

UNIVERSITY OF TARTU  
SCHOOL OF LAW  
Department of Public Law

Taiia Avram

**INTERNATIONAL LEGAL REGULATION OF HUMAN SHIELDS: STATUS,  
PROTECTION AND PERSPECTIVES OF LEGAL DEVELOPMENT**

Master's Thesis

Supervisor  
dr.iur. René Värk

Tallinn  
2020

## TABLE OF CONTENTS

INTRODUCTION .....	3
1. INTERNATIONAL LEGAL BASIS OF HUMAN SHIELDS.....	9
1.1. THE CONCEPT OF HUMAN SHIELDS IN INTERNATIONAL LAW .....	9
1.1.1. International humanitarian law approach to human shields .....	10
1.1.2. International criminal law approach to human shields.....	12
1.2. DETERMINATION OF HUMAN SHIELDS .....	14
1.2.1. Definition of human shields .....	14
1.2.2. Direct participation in hostilities .....	17
1.2.3. Discrepancy between perfidy and human shielding.....	20
2. STATUS OF HUMAN SHIELDS UNDER INTERNATIONAL LAW .....	24
2.1. STATUS OF INVOLUNTARY HUMAN SHIELDS.....	25
2.1.1. Participants of involuntary human shields under the Geneva regulations.....	25
2.1.2. Status of involuntary human shields formed by the United Nations Peacekeepers	28
2.2. STATUS OF VOLUNTARY HUMAN SHIELDS .....	31
2.2.1. Combatant status of voluntary human shields.....	32
2.2.2. <i>Levée en masse</i> status of voluntary human shields.....	35
2.2.3. Persons accompanying armed forces and status of voluntary human shields .....	37
2.2.4. Civilian status of voluntary human shields.....	40
3. PROTECTION PRESCRIBED TO HUMAN SHIELDS .....	43
3.1. PROTECTION OF HUMAN SHIELDS DEPENDING ON THEIR NATURE.....	43
3.1.1. Protection of involuntary human shields .....	43
3.1.2. Protection of voluntary human shields .....	46
3.2. OBLIGATIONS OF BELLIGERENTS IN REGARD TO HUMAN SHIELDS PROTECTION.....	49
3.2.1. Obligations of the belligerent using human shields.....	49
3.2.2. Obligations of the belligerent attacking human shields.....	52
3.3. CHALLENGES TO PROTECTION OF HUMAN SHIELDS .....	55
3.3.1. Dilemma of proportionality principle.....	55
3.3.2. Protection of human shields under non-international armed conflict.....	58
CONCLUSION .....	61
BIBLIOGRAPHY .....	66

## INTRODUCTION

To begin with, the use of human shields is strictly prohibited under international law. However, there is no explicit definition of human shields in international law. Essentially, human shielding implies the taking part in hostilities by persons, who are not supposed to be present on the battlefield at all. In its turn, by this participation it means the shielding military objectives with human bodies in order to prevent possible attack. The absence of definition is not the only one peculiarity of human shields laying in the very basics of the concept. It should be mentioned that the concept is not approached by the only one branch of international law, and it is quite complex and confusing concept. As it was already mentioned, there is no definition of human shields and human shielding can easily be mistaken with treachery, for example. Especially when the combatants behave treacherous by pretending civilians.

Another significant peculiarity of the human shields lies in the character of the shields. The key is that human shields can be formed voluntarily or involuntarily. Therefore, there are voluntary human shields and involuntary human shields. It should be understood that voluntary human shielding supposes that the members of human shields are not forced by party to the conflict to take part in hostilities. If voluntary human shields put their life in danger because of their desire, the involuntary human shields do not act on the base of personal will. Members of involuntary human shields are forced by party to the conflict to take part in hostilities. As for the international law approach to the issue of voluntariness, it does not explicitly distinguish voluntary and involuntary human shields, however.

Nevertheless, in/voluntariness does not have inconsiderable impact on the determination whether the human shield takes direct or indirect participation in hostilities. The in/direct participation in hostilities as a feature is another peculiarity of human shields. In general, direct participation in hostilities suggests committing a direct harm to the enemy on the battlefield. It is believed that involuntary human shielding is an example of indirect participation in hostilities because of the reason the members of such shield do not have aspiration to take part in hostilities and to cause damage. In contrast, the voluntary human shields are believed to directly participate in hostilities. As a consequence, there is a dilemma – how the in/voluntariness and in/direct participation in hostilities influence the status and protection of in/voluntary human shields.

The determination of status of human shields is a difficult question in international law. The status is meant to show how the person should be treated according to the law. Dilemma of status of human shields lies in the determination of the status. Since there are peculiarities of willingness, participation in hostilities and type of participation, there is an issue whether the status depends on them. The *Targeted Killing* case,<sup>1</sup> for example, showed that the question of intent of the people, who took part in hostilities in the role of human shields, is central to the determination of their actual role during hostilities. The actual presence of human shields on the battlefield can possibly confuse the belligerent. This confusion is about the absence of understanding who the members of the shield are – combatants, the *levee en masse*, persons accompanying the armed forces, *hors de combat*, or innocent civilians, for example.

As for the protection of human shields, it is another sharp question. Protection is about how the use of human shields is prohibited and how the belligerents should act to prevent the appearance of the human shields or when they face the human shields. The complexity of the protection issue in the context of human shields is that it may be influenced by in/voluntariness, in/direct participation in hostilities and status of persons forming the human shield. In should be understood the protection of voluntary human shields and protection of involuntary human shields are two distinct protections which may somehow overlap and become repetitive. The peculiarity presented as the difference in protection is well proved by the application of the principle of proportionality, for example.

In general, the principle of proportionality is about counting how many civilian deaths may be justified when it is the reaching of military objective. It is believed that proportionality principle should be fully applied to involuntary human shields. As for voluntary human shields, there is no common agreement how the principle should be applied, and this constitutes a problem. On the one hand, it is possible to suppose the principle of proportionality is not to be applicable. The possible reasoning can be that persons, who intentionally take part in hostilities, become legitimate target and, hence, are not protected from the attack. On the other hand, it is possible to suppose the principle of proportionality is to be fully applicable. The reasoning may be the persons, who intentionally form human shield, are manipulated and/or possibly presumed to be considered innocent civilians. The issue of proportionality principle is believed to be crucial for the human shields,<sup>2</sup> but it is not the only one existing in the context of their protection.

---

<sup>1</sup> Supreme Court of Israel HCJ 769/02, *Public Committee v. Government of Israel (Targeted Killings)*, Judgement, 13 December 2006

<sup>2</sup> G. D. Solis. *The Law of Armed Conflict: International Humanitarian Law in War*. Cambridge: Cambridge University Press 2010, p. 320

Even though the issue of human shields is not a new one, it remains sharp. The armed conflicts have not stopped occurring, and the use of human shields tends to happen. The topic of this thesis is relevant because of the reason there are legal gaps in the international legal regulation of human shields in time, when human shields are actively used. This thesis contains possible solutions to the challenges needed to be overcome. Hence, it contributes to the development of the human shields concept. Additionally, thesis clearly differentiates voluntary and involuntary human shields. Accordingly, it enables to see in detail the difference in international legal regulation of them. Also, the thesis tackles with issue of the human shields' status. The provided determination can assist in establishing the status by the authorized body, for example. Along with the above mentioned, the thesis provides the detailed interpretation of the human shield crime under international criminal law. This can possibly simplify and justify bringing criminals to the justice for the use of voluntary human shields.

The object of the thesis is the international legal regulation of human shields. In this work, the basis of human shields, their status and the protections are covered under the framework of international legal regulation. The three mentioned parts of the concept of human shields are the difficult questions under international law. All of them have certain legal gaps needed to be fulfilled. The part on the basis is about the basics of human shields and the challenges to these basics. In its turn, the regulation of status relates to the actual legal status of human shields, its peculiarities and solutions to the existing problems. As for the protection of human shields, it is about the actual extent of protections and solutions to the challenges related to the issue under consideration.

The research problem lies in the presence of challenges to the issue how international law regulates human shields. The main challenges relate to the human shields' status and protection. These challenges largely appear from the basics of the human shields concept, the reality that human shields can practically be voluntary and involuntary, and the fact that their activity can be considered direct or indirect participation in hostilities. Consequently, there is a dilemma of the correct factual determination of the status. In view of the fact that the specific status is supposed to have the specific protections, there also is a dilemma how the person, who does not act according to his/her status, is protected.

The aim of this thesis is to establish the status of human shields, determine what the protection of human shields entails, and to fill the existing gaps. Considering the complexity of the topic, the author of this thesis defined the hypothesis and three research questions. The hypothesis of

this study is that human shields do not suffer changes of status during the participation in hostilities, the regulation of human shields protection is weakly developed, and there is a place for the development of international legal regulation of human shields in the context of existing legal gaps. As for the research questions, the following questions are posted in this work:

1. How does international law regulate the status of human shields?
2. How does international law regulate the protection of human shields?
3. What are the legal gaps in international legal regulation of human shields?

The author of this thesis used several research methods in this thesis work. The systematic research method was largely used in this thesis. For example, a number of journal articles on the correlation between the human shields and the principle of proportionality were critically analyzed, and it resulted in discovering the legal gap in the context of application of the proportionality principle to the voluntary human shields. It became crystal clear that there is a dilemma whether the application should be relaxed, disregarded or fully applicable. As for the analytical research method, it also was largely used. As an example, it enabled to discover that voluntary human shields have the civilian status and their status cannot be considered the combatant status.

The qualitative research method was also used in order to have comprehensive analysis of the sources, which provide with theoretical knowledge. Essentially, it enabled to discover the originality of the human shields concept and its certain dependence on the concept of direct participation in hostilities, for example. In addition, the method of interpretation was used to interpret the provisions of international instruments. The method enabled to establish that provisions of international humanitarian law prohibiting human shielding are equally applicable to both involuntary and voluntary human shields, for instance. Besides the above-mentioned methods, the quantitative method was used in respect to the jurisprudence. As a result, the practical possibility of the application of the provisions on human shields was found out and the peculiarities of the application were established. For example, the method enabled to see that the prohibition to use human shields practically covers not only civilians, but the combatants taken as hostages too.

