminate and even the "reasonable military commander"<sup>32</sup> degree of care could be inappropriate: it's even questionable which elements should be put on the balance. Which are the duties of a decision-maker before launching an attack? How shall the importance of an objective be valued? Which choices shall be done to minimize the casualties? Which tactics best fit into the proportionality standards?

Despite all the doubts and indeterminacies, a reasonable list of factors that must be taken in consideration while judging an attack can be made<sup>33</sup>.

First of all, the importance of the target and the urgency of the situation are the fundamental elements in balancing the proportionality of the action. But the importance of a military objective could depend on many factors and the "military advantage anticipated from the attack" is subject to a potentially expansive interpretation. Indeed, even if it has

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<sup>32</sup> See Fenrick William J., *Justice in cataclysm criminal trials*, (supra note 30).

<sup>33</sup> See Rogers A. P. V., *Zero-casualty warfare*, in *International Review of the Red Cross* No. 837, p. 165-181.

been said<sup>34</sup> that “the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded”, some States have explicitly stated, before their signature or ratification of the First Protocol, that “the military advantage anticipated from the attack is intended to refer to the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the attack”. The evaluation of the importance of a target should be undoubtedly based on detailed information from the intelligence services. Those responsible of an attack should have great care on verifying a target and control what’s it used for and when: “the overview should include topography, an indication of the forces and equipment available to each side, their objectives and constraints, the size of the area attacked, the number of civilians and the number and nature of civilian objects in the area”<sup>35</sup>. Great care should be also taken in evaluating the accuracy of the information obtained, any doubt should be eliminated and, if it’s not possible, the attack should not be carried out: there is a “a continuing

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<sup>34</sup> See International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 2209, available at <http://www.icrc.org>.

<sup>35</sup> Fenrick William J., *Justice in cataclysm criminal trials*, (supra note 30).

obligation to assign a high priority to the collection, collation, evaluation and dissemination of timely target intelligence”<sup>36</sup>.

On the basis of the information obtained, commanders should decide which weapons to use, taking into account their range, their accuracy and their effects, both for military and humanitarian reasons. Weapons used should be proportionate to the target attacked, they should be the most accurate and the less destructive possible. The best choice would be to use the so-called “precision engagement”<sup>37</sup>, taking advantage of the recent technological developments, like smart weapons and non-lethal weaponry.

This doesn’t mean that forces in conflict are obliged to use their most discriminating weaponry in every situation: many events during the recent conflicts (from Operation Desert Storm, the first conflict where precision-guided missiles were used, to current conflicts) have demonstrated that it’s not always the best way to minimize the collateral damages<sup>38</sup>. In any case, the duty of the decision-makers is to make a comparison between different tactics and weapons, in order to choose the

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<sup>36</sup> Solf Waldemar A., *New Rules for Victims of Armed Conflicts* (Boston: Martinus Nijhoff Publishers, 1982), as cited in Human Rights Watch, *Needless deaths in the gulf war*, available at <http://www.hrw.org/reports/1991/gulfwar/>.

<sup>37</sup> See Schmitt Michael N., *The Principle of Discrimination* (supra note 3).

less destructive means compatible with the achievement of military success.

In their choices, commanders should also bear in mind the conditions affecting the accuracy of targeting, like terrain, weather conditions, day or night time, and the factors affecting incidental loss or damage, such as the presence of civilians on site and the nature of the objective. As an example, if the aim of an attack is to destroy a building, the best choice should be to bomb that building during the night, when it's supposed to be less frequented by people working in it.

The “reasonable military commander” will also take care of the risk to his own troops, while choosing between the different options. In this case, there is a conflict of duties, between the duty to spare civilians and reduce incidental civilian casualties and the duty to reduce to the minimum the deaths of his own soldiers, “nevertheless, there may be occasions when a commander will have to accept a higher level of risk to his own forces in order to avoid or reduce collateral damage to the enemy's civil population.”<sup>39</sup>

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<sup>38</sup> See Infeld Danielle L., *Precision-guided munitions demonstrated their pinpoint accuracy in desert storm; but is a country obligated to use precision technology to minimize collateral civilian injury and damage?*, in 26 *GW J. Int'l L. & Econ.* 109.

<sup>39</sup> *British Defence Doctrine* (JWP 0-01) issued by the British Minister of Defence in 1996, as cited by Rogers A. P. V., *Zero-casualty warfare* (supra note 33).

### Reactions to the presence of human shields

As stated before, all the above rules of law shall be applied in cases of presence of human shields, since they must be considered as civilians.