The thesis work consists of three chapters, which are designed to answer all the research question and achieve the objective. The first chapter focuses on the human shield basis in international law. At first, it examines the approaches of international humanitarian law and

international criminal law to the concept of human shield. It results in finding out the peculiarity that humanitarian law approaches the shields as prohibited method of warfare while the criminal law addresses it as a war crime. Then, the chapter determines a number of peculiarities of human shields. It finds the legal gap existing as an absence of the definition of human shields and it presents a possible solution to the problem. After, the chapter explores the relationship between the direct participation in hostilities. As a result, it establishes the dependence of human shields concept on the concept of the direct participation as well as existence of the genuine link between the voluntary human shields and direct participation, and the correlation between the indirect participation in hostilities and involuntary human shields. At last, the chapter draws a clear line between the treachery, when combatants pretend to be civilians, and the factual human shielding. Accordingly, it shows the originality as a feature of the human shields concept.

As for the second chapter, it has a precise look at the status of human shields and the legal issues connected with. At first, it examines the status of involuntary human shields. As a result, it establishes that involuntary human shields always retain their original status and, hence, suffer no changes in the status. Additionally, it determines the peculiarities of status determination when the involuntary human shield consists of the United Nations Peacekeepers. Then, the chapter addresses the issue of status of voluntary human shields as a legal problem and resolves a dilemma of the status determination. Step by step it discovers that voluntary human shields cannot be considered combatants, the *levee en masse* or the persons accompanying the armed forces. Besides that, it proves the civilian status of voluntary human shields and it argues the status of these shields is considered neither a legal problem nor a subject to changes.

The third chapter deals with the issue of international legal regulation in the context of human shields protection. In essence, it establishes how international law deters parties to conflict from the use of human shields and how human shields are protected from the dangers of attack. At first, the chapter discovers that involuntary human shields are subject to the protection prescribed to the original status of the members of the shield and there is no relaxing in this context. As for the voluntary human shields, the chapter shows they may be a subject to the loss of basic protections. Then, the chapter determines the duties of the parties to the conflict in the context of human shields. Therefore, it shows how the belligerent may act to prevent the appearance and use of human shields, and it also shows how the belligerent should act when it faces the human shielding. At last, the chapter addresses two main legal gaps in the context of

human shields protection. It defines the problem of the proportionality principle and the prohibition to use human shields during non-international armed conflict, and it provides with the possible solutions.

The main bibliography consists of international instruments such as the 1949 Geneva Conventions, the Additional Protocols to the 1949 Geneva Conventions, the 1907 Hague Convention, and the Rome Statute of the International Criminal Court. The jurisprudence also has place in bibliography. The special attention is given to the practice of the International Court of Justice and the International Criminal Tribunal for Former Yugoslavia. As for the soft law, it also is referenced in this thesis and is mainly represented by the resolutions of the United Nations Secretary General, the United Nations Security Council, and the United Nations Human Rights Council. The bibliography is not limited to the above-mentioned sources, however. The author also gives special attention to the books, journal articles and chapters in the books, which are written by authoritative legal experts.

**KEYWORDS:** international humanitarian law, human shields, status, direct participation, protection



## 1. INTERNATIONAL LEGAL BASIS OF HUMAN SHIELDS

The human shields concept may not be considered a brand-new in international law. Its reflection can be found in various sources of international law. There is a recognized international law custom to refrain from the usage of human shields,<sup>3</sup> for example. Provisions on human shields also are in a number of international instruments, and the prominent examples are the 1949 Geneva Conventions and the Rome Statute.<sup>4</sup> Additionally, the cases involving human shields usage were held in international courts, and the *Demiray* case<sup>5</sup> is an example. At first sight it may be assumed the human shields concept is well developed. Nevertheless, this is only the first sight and the issue of human shields is a complex question, which contains several legal gaps needed to be filled. This chapter focuses on the international legal basis of human shields and provides an analysis of two issues. First, it discovers the place of the human shields concept in international law. Second, it conducts analysis in order to define the human shields.

### 1.1. The concept of human shields in international law

The concept of human shields is complex one and it reflected in several branches of international law. There are two branches of international law, which address the issue of human shields, to pay particular attention to. They are international humanitarian law and international criminal law. The key is that in relation to human shields, these branches are tightly connected. For example, international humanitarian law considers the prevention of human shields usage in armed conflicts while international criminal law implies the legal consequences coming from the use of human shields. In other words, one of the mentioned branches is about protections and prohibitions, and another one is about bearing liability and delivering justice, but both of them relate to the same subject, which is human shields.

Because of the above-mentioned reasons the analysis of human shields concept will not be enough accurate and rigorous if it is done only under the framework of only one branch of international law. Understanding the complexity of the concept under the question, the author

---

<sup>3</sup> J.-M. Henckaerts, L. Doswald-Beck (eds). Customary International Humanitarian Law. Vol. I, Rules. Cambridge: Cambridge University Press 2005, p. 337

<sup>4</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva 12.08.1949, e.i.f. 21.10.1950, Art. 19 (hereinafter: Geneva Convention I); Convention (III) Relative to the Treatment of Prisoners of War, Geneva 12.08.1949, e.i.f. 21.10.1950, Art. 23.2 (hereinafter: Geneva Convention III); Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva 12.08.1949, e.i.f. 21.10.1950, Art. 28 (hereinafter: Geneva Convention IV); Rome Statute of the International Criminal Court, Rome 17.07.1998, e.i.f. 01.07.2002, Art. 8(2)(b)(xxiii) (hereinafter: Rome Statute)

<sup>5</sup> ECtHR 27308/95, *Demiray v Turkey*, 21.11.2000

of the thesis analyses the concept of human shields under two mentioned branches of international law and delivers it in this sub-chapter. First, the research on the approach to human shields, which is had by international humanitarian law, is delivered. Second, the sub-chapter provides an analysis on the human shields concept under international criminal law.

### **1.1.1. International humanitarian law approach to human shields**

International humanitarian law is quite rich on the provisions prohibiting the use of human shields. These provisions can be found in of the 1949 Geneva Conventions. For example, the Geneva Convention I precludes from the use of medical personnel as human shields.<sup>6</sup> In its turn, the Geneva Convention III prohibits the use of human shields formed by the prisoners of war.<sup>7</sup> As for the Geneva Convention IV, it says “the presence of a protected person may not be used to render certain points or areas immune from military operations”.<sup>8</sup> Along with the Geneva Conventions, the Additional Protocols to the 1949 Geneva Conventions also include a few provisions on human shields.

There are two provisions on human shields in the Protocol I. At first, the Protocol prohibits the use of human shields formed by the medical personnel.<sup>9</sup> At second, it prohibits the using civilians as human shields.<sup>10</sup> As for the Additional Protocol II, it does not contain an explicit prohibition to use human shields. However, the International Committee of the Red Cross explains the Protocol II contains the article, which may be considered in the context of human shields.<sup>11</sup> The article says “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”.<sup>12</sup> Besides, Stéphanie Bouchié de Belle believes there are two more articles in the Protocol II, which can be used to in respect to the rule prohibiting the use of human shields. According to her, it is the Article 5(2)(c) on evacuation from the areas of combat, and it is the Article 4(2)(c) on the hostage-taking.<sup>13</sup> However, there also is a detail which should be noted along with the above-mentioned.

---

<sup>6</sup> Geneva Convention I, Art. 19

<sup>7</sup> Geneva Convention III, Art. 23

<sup>8</sup> Geneva Convention IV, Art. 28

<sup>9</sup> Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), Geneva 08.06.1977, e.i.f. 07.12.1978, Art. 12.4 (hereinafter: Additional Protocol I)

<sup>10</sup> *Ibid.*, Art. 51.7

<sup>11</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 338

<sup>12</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II), Geneva 28.06.1977, e.i.f. 07.12.1978, Art. 13.1 (hereinafter: Additional Protocol II)

<sup>13</sup> S. B. De Belle. Chained to Cannons or Wearing Targets on Their T-Shirts: Human Shields in International Humanitarian Law. – International Review of the Red Cross 2008/90 (872), p. 887

According to the International Committee of the Red Cross, the prohibition to use human shield is the norm of customary law and is applicable in both types of armed conflict – international and non-international.<sup>14</sup> Also, Stéphanie Bouchié de Belle emphasizes that in the context of non-international armed conflict, it is more appropriate to refer specifically to the customary character of the rule prohibiting the use of human shields.<sup>15</sup> Accordingly, it becomes crystal clear that the prohibition to use of human shields is covered by both international customary law and international instruments, and is applicable in both types of armed conflicts – international and non-international. Altogether, specifically all the above-mentioned constitute the international legal framework of human shields in the context of international humanitarian law.

There also are a number of details, which deserve particular emphasis. To begin with, the legal framework on the human shields addresses the use of them as a prohibited method of warfare, but the framework does not distinguish between the voluntary and involuntary human shields. Therefore, it does not mean to have legal provisions relating only to the one type of human shields. It should be understood the human shields almost always are civilians, who have an explicit protection from the direct attack.<sup>16</sup> Hence, the provisions mean to prohibit the use of both types of human shields – voluntary and involuntary. However, Tobias Vestner notes the prohibition to use human shields has relation only to persons, but it is not applicable to the civilian objects.<sup>17</sup> Hence, attack on the military object, which tried to imitate civilian object, will not constitute the violation of humanitarian law.<sup>18</sup> Thus, the prohibition to use human shields refers to the persons but not to the objects.

Additionally, Marco Sassoli explains the violation of prohibition to use human shields is different from the violation of the rule on taking precautionary measures,<sup>19</sup> which targets the general protections prescribed to civilians. According to him, the intent is a key factor, which distinguish these two concepts from each other.<sup>20</sup> Accordingly, when the belligerent has intent to benefit from the civilian presence, it is violation of the rule prohibiting the use human shields;

---

<sup>14</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 337

<sup>15</sup> De Belle. Chained to Cannons or Wearing Targets on Their T-Shirts, *supra* note 13, p. 887

<sup>16</sup> Additional Protocol I, Art. 51.2

<sup>17</sup> T. Vestner. Addressing the Use of Human Shields. – GCSP Strategic Security Analysis 2019/8, p. 6

<sup>18</sup> *Ibid.*, p. 6

<sup>19</sup> M. Sassoli. International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare. Cheltenham: Edward Elgar Publishing Limited 2019, p. 369

<sup>20</sup> *Ibid.*, p. 369

but when the belligerent ignores the presence of civilians, it shows the belligerent does not take the precautionary measures.<sup>21</sup> Hence, it is already possible to see the features of originality of the concept of human shields.

Nevertheless, it will be wrong to conclude the concept of human shields is overdeveloped, and there are no gaps, questions and uncertainties. The most of doubts relate to the status of human shields and, thus, to protection prescribed to them. The possibility of human shields to have voluntary and involuntary character makes ask questions how to classify the participants of human shields and how to effectively protect them. Also, even though the concept of human shields has features of independency, it should not be left apart that this concept still overlaps with some other concepts under international humanitarian law. As an example, it has tight relations with the concept of direct participation in hostilities and with the concept of the principles of international humanitarian law. This list is not exhaustive, however.

### **1.1.2. International criminal law approach to human shields**

In the context of international criminal law, it is appropriate to start with the issue how the International Criminal Court addresses the question of human shields. The Rome Statute says “utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations” and it classifies the human shielding as a war crime.<sup>22</sup> The crime of the use of human shields has four determining features, and these features are elements of crime. They are the using the presence of people protected under international humanitarian law for the military benefit, the intent to shield specific military objective, the resorting to the use of human shields during the international armed conflict, and the knowing of perpetrator about the existence of such conflict.<sup>23</sup> In general, the Rome Statute and the elements of crime represent the basic legal framework of the crime of use of human shields under the international criminal law.

There is a number of peculiarities, however. To begin with, the use of human shields is not considered a grave breach.<sup>24</sup> Additionally, Stéphanie Bouchié de Belle emphasizes the human shielding is not a matter of fact for international criminal law if the crime was committed in

---

<sup>21</sup> *Ibid.*, p. 369

<sup>22</sup> Rome Statute, Art. 8.2(b)(xxiii)

<sup>23</sup> International Criminal Court. Elements of Crimes. The Hague: ICC 2011, p. 30

<sup>24</sup> G. Werle, F. Jessberger. Principles of International Criminal Law. 3d ed. Oxford: Oxford University Press 2014, para. 1373

time of non-international armed conflict.<sup>25</sup> The reason for this is quite obvious. As it was already stated, the war crime of using human shields requires to be committed during international armed conflict. Hence, the resorting to the use of human shields will not be prosecuted at the International Criminal Court if it happens during the inner conflict, for example. However, it does not preclude from the prosecution in national courts.

Additionally, Gerhard Werle and Florian Jessberger explain the use of human shields suggests two situations,<sup>26</sup> which differ from each other at the first sight, but they have the same intent if to give careful consideration to. The situations are the placing specific military object in the area with high civilian population in order to shield, and the engaging civilian to shield the military object situated on the battlefield.<sup>27</sup> As for the relation to the elements of crime, the element of benefiting from civilian presence is not described in details. Hence, it is possible to conclude that both mentioned situations meet the requirement of benefitting and, hence, are covered by the crime.

Some light should be shed on the details of fact, that the Rome Statute addresses the war crime of the use of human shields as the use of persons.<sup>28</sup> Hence, it may be presumed the crime excludes the use of voluntary human shields. Guo Yang explains that in the context of war crime the voluntary human shields do not meet this requirement of being used since they are willfully shielding.<sup>29</sup> Hence, the belligerent, which resorted to the use of voluntary human shields, should not be the responsible at the court.<sup>30</sup> This is arguable, however. According to Gerhard Werle and Florian Jessberger, when the belligerent employs human shields to shield the military objective, this is a situation of war crime.<sup>31</sup> In this case, employment suggests the voluntary character but remains to be a crime. In addition, the Rome Statute and the elements of crime do not explicitly require that persons were forced to form the human shields. Thus, it may be concluded that war crime of the use of human shields covers the use of both voluntary and involuntary shields.

---

<sup>25</sup> De Belle. Chained to Cannons or Wearing Targets on Their T-Shirts, *supra* note 13, p. 887

<sup>26</sup> Werle, Jessberger. Principles of International Criminal Law, *supra* note 24, para. 1376

<sup>27</sup> *Ibid.*, para. 1376

<sup>28</sup> Rome Statute, Art. 8.2(b)(xxiii)

<sup>29</sup> G. Yang. The Grave Breaches Regime of the 1949 Geneva Conventions: Origins, Developments and Prospects. – M. Bergsmo, C. Wui Ling, S. Tianying, Y. Ping (eds). Historical Origins of International Criminal Law. Vol. 3. Brussels: Torkel Opsahl Academic EPublisher 2015, p. 382

<sup>30</sup> *Ibid.*, p. 382

<sup>31</sup> Werle, Jessberger. Principles of International Criminal Law, *supra* note 24, para. 1376

As for judicial bodies, it should be understood the International Criminal Court is not the only one, which deals with the such war crime as human shielding. For example, the International Criminal Tribunal for the Former Yugoslavia also prosecuted the crime under the question. The Tribunal showed that the war crime of human shielding has connections with other crimes. For example, in the *Kvočka* case, the use of human shields was compared to and classified as cruel treatment.<sup>32</sup> The court practice is not limited to the mentioned case, however. For example, in the *Blaskić* case the human shielding was also considered cruel treatment, and it was reasoned by the statement that members of human shield suffered mental harm and their human dignity was attacked.<sup>33</sup> The peculiarity of this case is the following. It established the prohibition to use human shields even if the possibility of attack directed against them is excluded.<sup>34</sup> Altogether, it is possible to see that the war of use of human shields does not relate to the very limited situations, but it covers a broad area.

## **1.2. Determination of human shields**

Knowing the place of human shields concept in international law and still talking about the international legal basis of human shields, it also is quite important to be able to understand who and what human shields are. This is because of the reason the proper understanding enables to correctly determine them and prevent the appearance of confusions. This sub-chapter discovers the definition of human shields at first. Then, it analyses the correlation between the human shields and direct participation in hostilities, and, thus, it discovers whether the usage of human shields necessarily means that participants of shields conduct the direct participation in hostilities. At last, it establishes the distinction between the perfidy and human shielding.

### **1.2.1. Definition of human shields**

The peculiarity of the human shields concept is that it does not have explicit definition under international law, and in every other branch of international law, where the human shields concept reflected, too. To all intents and purposes, human shields are addressed as somewhat of prohibited method or process. The presence of the definition, which determines who human shields are could possibly contribute to the simplification of determination of human shields status, which is problematic. The further research should be conducted in order to establish the proposal of possible definition and, thus, to facilitate the development of the concept.

---

<sup>32</sup> ICTY IT-98-30/1-T, *Prosecutor v. Miroslav Kvočka et al.*, Judgement, 2 November 2001, para. 161

<sup>33</sup> ICTY IT-95-14-A, *Prosecutor v. Tihomir Blaskić*, Judgement, 29 July 2004, para. 653, 669

<sup>34</sup> *Ibid.*, para. 654

The first approach to the process of definition determination is simple one and is based on the dictionary application. It should be noted the reference to the dictionaries is justified on the base, that it is a common practice of international courts to refer to the dictionaries in order to find out the meaning of undefined term. For example, three dictionaries were used by the International Court of Justice in the *Oil Platforms* case,<sup>35</sup> and the reference to the dictionary was also made by the court in the *Avena* case.<sup>36</sup> In addition to the practice of the International Court of Justice, the World Trade Organization frequently invoke the dictionaries<sup>37</sup> too. Additionally, states accept the approach of clarification of term by referring to the dictionaries. The Netherlands used dictionary in its request for advisory opinion in respect to the meaning of the term ‘people’,<sup>38</sup> for instance.

Due to the fact that such authoritative sources as the Dictionary of the International Law of Armed Conflict<sup>39</sup> and the Black’s Law Dictionary<sup>40</sup> do not give meaning of the term ‘human shield’, there is a need to refer to other dictionaries. The Oxford dictionary interprets the human shields as “person or group of people”<sup>41</sup> while the Dictionary of Military Terms addresses the human shields as a “group of hostages”.<sup>42</sup> In essence, the definition of human shields is represented in a quite broad way by the dictionaries, and this circumstance does not really enable to approach the precise definition. Alternatively, it is significant to analyze legal instruments and judicial practice in order to determine who are human shields.

First, the Rome Statute addresses the members of human shields as “civilian or other protected persons”.<sup>43</sup> Additionally, the 1949 Geneva Conventions prohibit the use of human shields formed by medical personnel, prisoners of war, and “protected persons”.<sup>44</sup> As for the Additional

---

<sup>35</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 803, para. 45

<sup>36</sup> *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgement, I.C.J. Reports 2004, p. 12, para. 84

<sup>37</sup> WTO WT/DS257/AB/R, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, Report of the Appellate Body, 17.02.2004, para. 58; WTO WT/DS217/ARB/BRA, *United States – Continued Dumping and Subsidy Offset Act of 2000*, Decision by the Arbitrator, 31.08.2004, para. 248; WTO WT/DS285/AB/R, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, 20.04.2005, para. 164

<sup>38</sup> *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for an Advisory Opinion)*, Written Comments of the Kingdom of the Netherlands, International Court of Justice, 17.07.2009, para. 3.6

<sup>39</sup> P. Verri. Dictionary of the International Law of Armed Conflict. Geneva: International Committee of the Red Cross 1992

<sup>40</sup> B. A. Garner. Black’s Law Dictionary. 11th Edition. St. Paul, MN: Thomson Reuters 2019

<sup>41</sup> A. Stevenson. Oxford Dictionary of English. 3d Edition. Oxford: Oxford University Press 2010, p. 854

<sup>42</sup> R. Bowyer. Dictionary of Military Terms. 3d Edition. London: A&C Black 2007, p. 121

<sup>43</sup> Rome Statute, 8(2)(b)(xxiii)

<sup>44</sup> Geneva Convention I, Art. 19; Geneva Convention III, Art. 23.1; Geneva Convention IV, Art. 28

Protocols to the 1949 Geneva Conventions, the members of human shields are addressed as medical personnel and civilians.<sup>45</sup> In total, all these kinds of members are not combatants and are protected persons under the 1949 Geneva regulations.