Human shields, in fact, now fall within the definition of “civilian” given by the article 50 of the I Additional Protocol, since they do not fall within any of the categories of persons referred to in article 4 A (1), (2) and (3) of the Third Geneva Convention and in article 43 of the Protocol I.

They cannot fall within the definition of combatants, since they do not seem to “take part” to the hostilities in any recognized way, either legally or illegally: in both the Hague and Geneva conventions, combatants, lawful and unlawful, are armed or in possession of weapons. Hence, human shields cannot be considered as combatants, even if they are volunteers, acting in a “hostile way” against one of the parties in conflict<sup>40</sup>.

The practice of volunteering as human shields has begun recently, during the latest international conflicts, and will probably continue to increase in the future. The practice usually involves several peace activists traveling to conflict areas with the aim to shield facilities (mostly

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<sup>40</sup> See Parrish Richard, *Abstract of Voluntary Human Shields*, available at <http://polisci.wisc.edu/~rdparrish/Research.html> .



civilian) of states under attack by western coalition forces. However, the status of these activists under international law has not been codified yet and little has been written about it.

Even if one author distinguishes between “guilty civilians and innocent civilians”<sup>41</sup>, trying to judge their behaviour in a moral way and deriving legal consequences from this moral judgement, the international law at the moment does not make any difference between civilians. Therefore, parties in conflict shall take into the same account both voluntary and involuntary human shields, as well as any other civilian. The same author, indeed, affirms that only when it’s not possible to avoid the consequences of human shields’ activities and when “*the civilians pose a risk*, will the obligation of a democratic state to avoid harm to these civilians be cancelled and these civilians will lose their rights”.<sup>42</sup>

A review of several cases where countries that are concerned about respect of international humanitarian law have reacted to the presence of human shields on the battlefield will provide insight as to how the above rules have been concretely applied in recent conflicts.

Being involved in most of the recent international conflicts, the armed forces of the United States have faced situations in which human shields

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<sup>41</sup> See Gross Emanuel, *Use of civilians as human shields* (supra note 2).

were opposed to military actions several times. Even if the United States is not party to the First Additional Protocol, and even if it has criticized the language used, it has recognized the value of articles 51 and 57 as a codification of pre-existing customary law restraints on methods and means of combat<sup>43</sup>. Moreover, the United States has always stressed its intention to minimize suffering to combatants and non-combatants<sup>44</sup>.

During the first Gulf war, the US army started to use “precision delivery” weapons, both with the intention to avoid errors and to avoid unnecessary damages, and “the operations were conducted with exceptional care to minimize collateral damage to the population and property”<sup>45</sup>. Despite numerous threats, no concrete use of human shield in order to prevent bombings took place, but many military objectives were placed nearby civilian neighbourhoods, forcing the Coalition forces to react trying to take all the appropriate measures.

The Pentagon stated: “the Coalition military campaign will be remembered for its effort, within the bounds of war, to be humane. Coalition air strikes were designed to be as precise as possible. Coalition

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<sup>42</sup> Ibid (emphasis added).

<sup>43</sup> See United States: Department of Defence, *Report to Congress* (supra note 1).

<sup>44</sup> Ibid.: “The US military’s law of war program is one of the more comprehensive in the world”.

<sup>45</sup> Lippman Matthew, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan*, in 33 *Cal. W. Int’l L.J. I.*

pilots took additional risks and planners spared legitimate military targets to minimize civilian casualties”<sup>46</sup>. According to the US Government, all “feasible precautions” were used and the civilian casualties that took place during the conflict were to be attributed to Iraq’s responsibility or to inevitable errors.

The same “policy” to avoid casualties through the daily use of a computerized target development and review system, and the same arguments to justify them, were used during the NATO campaign in the former Federal Republic of Yugoslavia. In any case, during this conflict, attacks against targets shielded by civilians effectively did take place and were discussed publicly and analysed by an *ad hoc* Committee appointed by the ICTY and by the Independent International Commission on Kosovo.

The scale of civilian damage was relatively small, if related to the magnitude of the war and its duration.<sup>47</sup> “The fact that on 78 days, with over 23,000 weapons dropped or fired, there were only 20 incidents of collateral damage ... that's an incident rate of less than 1/10 of 1

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<sup>46</sup> See U.S. Department of Defense, *Conduct of the Persian Gulf Conflict/An Interim Report to Congress*, July 1991, as cited in Human Rights Watch, *Needless deaths* (supra note 36) .