As for the judicial practice of international courts, civilians were defined as members of human shields in the *Karadzic and Mladic* case by the International Criminal Tribunal for the Former Yugoslavia.<sup>46</sup> The usage of civilians and child soldiers as human shields was emphasized multiple times in the *AFRC Accused* case by the Special Court for Sierra Leone case,<sup>47</sup> for example. The Inter-American Court of Human Rights emphasized the usage of civilians as human shields in the *Santo Domingo Massacre* case<sup>48</sup> in 2012. Additionally, the use of the detained civilians as human shields was highlighted in the number of cases held by the Court of Bosnia and Herzegovina.<sup>49</sup> It should be noted this list of cases is not exhausted, but nevertheless, it sheds some light in the tendency in human shield membership.

Alternatively, it should be mentioned that international organizations also do not stand on the sidelines, but they have certain activity on the issue of human shields. The United Nations Organization is on the leading positions and, for example, in 1996, there was a report, which was prepared by the Secretary-General, that civilians were used as human shields in Liberia,<sup>50</sup> as well as there was report on Sierra Leone, where it was noted that civilians were forced to form human shields.<sup>51</sup> Additionally, the United Nations High Commissioner for Human Rights mentioned that use of civilians as human shields by the Palestinian forces.<sup>52</sup> Nevertheless, the

---

<sup>45</sup> Additional Protocol I, Art. 12.4, 51.7

<sup>46</sup> ICTY IT-95-5-I, *The Prosecutor of the Tribunal against Radovan Karadzic, Ratko Mladic*, Initial Indictment, 24.07.1995, para. 48

<sup>47</sup> SCSL SCSL-04-16-T, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused)*, Judgement, 20 June 2007, para. 236, 1275, 1384, 1447, 1452

<sup>48</sup> *Case of the Santo Domingo Massacre v. Colombia*, Judgement, IACtHR, 30.11.2012, para. 5

<sup>49</sup> WCS BiH 1st Inst. X-KR-03-16, *Prosecutor v. Dragole Paunovic*, Verdict, 26 May 2006, para. 2; WCS BiH 1st Inst. X-KR-05-51, *Prosecutor v. Dragan Damjanovic*, Verdict, 15 December 2006, para. 6; WCS BiH 1st Inst. X-KR-07/442, *Prosecutor v. Kujundzic Predrag*, Verdict, 30 October 2009, para. 3, 408, 430, 437, 450

<sup>50</sup> UN Secretary General (UNSG), Fifteenth Progress Report of the Secretary-General on the United Nations Observer Mission in Liberia, 23 January 1996, S/1996/47, para. 24

<sup>51</sup> UN Security Council (UNSC), First Progress Report of the Secretary-General on the Situation in Sierra Leone, 12 August 1998, S/1998/750, para. 33, 36

<sup>52</sup> UN Human Rights Council (UNHRC), Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1, Addendum : The human rights situation in the Occupied Palestinian Territory between 12 June and 26 August 2014, including the escalation in hostilities between the State of Israel and Palestinian armed groups in Gaza, 26 December 2014, A/HRC/28/80/Add.1, para. 31



United Nations is not the only one organization, which reacts on the human shields use. It was also done by such international non-governmental organizations as the Amnesty International<sup>53</sup> and the Human Rights Watch,<sup>54</sup> for example. This list is not exhaustive, however.

Considering all the above-mentioned, it becomes crystal clear that there is a need to make an emphasis on the civilians as human shields but without omission of other protected group of persons. Thus, human shields are person or group of persons, who are civilians or another protected person, who voluntary or involuntary are utilized by belligerents in a certain area in order to achieve certain military objectives e.g. deter attack. It is understandable that proposed definition may be disputable. Nevertheless, the definition is acceptable and is an alternative to the absence.

### **1.2.2. Direct participation in hostilities**

To begin with, the nature of human shields, if they are voluntary or involuntary formed, suggests that members of any kind of shield are differently involved in the course of hostilities. Consequently, it may be assumed that kind of participation in hostilities (direct or indirect) depends on the nature of human shields. Accordingly, while the indirect participation is supposed to result in achieving military objectives but is not supposed to result in direct harming the enemy, the direct participation is about hostile conduct which belongs to the hostilities conduct between parties to the conflict.<sup>55</sup> As for the human shields, direct participation in hostilities is usually used in the context of voluntary human shields while indirect participation is regularly used in the context of involuntary human shields.

It should be noted, by itself the international humanitarian law does not contain prohibition, which supposes that person should deter from the direct participation in hostilities.<sup>56</sup> However, under international humanitarian law direct participation in hostilities exists along with active

---

<sup>53</sup> Amnesty International, Israel - Lebanon: Out of All Proportion - Civilians Bear the Brunt of the War, 21 November 2006, AI Index: MDE 02/033/2006. Available at

<https://www.amnesty.org/download/Documents/76000/mde020332006en.pdf> (27.01.2020), p. 60-69

<sup>54</sup> Human Rights Watch. Dead Men Walking: Convict Porters on the Front Lines in Eastern Burma. New York: Human Rights Watch 2011, p. 35-39

<sup>55</sup> N. Melzer. International Humanitarian Law: A Comprehensive Introduction. Geneva: International Committee of the Red Cross 2016, p. 87

<sup>56</sup> A. McDonald. Ghosts in the Machine: Some Legal Issues Concerning US Military Contractors in Iraq: Essays in Honor of Yoram Dinstein. – M. Schmitt, J. Pejic (eds). International Law and Armed Conflict: Exploring the Faultlines. Leiden: Martinus Nijhoff Publishers 2007, p. 400

participation in hostilities. For example, the 1949 Geneva Conventions use the word “active”<sup>57</sup> while the Additional Protocols use the term “direct”.<sup>58</sup> This may possibly lead to confusions. Due to that fact, there is a need to clarify whether there is any difference between direct and active participation in hostilities.

At first sight it may be supposed that mentioned terms are different. Nevertheless, the legal adviser at the International Committee of the Red Cross Nils Melzer explains that difference only is in wording of English version of the instruments but there is no difference in the context, and, for example, authentic French version of the instruments includes only one wording, which is “*participent directement*”, and, thus, there is no difference between direct and active participation in hostilities.<sup>59</sup> Also, prominent scholar in the field of international humanitarian law Avril McDonald analyzed the civilian contractors as armed forces members and she highlighted that even marginal difference cannot be applied.<sup>60</sup> Additionally, in the *Akayesu* case the International Criminal Tribunal for Rwanda defined that direct participation and active participation in hostilities are synonymic terms.<sup>61</sup> Hence, the terms have no difference and are the same.

Peculiarity of the voluntary human shields is that their conduct in hostilities may be considered either direct participation or indirect participation, and this depends on circumstances.<sup>62</sup> As for the circumstances, in the *Targeted Killing* case the court defined that in case the voluntary human shields acted with intent to support the activity of terrorist organization, then it is the case of direct participation in hostilities.<sup>63</sup> The court also stated that if persons are forced to form a human shield, then it is indirect participation in hostilities.<sup>64</sup> Nevertheless, the circumstance, which defines if the shields were formed voluntarily or not, is not the only one which contributes to the determination whether it is direct or indirect participation in hostilities.

---

<sup>57</sup> Geneva Convention I, Art. 3; Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva 12.08.1949, e.i.f. 21.10.1950, Art. 3 (hereinafter: Geneva Convention II); Geneva Convention III, Art. 3; Geneva Convention IV, Art. 3

<sup>58</sup> Additional Protocol I, Art. 43.2, 51.3, 67.1.E; Additional Protocol II, Art. 13.3

<sup>59</sup> N. Melzer. Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009. – International Review of the Red Cross 2008/90 (872), p. 1013-1014

<sup>60</sup> McDonald. Ghosts in the Machine, *supra* note 56, p. 400

<sup>61</sup> ICTR ICTR-96-4-T, *Prosecutor v. Jean-Paul Akayesu*, Judgement, 2 September 1998, para. 629

<sup>62</sup> J. Romer. Killing in a Gray Area between Humanitarian Law and Human Rights: How Can the National Police of Colombia Overcome the Uncertainty of Which Branch of International Law to Apply? Uelzen: Springer 2010, p. 56

<sup>63</sup> S. Bosch. Targeting Decisions involving Voluntary Human Shields in International Armed Conflicts in Light of the Notion of Direct Participation in Hostilities. – The Comparative and International Law Journal of Southern Africa 2013/46 (3), p. 458

<sup>64</sup> L. Rewi. Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States. – Melbourne Journal of International Law 2008/9 (2), p. 320

According to Michel L. Gross, the determination whether voluntary human shields take direct or indirect participation in hostilities depends on the circumstance if their conduct represents facilitation or forestalling of attack.<sup>65</sup> Also, the scholar provides the following examples with aid, which can be possibly provided by the human shields voluntarily formed. First, when the voluntary human shields provide the war-sustaining aid in the form of supplying depot, or protecting militias who are retreating, the shielding headquarters which belong to the military command of party to the conflict, and then the conduct should be considered indirect participation in hostilities.<sup>66</sup> In contrast, when the voluntary human shields conduct the aid which is the war-fighting and actually is protection of the militias attacking or shielding missile launcher which is primed, for example, then the conduct of human shields should be considered direct participation in hostilities.<sup>67</sup> These examples are practical and make it crystal clear how exactly the division of conduct of voluntary human shields on direct and indirect participation in hostilities can actually be done.

Nevertheless, it should be noted the development of the concept of the direct participation in hostilities began only in 2009. Before that year there was no real clarification what direct participation in hostilities is. As of today, it is possible to see flexibility in division into direct and indirect participation in hostilities in the context of voluntary human shields, but then it was a difficult question. For example, analyzing the conduct of voluntary human shields Stéphanie Bouchié de Belle stated that even if the voluntary human shields may possibly contribute to war capabilities and be a threat to the militias of another party to the conflict, the threat cannot be considered immediate, and thus, the voluntary human shields take only indirect participation in hostilities.<sup>68</sup> However, there also is a contrary view to the indirect participation in hostilities as a feature of voluntary human shields.

According to Michael N. Schmitt, there is no doubt that act of voluntary human shields always constitute direct participation, and this is because the conduct is willful.<sup>69</sup> In essence, it shows somewhat of absolutism in respect to the voluntary human shielding and the type of participation in hostilities they represent – strictly indirect or mandatory direct one. As of today,

---

<sup>65</sup> M. L. Gross. *The Ethics of Insurgency: A Critical Guide to Just Guerrilla Warfare*. Cambridge: Cambridge University Press 2015, p. 133

<sup>66</sup> *Ibid.*, p. 134, Table 6.2.

<sup>67</sup> *Ibid.*, p. 134, Table 6.2.

<sup>68</sup> De Belle. *Chained to Cannons or Wearing Targets on Their T-Shirts*, *supra* note 13, p. 894-895

<sup>69</sup> M. N. Schmitt. *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*. – *Chicago Journal of International Law* 2005/5 (2), p. 541

legal research has moved from the absolutism of in/direct participation, it shows the factual development of law and its ability to adapt to the changing circumstances. Nevertheless, it is the legal field changed its approach only to the participation of voluntary human shields.

As for involuntary human shields and their participation in hostilities, it should be noted that division on direct and indirect participation in hostilities applies only to the voluntary human shields.<sup>70</sup> Analyzing the legal consequences resulting from the use of human shields, Robin Geib and James G. Devaney multiple times highlighted that indirect participation in hostilities is amounted to the conduct of involuntary human shields while direct participation is not.<sup>71</sup> Additionally, Eduard Hovsepyan explains the key is that when human shield is involuntarily formed, then there is a natural link in the form of belligerent nexus between the shield and the party using it, and consequently, the conduct of the human shield under the question does not represent direct participation in hostilities.<sup>72</sup> It it may be concluded and stated once again, that involuntary human shields may not be considered as these directly participating in hostilities. Hence, in the circumstances, when the conduct of the voluntary human shield would be obviously counted as direct participation, the same conduct done by the involuntary human shields would be counted as indirect participation in hostilities.

### **1.2.3. Discrepancy between perfidy and human shielding**

International humanitarian law is rich on provisions, which are created to prohibit certain kinds of activity in order to secure the good faith of conducting hostilities by parties to the armed conflict. The perfidy and human shielding are considered these prohibited activities. However, they also are these two kinds, which may possibly be confused between each other. For example, the possible confusion may happen when the combatants dress civilian clothes and imitate civilians forced to be close to the military objective. It is significant to have a clear line between these two crimes.

---

<sup>70</sup> Gross. The Ethics of Insurgency, *supra* note 65, p. 133

<sup>71</sup> R. Geib, J.G. Devaney. Zealots, Victims and Captives: Maintaining Adequate Protection of Human Shields in Contemporary International Humanitarian Law. – Y. Dinstein (ed). Israel Yearbook on Human Rights. Vol. 47. Boston: Brill Nijhoff 2017, p. 24

<sup>72</sup> E. Hovsepyan. Legality of Attacks Against Human Shields in Armed Conflict. – UCL Journal of Law and Jurisprudence 2017/6 (1), p. 181

To begin with, according to the International Committee of the Red Cross, prohibition of human shielding is norm of customary law.<sup>73</sup> This rule is also set in two of the 1949 Geneva Conventions, the Additional Protocol I, and the Rome Statute of the International Criminal Court.<sup>74</sup> International instruments address the shielding as prohibited method of warfare. As for the perfidy, it is set in the Hague Convention IV, the Additional Protocol I to the 1949 Geneva Conventions, and the Rome Statute.<sup>75</sup> If to consider the provisions, it is possible to discover that international law also addresses the perfidy as prohibited method of warfare. For example, the Additional Protocol I describes the perfidy as acting in the manner, which makes the enemy believe and betrays the confidence of enemy in regard to the believed subject.<sup>76</sup> Being treated as a prohibited method of warfare is the common feature of perfidy and the human shielding, but these two crimes have a number of differences.

The elements of crime, which are clearly defined under the Rome Statute, are to assist in establishing the difference between the perfidy and the human shields. The first element is the intent to betray confidence.<sup>77</sup> According to the International Committee of the Red Cross, it actually is the main and primary feature of the crime of perfidy.<sup>78</sup> As for the human shields in this mentioned context, they do not mean to betray the confidence. In contrast, their conduct suggests the prevention of attack, which is being prepared by the enemy. Accordingly, by dressing civilian clothes the combatants betray the enemy's confidence while the civilians, who are placed close to the military objective in order to shield, do not do that. Altogether, the intents of mentioned war crimes are distinctively different and do not copy each other, and it emphasizes the human shields do not meet the requirement under the consideration.

Another element of perfidy supposes that in the time of pretending, the perpetrator causes deaths of or injuring to the members of forces belonging to the enemy.<sup>79</sup> As for the human shields in the context of this element, it is important to understand that members of human shields do not have an intent to harm. They have intent to shield and prevent. Also, it is even disputable whether the conduct of human shields may cause a real harm or directly damage the enemy. Not all kinds of conduct of human shields are even classified as direct participation in

---

<sup>73</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 337

<sup>74</sup> Geneva Convention III, Art. 23; Geneva Convention IV, Art.28; Additional Protocol I, Art. 51.7; Rome Statute, Art. 8.2(b)(xxiii)

<sup>75</sup> Convention respecting the Law and Customs of War on Land, The Hague 18.10.1907, e.i.f. 26.01.1910, Art. 23(b) (hereinafter: The Hague Convention IV); Additional Protocol I, Art. 37.1; Rome Statute, Art. 8.2(b)(xi)

<sup>76</sup> Additional Protocol I, Art. 37.1

<sup>77</sup> ICC. Elements of Crimes, *supra* note 23, p. 24

<sup>78</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 223

<sup>79</sup> ICC. Elements of Crimes, *supra* note 23, p. 24

hostilities, and scholars do not have mutual agreement on the kind of participation in hostilities, which is had by human shields. Hence, human shields may not be considered to meet the requirement of killing or injuring the enemy. Moreover, the human shields are those, who may suffer from the act of shielding.

According to another element of crime which is one more distinguishing feature of the crime of perfidy, the persons committing the crime should “belong to an adverse party”.<sup>80</sup> In other words, perpetrator should be considered an authorized member of the armed forces of the party to armed conflict. As for the human shields, their status does not enable to state and conclude that human shields are authorized combatants belonging to the armed forces. Moreover, the detailed analysis on the status of human shields clearly showed the human shields have civilian status.<sup>81</sup> Consequently, human shields do not meet the above-mentioned requirement.

The human shielding does not meet requirements of perfidy in the same way as the perfidy does not meet the requirements of human shielding. For example, one of the elements of human shielding crime is benefiting from the presence of civilian population close to the military objective.<sup>82</sup> When combatants take off military uniform and dress civilian clothes, they do not lose combatant status. Moreover, combatant does not lose his status even in time of resting at home, as it was defined by the court in the *Kordic* case.<sup>83</sup> Also, the benefit from presence of civilians supposes that belligerent, who prepares to attack, will see the human shields and decide to postpone the operation. As for the perfidy, it is about making believe, and after to betray and harm. Hence, the combatants imitating civilians do not become civilians, and the intent of perfidy differs from the intent of human shielding. As a result, the benefiting prescribed to the use of human shields does not happen.

One more element of human shielding is the forces, which resort to the crime, have a desire to shield military objectives.<sup>84</sup> As it was already stated multiple times, perfidy is to betray and harm. The shielding does not cause a direct damage to the forces. Also, the shielding does not imitate civilian presence. This is because of the reason the human shields are *ipso facto* civilians

---

<sup>80</sup> *Ibid.*, *supra* note 23, p. 24

<sup>81</sup> See Chapter 2

<sup>82</sup> ICC. Elements of Crimes, *supra* note 23, p. 30

<sup>83</sup> ICTY IT-95-14/2-A, *Prosecutor v. Dario Kordic and Mario Cerkez*, Judgement, 17 December 2004, para. 51

<sup>84</sup> ICC. Elements of Crimes, *supra* note 23, p. 30

and they have an intent to support the specific belligerent or are forced to do that. In total, it may be summarized that perfidy may not be considered to meet the requirement of shielding the objects which have the military importance and character.

In support to all the above-mentioned, it should also be mentioned that the International Committee of the Red Cross made up a list of acts of perfidy. According to this list, the perfidy is simulation of being *hors de combat*, of surrendering, of being protected under the status of the medical personnel and so on, of civilian status, and wearing uniforms which show the belonging to another party to the conflict.<sup>85</sup> If to carefully consider the list provided, it becomes possible to see that human shielding is not officially considered an act of perfidy by the Red Cross.

There is a strong academic support in respect to the issue that human shielding is different to the perfidy. As an example, Vera Rusinova explicitly states that human shielding is not a category of and may not be classified as perfidy.<sup>86</sup> In addition, Stéphanie Bouchié de Belle, who is diplomatic officer with the International Committee of the Red Cross, describes the prohibition to use human shields as the rule of war, and additionally emphasizes that rules of law are antonymic to the acts of perfidy, and thus, considering human shielding as perfidy is not appropriate in legal terms.<sup>87</sup> This is not an anonymous decision to not treat human shielding as act of perfidy, however. In contrast to the above-mentioned experts and according to Frederic de Mulinen, the act of involuntary human shielding is to be considered an act of perfidy.<sup>88</sup> Nevertheless, it is only the rare example of such approach.