<sup>47</sup> The International Commission itself declared to be “impressed” by it, in *The Kosovo Report* (supra note 1).

percent”.<sup>48</sup> But what is really impressive is the absence of any casualty in the allied forces, probably due to tactic of conducting air bombardments from high altitudes; tactic that probably had some influence on the number of civilian casualties.<sup>49</sup>

During the Djacovica attack, the airplanes were attacking from an altitude of 15,000 feet and, despite the fact that NATO has always said that the high altitudes maintained by its pilots did not affect the accuracy of the targeting, this was probably a reason for misidentifying the convoy.<sup>50</sup> Anyhow, it’s interesting to note that the identification of the target was discussed with the Airborne Command Control and Communications and the combined operations centre in Italy and that the attacks were suspended to permit a verification and then cancelled when the possible presence of civilians was reported.

The legitimacy of the attack on Korisa village, was as well confirmed by the NATO spokespersons on the basis of the intelligence sources. The attack was based on reconnaissance and intelligence orders, confirmed by follow-up intelligence and by the use of a forward air controller. NATO

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<sup>48</sup> General Wesley Clark, commander of the NATO forces in the war, quoted in Lippman Matthew, *Aerial Attacks* (supra note 45).

<sup>49</sup> See Human Rights Watch, *Civilian deaths in the NATO air campaign* (2000), available at <http://www.hrw.org/reports/2000/NATO/index.htm> .

stated that the area was believed to have been completely cleared of civilians.

Without discussing the legality of the NATO bombing campaign, or of these two episodes, is relevant to address the existence of the concrete possibility for a party in conflict to react lawfully to the presence of human shields on the battlefield, by deepening the knowledge of targets, by verifying the available information, by using “smart” weapons and, if necessary, by canceling or terminating the action.

Nevertheless, the applicable law is still too indefinite and the requirements are probably too vague to prevent every indiscriminate attacks and, most of all, to assure the punishment of those responsible.

#### Recent innovations of the rule of law

The recent Statute of the International Criminal Court has specific rules regarding indiscriminate attacks, and limits the liability to acts committed with a specific intent.

The Statute, in fact, defines as serious violations of the laws and customs applicable in international armed conflict the following acts, *inter alia*: “*intentionally* directing attacks against the civilian population as such or

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<sup>50</sup> See Amnesty International, “*Collateral Damage*” (supra note 9), citing

against individual civilians not taking direct part in hostilities”; “*intentionally* directing attacks against civilian objects”; “*intentionally* launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be *clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated”.<sup>51</sup>

These definitions are slightly different from those given by the Additional Protocol I, but such little differences are sufficient to ease the burden of investigation and precaution placed upon belligerents and to encompass only the most certain and conspicuous criminal conduct.<sup>52</sup>

Article 8 of the Rome Statute, in fact, requires the perpetrator of the attack to have the intention of causing damage to civilians and civilian objects and the knowledge that the attack will produce effects that undoubtedly exceed the military advantage.

Therefore, not only the conduct is considered criminal only when it's clearly excessive, but the required “concrete and direct” military advantage can be “overall” to justify the means. And that authorizes a

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Brigadier General Leaf: “...from the high altitude to the naked eye they appeared to be military vehicles”.

<sup>51</sup> Rome Statute of the International Criminal Court, art. 8 (emphasis added).

<sup>52</sup> See Lippman Matthew, *Aerial Attacks* (supra note 45).

broader and less restrictive interpretation: the advantage must be foreseeable by the perpetrator of the attack at the relevant time, but may not be temporally or geographically related to the object of the attack.<sup>53</sup>

While this language conveys a more precise definition of the prohibited conduct, it leaves unpunished all those actions in which is not possible to demonstrate the will to hit the civilian population and where it's impossible to estimate the collateral damage as excessive beyond any doubt.

### **Conclusion**

The status of human shields under international law is still too indefinite. The few rules regarding these subjects are insufficient to form a complete regulation of all the issues deriving from their presence on the battlefield, especially in the case of voluntary human shields.

As seen above, there is now no distinction between “normal” civilians and human shields, nor between involuntary and voluntary human shields. And this causes too much uncertainty about the applicable rule

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<sup>53</sup> See *Elements of crimes, Appendix to the Rome Statute of the International Criminal Court*, reprinted in Schabas William A., *An introduction to the International Criminal Court*, Cambridge University Press, 2001.

of law, leaving human shields' lives unprotected and belligerents' military interests with no guarantee.

The increasing practice of shielding military objectives with civilians urges the international community to fill up this void in the rule of law.

What is needed now is a resolution in international law defining in detail the proper treatment of human shields, during and after attacks, clearly stating their rights and determining belligerents' duties.



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