---

<sup>85</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 224

<sup>86</sup> V. Rusinova. Human Shields. – F. Lachenmann, R. Wolfrum (eds). The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law. Vol. 2. Oxford: Oxford University Press 2017, p. 455

<sup>87</sup> De Belle. Chained to Cannons or Wearing Targets on Their T-Shirts, *supra* note 13, p. 888

<sup>88</sup> F. De Mulinen. Distinction Between Military and Civilian Objects. – C. Tomuschat (ed). Kosovo and the International Community: A Legal Assessment. The Hague: Martinus Nijhoff Publishers 2002, p. 113

## 2. STATUS OF HUMAN SHIELDS UNDER INTERNATIONAL LAW

To begin with, the Additional Protocol I to the 1949 Geneva Conventions contains the rule, which determines that all persons, who are in power of the adverse party, should have protected status up to the moment the competent judicial body determines the actual status.<sup>89</sup> When it comes to the determination of the status of human shields the doubts arise. The key is that in/voluntary character, the kind of participation in hostilities, and the original status of persons forming the shield are the main causes of questions in respect to the status of human shields. It is quite important to note that international law does not explicitly divide human shields into two categories, which are voluntary and involuntary human shields.

On one hand, it may possibly be unreasonable to have an explicit distinction. According to Marco Sassòli, such division is unnecessary in the context of international humanitarian law.<sup>90</sup> Additionally, Wolff Heintschel von Heinegg explains that in practice, and especially in course of hostilities, it may be impossible to identify whether the human shield is created on voluntary or involuntary basis.<sup>91</sup> This is not the one existing approach to the division, however. On another hand, Marco Sassòli shows flexibility in respect to the division of human shields into voluntary and involuntary. He explicitly defines that distinction is fundamental in the context of the criminal law and the law of enforcement operations.<sup>92</sup> The author of this thesis believes that the key is the following.

There is a question of precautions and legal consequences for the use of and taking part in hostilities as a member of human shields. Consequently, the issue of status of human shields is not this one, which should be left apart. It basically is significant question which requires solution. Hence, taking all the above-mentioned reasons and peculiarities into consideration, this chapter carefully considers the status of human shields. Noting the importance of such fundamental features as involuntariness and voluntariness, the chapter does not determine the status of human shields in general, but it separately discovers the status of voluntary and involuntary human shields. Thus, it finds out the status of involuntary human shields at first. Then, it determines the status of human shields, which are voluntarily created.

---

<sup>89</sup> Additional Protocol I, Art. 43

<sup>90</sup> Sassòli. *International Humanitarian Law*, *supra* note 19, p. 371

<sup>91</sup> W. Heintschel von Heinegg. *Asymmetric Warfare*. – F. Lachenmann, R. Wolfrum (eds). *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law*. Vol. 2. Oxford: Oxford University Press 2017, p. 103

<sup>92</sup> Sassòli. *International Humanitarian Law*, *supra* note 19, p. 371



## **2.1. Status of involuntary human shields**

It may be possible to suppose that there are no uncertainties in the determination of the status of involuntary human shields. Nevertheless, the reality is different. The key is that involuntary human shields may be formed by a variety of persons, and some of them do not cause any questions regarding the status of human shield. However, some of them may be a reason for the dispute. This sub-chapter focuses on the status on involuntary human shields. First, it discovers the status of human shields, which are involuntarily formed by persons who are explicitly protected under the Geneva Regulations. Then, it defines the status of involuntary human shields, which are formed by the United Nations peacekeepers.

### **2.1.1. Participants of involuntary human shields under the Geneva regulations**

In contrast to the status of voluntary human shields and the status of the human shields involuntarily formed by the United Nations Peacekeepers, the determination of status of people, who constitute involuntary human shields, does not constitute big challenges. In essence, the international humanitarian law *ipso facto* treats human shields as those formed by specific persons mentioned in the 1949 Geneva Conventions and the Additional Protocol I. Additionally, Marco Sassòli emphasizes that involuntary human shields always retain their status.<sup>93</sup> The key is that this rule mentioned by Sassòli is applicable to all persons, who form involuntary human shields, and the analysis down shows how it practically works.

To begin with, the 1949 Geneva Conventions and the Additional Protocols I do not address the issue of human shields by explicit application of this term. Nevertheless, they do address the question of human shields. For example, the 1949 Geneva Convention I prohibits the use of human shields in respect to medical personnel and it basically says the states bear responsibility to deter medical units from being situated in the manner which imperil their safety if there is an attack against military objectives.<sup>94</sup> Medical personnel have special status under international humanitarian law, but once they are used as human shields, they do not lose their status. Accordingly, the medical personnel keep having their status and do not become combatants, for example.

---

<sup>93</sup> *Ibid.*, p. 370

<sup>94</sup> Geneva Convention I, Art. 19

In contrast, the 1949 Geneva Convention III does not allow to use human shields formed by the prisoners of war and it actually says that it is prohibited to place the prisoners of war in such places, where their presence will influence the course of hostilities and will result in rendering certain points.<sup>95</sup> It should be noted that prisoner of war is a status of combatants, who are in power of adverse party and cannot take part in hostilities at time of physical custody, and, consequently, are entitled to *hors de combat* status.<sup>96</sup> When persons, which placed *hors de combat*, form non-voluntary human shields, their *hors de combat* status does not suffer changes and these persons keep being *hors de combat*. Hence, when the *hors de combat* start taking part in hostilities as human shields, the *hors de combat* do not become active combatant but they still fully satisfy the criteria of *hors de combat* status,<sup>97</sup> and they still do have status of *hors de combat* in case of being human shields.

The same happens to the status of other persons who are protected from the use as human shields. If the 1949 Geneva Convention IV addresses the issue of human shields and its actual wording is “presence of a protected person may not be used to render certain points or areas immune from military operations”,<sup>98</sup> these protected persons still have their status. Alternatively, the same applies to human shields addressed by the Additional Protocol I. Mentioned protocol says about human shields twice. First, it does so in respect to the medical units.<sup>99</sup> Then, the Protocol prohibits placing civilians in certain areas in order to shield military operations or deter attack.<sup>100</sup> According to Yoram Dinstein, the civilians are considered innocent civilians,<sup>101</sup> and thus, civilians retain their civilian status.

Altogether, every group retains their status in time of being used as involuntary human shields. For example, the civilians who are forced to create non-voluntary human shields do not become combatants because of the following reasons. First, and as it was already mentioned above in the section 1.2.2., when there is involuntary human shield, this shield does not constitute direct participation in hostilities. Also, civilians in human shields do not meet requirements of combatant status. Combatants are defined in the Additional Protocol I to the 1949 Geneva Conventions, which defines that combatants are “members of the armed forces of a Party to a

---

<sup>95</sup> Geneva Convention III, e.i.f. 21.10.1950, Art. 23.1

<sup>96</sup> Romer. Killing in a Gray Area between Humanitarian Law and Human Rights, *supra* note 62, p. 73-74

<sup>97</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 164

<sup>98</sup> Geneva Convention IV, Art. 28

<sup>99</sup> Additional Protocol I, Art. 12.4

<sup>100</sup> *Ibid.*, Art. 51.7

<sup>101</sup> Y. Dinstein. The Principle of Proportionality. – K. Mujezinovic Larsen, C. G. Guldahl Cooper, G. Nystuen (eds). Searching for a ‘Principle of Humanity’ in International Humanitarian Law. Cambridge: Cambridge University Press 2013, p. 81

conflict”.<sup>102</sup> Civilians are non-combatants, and this is despite the fact that non-combatants may be members of armed forces,<sup>103</sup> civilians used as involuntary human shields do not belong to armed forces. Moreover, civilians are required to be distinguished from the armed forces.<sup>104</sup> Altogether civilians retain their civilian status.

Additionally, it is quite important to indicate that human shields issue is also addressed by the International Criminal Court. Its statute prohibits the usage of civilian persons as human shields.<sup>105</sup> Also, the guide on the elements of crimes emphasizes utilizing civilians as human shields.<sup>106</sup> The analysis of elements of human shields crime, which is done by the legal advisor of the International Committee of the Red Cross, Knut Dormann, in cooperation with Louise Doswald-Beck and Robert Kolb, couple of times highlights the explicit prohibition to use civilians and other protected persons i.e. detainees.<sup>107</sup> In essence, it is important to follow the common tendency to emphasize the use of civilians as involuntary human shields. As it was already stated multiple times, civilians are supposed to and by default have civilian status. Once again, civilian status does not disappear once civilians form non-voluntary human shields because involuntary human shields do not take direct participation in hostilities. Thus, human shields, which are involuntary formed by civilians, retains civilian status.

In general, the status of involuntary human shields can be easily determined and is not influenced by such peculiarities as kind of participation in hostilities, for example. The key is that legal framework on involuntary human shields is crystal clear and enables to determine the status of involuntary human shields without explicit and deep analysis. The framework shows that it is to preserve the status of human shields in respect to the status of persons who were forced to form the human shield. The key also lies in the fact that the conduct of involuntary human shields does not constitute the direct participation in hostilities. Since, involuntary human shields and direct participation in hostilities are separated questions, which do not have tight connection, there is no need to argue on status of non-voluntary human shields and the preservation of their original status. The absence of mentioned link should be understood as the main reason which defines that members of involuntary human shields retain the status which they had before the moment when they were forced to form the shield.

---

<sup>102</sup> Additional Protocol I, Art. 43.2

<sup>103</sup> The Hague Convention IV, Annex, Art. 3

<sup>104</sup> Additional Protocol I, Art. 48, 51.2, 52.2

<sup>105</sup> Rome Statute, Art. 8(2)(b)(xxiii)

<sup>106</sup> ICC. Elements of Crimes, *supra* note 23, p. 30

<sup>107</sup> K. Dormann, L. Doswald-Beck, R. Kolb. Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary. Cambridge: Cambridge University Press 2003, p. 344-348

### 2.1.2. Status of involuntary human shields formed by the United Nations Peacekeepers

It may possibly happen that the military component of the United Nations peacekeeping operation plays the role of human shields. The peculiarity of this case is the status of military personnel may vary. The key is what status peacekeepers originally had had before they formed human shield. Legal expert Róisín Burke emphasizes that status of the UN military forces can be found in the Status of Forces Agreements (SOFA) which are status of forces agreements between the host state and the United Nations, and are mission specific.<sup>108</sup> SOFAs are probably the most significant in relation to status determination because of the reason that they are quite detailed.<sup>109</sup> One of such agreements was concluded between the United Nations and Haiti in 2004,<sup>110</sup> for instance.

In addition, it should be highlighted that military personnel, which belong to the United Nations peacekeeping operation, operate under the United Nations control but still belong to their national establishments.<sup>111</sup> In other words, it should be understood, for example, soldier, whose sending state is the Netherlands and who is wearing the United Nations blue helmet, remains to be Dutch soldier in fact. The reality that at the same time, person belongs to the national establishment and wears the United Nations blue helmet influences the status of person under the question. Dieter Fleck defines the status of military personnel, which operates on the territory of host state, as special one.<sup>112</sup> The peculiarity is that it is a dual status, which suggests that person retains his position as organ of and in his parent state, and at the same time, he bears status, which comes from the international organization,<sup>113</sup> which is the United Nations, and provides him immunities, which are not generally guaranteed to the national military personnel. The consequence of the dual status is that that peacekeepers can be considered both civilians and combatants.<sup>114</sup> So, the following should be mentioned.

---

<sup>108</sup> R. Burke. Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity. – *Journal of Conflict and Security Law*, 2011/16 (1), p. 65-66

<sup>109</sup> O. Engdahl. *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' against the Background of General International Law*. Leiden: Brill Nijhoff 2007p. 55

<sup>110</sup> Agreement between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti, Port-au-Prince 9.07.2004, e.i.f. 9.07.2004

<sup>111</sup> Department of Peacekeeping Operations, Peacekeeping Best Practices Unit. *Handbook on United Nations Multidimensional Peacekeeping Operations*. New York: UN 2003, p. 4

<sup>112</sup> D. Fleck. *The Legal Status of Personnel Involved in United Nations Peace Operations*. – *International Review of the Red Cross*, 2013/95 (891/892), p. 614

<sup>113</sup> T. D. Gill, D. Fleck, W. H. Boothby, A. Vanheusden (eds). *Leuven Manual on the International Law Applicable to Peace Operations*. Cambridge: Cambridge University Press 2017, p. 282

<sup>114</sup> D. Shraga. *The applicability of the laws of armed conflict to peacekeeping operations*. – R. Liivoja, T. McCormac (eds). *Routledge Handbook of the Law of Armed Conflict*. Abingdon: Routledge 2016, p. 424

According to Alexander Gilder, by default military personnel of the United Nations peacekeepers are classified as non-combatants.<sup>115</sup> This believe can be considered well-reasoned. The First Additional Protocol to the 1949 Geneva Conventions defines who are combatants and basically says that combatants are “members of the armed forces of a Party to a conflict”.<sup>116</sup> As for the United Nations peacekeepers, they meet the requirement of being armed forces but they do not meet the requirement of belonging to the party to conflict. This is because of the reason they factually represent a neutral party. Consequently, the United Nations military forces cannot be classified as combatants, and, thus, are classified as non-combatants.

The additional reason to determine peacekeepers as non-combatants is that such status is officially recognized in relation to the peacekeepers. For example, determining when peacekeepers lose their non-combatant status<sup>117</sup> the United Nations Secretary-General confirms the non-combatant status of peacekeepers. Besides, the International Committee of the Red Cross explains the peacekeepers hold their non-combatant status only in cases when peacekeepers have mandate to protect civilians and, thus, when it is peace-enforcement operation, the non-combatant status is not applicable to them anymore.<sup>118</sup> Accordingly, the status of peacekeepers will not be affected if they use weapon in case of self-defense.<sup>119</sup> However, the determination of status of peacekeepers is not really limited to the non-combatant status.

Along with the non-combatant status, the peacekeepers basically are soldiers who are treated as civilians. That was clearly established during the proceeding at the International Criminal Tribunal for the Former Yugoslavia in the *Karadzic and Mladic* case.<sup>120</sup> In this case, both Radovan Karadzic and Ratko Mladic were accused for “taking of civilians, that is UN peacekeepers, as hostages and, additionally, using them as human shields”.<sup>121</sup> Nevertheless, application of civilian status to peacekeepers is not limited to mentioned court case. The doctrinal studies also support the idea that peacekeepers are to be considered the persons enjoying the civilian status.

---

<sup>115</sup> A. Gilder. The Effect of ‘Stabilization’ on the Mandates and Practice of UN Peace Operations. – Netherlands International Law Review, 2019/66, p. 56

<sup>116</sup> Additional Protocol I, Art. 43.2

<sup>117</sup> UN Secretary-General (UNSG), Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, 6 August 1999, ST/SGB/1999/13, para. 1.2

<sup>118</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 114

<sup>119</sup> Fleck. The Legal Status of Personnel Involved in United Nations Peace Operations, *supra* note 112, p. 614

<sup>120</sup> ICTY. The Prosecutor of the Tribunal against Radovan Karadzic, *supra* note 46

<sup>121</sup> *Ibid.*, para. 48

For example, Damian Lilly, the Chief of the Protection Division at the United Nations Relief and Works Agency for Palestine Refugees in the Near East, conducted a research on the status of peacekeepers and states that the Rome Statute of the International Criminal Court applies to peacekeepers as to civilians, and, thus, peacekeepers have civilian status.<sup>122</sup> On another hand, researcher Magdalena Pacholska emphasized that UN peacekeepers are generally entitled to civilian status because of the way they use force i.e. in order to defense themselves;<sup>123</sup> while Conor Foley stated that UN peacekeepers are entitled to civilian status because they do not take part in armed conflict as combatant.<sup>124</sup> All of that leads to the conclusion that since peacekeepers have civilian status, they still keep it after becoming involuntary human shields.

As it was already mentioned, the status of members of human shields depends on what status peacekeepers had before they formed the shield. So, civilian status is not the only one possible status which can belong to peacekeepers. For example, the activity of the United Nations Force Brigade in Congo enabled to believe that the United Nations peacekeeping operations can be engaged in conflict as party to it, and thus, peacekeepers can be considered combatants.<sup>125</sup> It is disputable question whether the United Nations and its peacekeepers can become party to a conflict, but mostly the researches are tend to support this concept.<sup>126</sup> Nevertheless, approach, where peacekeepers are considered to be combatants when the United Nations become a party to conflict, is not the only one.

Alternatively, the International Committee of the Red Cross states that once peacekeepers engaged in enforcement operations, they enjoy combatant status.<sup>127</sup> Nigel D. White also believes that status of peacekeepers depends on type of operation they engaged, or in other words, status of peacekeepers can be affected by mandate they have.<sup>128</sup> This can be explained by the following. Usually the mandate of the robust peace operation suggest that military force

---

<sup>122</sup> D. Lilly. The United Nations as a Party to Armed Conflict: The Intervention Brigade of MONUSCO in the Democratic Republic of Congo (DRC). – *Journal of International Peacekeeping*, 2016/20, p. 330, 341

<sup>123</sup> M. Pacholska. (Il)legality of Killing Peacekeepers: The crime of Attacking Peacekeepers in the Jurisprudence of International Criminal Tribunals. – *Journal of International Criminal Justice*, 2015/13 (1), p. 71

<sup>124</sup> C. Foley. *UN Peacekeeping Operations and Protection of Civilians: Saving Succeeding Generations*. Cambridge: Cambridge University Press 2017, p. 142

<sup>125</sup> Lilly. The United Nations as a Party to Armed Conflict, *supra* note 122, p. 341

<sup>126</sup> See E. David, O. Engdahl. Debate: How does the involvement of multinational peacekeeping force affect the classification of a situation? – *International Review of the Red Cross*, 2013/95 (891/892); L. Muller. The Force Intervention Brigade – United Nations Forces beyond the Fine Line Between Peacekeeping and Peace Enforcement. – *Journal of Conflict and Security Law*, 2015/20 (3); C. Saja. Multinational Peace Operations in Armed Conflicts – Identifying the Party. – *Institute for Human Rights Working Paper*, 2017/1; M. A. Khalil. Robust Peacekeeping – Not Aggressive Peacekeeping. – *Proceedings of the ASIL Annual Meeting 2018/112*

<sup>127</sup> Henckaerts, Doswald-Beck (eds). *Customary International Humanitarian Law*, *supra* note 3, p. 114

<sup>128</sup> N. D. White. *Peacekeeping and International Law*. – J. A. Koops, N. Macqueen, T. Tardy, P. D. Williams (eds). *The Oxford Handbook of United Nations Peacekeeping Operations*. New York: Oxford University Press 2015, p. 52

can be applied at both international and strategic levels.<sup>129</sup> Altogether it shows that it is possible for peacekeepers to enjoy the combatant status. And as for combatant status during enforcement operation, it also should be noted that combatant status is had by the peacekeepers during all the period of operation, where they are on duty. However, it happens only to the moment, when they use weapon in order to protect the mandate, for example. Hence, it really is about having combatant status and it is not about losing protection guaranteed to non-combatant civilian status.

The combatant status supposes that it can be changed to *hors de combat* or prisoner of war, for example. The same change of status applies to the peacekeepers, which are considered combatants. For example, during proceeding on *Karadzic* case the Trial Chamber's opinion was emphasized and that opinion was "even if the UN [P]ersonnel were combatants immediately before their detention, they were rendered '*hors de combat*'".<sup>130</sup> Hence, if peacekeepers, who originally were considered to be combatants, constitute involuntary human shields, now they should be considered as *hors de combat*, who constitute involuntary human shields.

## 2.2. Status of voluntary human shields

Controversy surrounding voluntary human shields arises when there is a need to define their status. The thing is that members of the voluntary human shields create human shields based on their personal will, and they basically may influence the course of hostilities, and consequently, their conduct may be possibly classified as directly participation in hostilities. Their intent and participation in hostilities cause a doubt how voluntary human shields should be classified and whether they lose original status or retain it in the same manner as it happens with the involuntary human shields.

Taking into account the before-mentioned presumption on the determination of status by the authoritative judicial bodies the legal expert Shannon Bosch believes that if to compare the voluntary human shields with other categories of persons under international humanitarian law, it may possibly help courts during the proceedings on human shields.<sup>131</sup> Besides that, the

---

<sup>129</sup> Gilder. The Effect of 'Stabilization' on the Mandates and Practice of UN Peace Operations, *supra* note 115, p. 55

<sup>130</sup> ICTY IT-95-5/18-AR73.9, *Prosecutor v. Radovan Karadzic*, Public Decision on Appeal from Denial of Judgement of Acquittal for Hostage-Taking, 11.12.2012, para. 4

<sup>131</sup> S. Bosch. Voluntary Human Shields: Status-Less in the Crosshairs. – Comparative and International Law Journal of Southern Africa 2007/40 (3), p. 326

determination of status of involuntary human shields, which is made on the base of comparisons, may possibly contribute to the development of the concept of human shields in general.

This sub-chapter is to discover the status of voluntary human shields and it does that on the base of the following comparisons. First, the sub-chapter analyses whether voluntary human shields are endowed with combatant status. Second, it discovers whether the *levée en masse* status is this one, which is enjoyed by the voluntary human shields. Third, the sub-chapter finds out whether voluntary human shields constitute the persons accompanying armed forces. At last, it discovers whether voluntary human shields meet the requirements of civilian status.

### **2.2.1. Combatant status of voluntary human shields**

When it comes to the determination of the status of voluntary human shields, it should be noted that it is not tricky process but quite delicate one. Shannon Bosch explains that status of voluntary human shields is one of the recognized categories, but distinction between voluntary human shields and combatants cannot be considered simplified because of the reasons that in reality some combatants do not have authorization to participate in hostilities and, for example, some civilians tend to accompany the military forces.<sup>132</sup> However, non-simplified does not mean impossible and unnecessary.

To begin with, the Additional Protocol I defines who are combatants and it says “members of the armed forces of a Party to a conflict ... are combatants”.<sup>133</sup> In its turn, armed forces are “organized armed forces, groups and units which are under a command”.<sup>134</sup> Additionally, the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia defined that members of armed forces, who rest at home in the conflict area, still are combatants despite the fact that they are engaged or are not engaged in combat, or are armed.<sup>135</sup> Alternatively, to have a combatant status the person should be member of organized resistance movement, volunteer corps or militia.<sup>136</sup> Nevertheless, the key is that person should meet a number of requirements to be considered a combatant.

---

<sup>132</sup> *Ibid.*, p. 326

<sup>133</sup> Additional Protocol I, Art. 43.2

<sup>134</sup> *Ibid.*, Art. 43.1

<sup>135</sup> ICTY. Prosecutor v. Dario Kordic and Mario Cerkez, *supra* note 83, para. 51

<sup>136</sup> Geneva Convention III, Art. 4.A.(2)



There requirements are to be under the command, and the command should bear responsibility for his/her subordinates; wear a sign which is fixed, distinctive, and recognizable at distance; carry arms openly; conduct done by the person should be in accordance with customs and laws of war.<sup>137</sup> As for the voluntary human shields, they do not meet these requirements. First, they are not authorized members of the armed forces. Second, the shields are not legitimate subordinates and they are not under the responsible command. Third, the shields do not wear needed sign. Fourth, human shielding is in practice, but it contradicts the laws and customs of war. It indeed becomes crystal clear that voluntary human shields do not meet requirements of combatant status. Hence, the shields do not enjoy combatant status.

It also should be noted that in practice the term “combatant” is usually applied in both international and non-international armed conflicts, but as a legal term it exists exclusively in international armed conflict.<sup>138</sup> As for the forces engaged in non-international armed conflict, the International Committee of the Red Cross clarifies that armed forces, which belong to the state, can possibly be considered combatants; but when persons whose conduct can be classified as direct participation in hostilities are called combatants, it supposes that they cannot rely on protections, which are granted to civilians, but at the same time, the status of combatants is not applicable to them.<sup>139</sup> Additionally, according to Robert Kolb international humanitarian law does not suppose the existence of combatant status in the context of non-international armed conflict, and hence, there are only different types of civilians who enjoy different extent of protection.<sup>140</sup> Following this logic, voluntary human shields do not enjoy the status of combatants. However, this approach, that there are only civilians in non-international armed conflict, is arguable.

In contrast, William Banks believes that it is wrong to believe that civilians, who take direct participation in hostilities, are party non-international conflict but are not combatants.<sup>141</sup> His arguments are the treating non-international armed conflict as conflict between the state forces and regular civilians contradicts the customs associated with the law of armed conflict, and it does not enable application of the principle of distinction during combat.<sup>142</sup> Alternatively, separately from each other two scholars Georg Nolte and Cecilie Hellestveit emphasized the

---

<sup>137</sup> *Ibid.*, Art. 4.A.(2)(a), 4.A.(2)(b), 4.A.(2)(c), 4.A.(2)(d)

<sup>138</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 11

<sup>139</sup> *Ibid.*, p. 12

<sup>140</sup> R. Kolb. Advanced Introduction to International Humanitarian Law. Cheltenham: Edward Elgar Publishing Limited 2014, p. 124

<sup>141</sup> W. Banks. Counterinsurgency Law: New Directions in Asymmetric Warfare. Oxford: Oxford University Press 2013, p. 66

<sup>142</sup> *Ibid.*, p. 66

possibility of considering the non-state actors as combatants if their conduct constitutes continuous combat function.<sup>143</sup> However, there are certain peculiarities in that context which are needed to be considered.

According to the research conducted by Emily Crawford the continuous combat function supposes that participation in combat is not temporary and excludes spontaneous and sporadic participation.<sup>144</sup> As for the voluntary human shields, there is no need for evidence that their conduct is not continuous. The key is that human shielding constitutes occasional activity. Additionally, the concept of the continuous combat function excludes civilians who have supportive functions and whose conduct cannot be considered direct participation in hostiles.<sup>145</sup> Hence, the activity of voluntary human shields, which theoretically can be classified as indirect participation in hostilities, cannot be amounted to continuous combat function. In total, voluntary human shields do not enjoy combatant status in non-international armed conflict.

In general, it is crystal clear that in the legal context of both types of armed conflicts voluntary human shields *ipso facto* do not enjoy combatant status. Additionally, it should be noted that scholars have different views on the status of voluntary human shields in the context of combatant status. For example, Aniceé Van Engeland and Banu Bargu do not contest the reality that voluntary human shields do not belong to combatants.<sup>146</sup> In contrast, Matthew V. Ezzo and Amos N. Guiora suggest that legal approach to the status of voluntary human shields should be changed. They inherently state that legal approach to the status of voluntary human shields should be changed and the shields should enjoy combatant status.<sup>147</sup> Their suggestion to change status is arguable and have not influenced the actual status of the shields, however. It should be understood, that 11 years have already passed after the moment their suggestion was presented to the world, but the status of voluntary human shields is still the same and the causes of such result are clear.

---

<sup>143</sup> G. Nolte. Targeted Killing. – F. Lachenmann, R. Wolfrum (eds). The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law. Vol. 2. Oxford: Oxford University Press 2017, p. 1213; C. Hellestveit. The Geneva Conventions and the IAC/NIAC Dichotomy – K. Mujezinovic Larsen, C. G. Guldahl Cooper, G. Nystuen (eds). Searching for a 'Principle of Humanity' in International Humanitarian Law. Cambridge: Cambridge University Press 2013, p. 122, note 131

<sup>144</sup> E. Crawford. Identifying the Enemy: Civilian Participation in Armed Conflict. Oxford: Oxford University Press 2015, p. 76

<sup>145</sup> *Ibid.*, p. 75; N. Melzer. Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law. Geneva: International Committee of the Red Cross 2009, p. 34

<sup>146</sup> A. Van Engeland. Civilian or Combatant? A Challenge for the Twenty-First Century. Oxford: Oxford University Press 2011, p. 112; B. Bargu. Bodies Against War: Voluntary Human Shielding as a Practice of Resistance. – American Journal of International Law Unbound 2016/110, p. 302

<sup>147</sup> M. V. Ezzo, A. N. Guiora. A Critical Decision Point on the Battlefield – Friend, Foe, or Innocent Bystander. – C. M. Bailliet (ed). Security: A Multidisciplinary Normative Approach. Leiden: Brill Nijhoff 2009, p. 100

On the one hand, this is an excellent idea to make voluntary human shields belong to combatant status and this is because of the following reason. Theoretically, bearing same responsibility as combatants do may decrease the willingness to form the shields and, thus, the appearance of them. In addition, it may solve the issue how the proportionality principle should be applied to the voluntary human shields, for example. On the other hand, there is no real need to change the status of voluntary human shields to the combatant status. The status of voluntary human shields does not remain a grey area, for example, and it is clear what happens to persons who formed voluntary human shields and basically took part in hostilities. Additionally, the change of status can possibly result in legitimizing of the use of human shields, but such consequence is not a desirable result in principle.

### **2.2.2. *Levée en masse* status of voluntary human shields**

The 1949 Geneva Conventions recognize *levée en masse*,<sup>148</sup> and, for example, the Geneva Convention III defines *levee en masse* as those who “spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war”.<sup>149</sup> As for the judicial practice, in 2006 the International Criminal Tribunal for the Former Yugoslavia defined Bosnian Muslims as *levée en masse*, which was a group composed of fighters whose actions were independent and lacked the main characteristics of army,<sup>150</sup> for example. According to Emily Crawford it is an example of rare incident of *levée en masse* recognition,<sup>151</sup> however.

There is a peculiarity in respect to the status of the *levee en masse*. To begin with that the *levée* are civilians in nature since the *levée* is formed by civilians. However, civilians, who belong to the *levée*, are not considered non-combatants.<sup>152</sup> In addition, Nils Melzer clarifies that the participants of the *levée* are not civilians, but they also are not considered combatants since they

---

<sup>148</sup> Geneva Convention I, Art. 13.6; Geneva Convention II, Art. 13.6; Geneva Convention III, Art. 4.A(6)

<sup>149</sup> Geneva Convention III, Art. 4.A(6)

<sup>150</sup> ICTY IT-03-68-T, *Prosecutor v. Naser Oric*, Judgement, 30 June 2006, para. 131

<sup>151</sup> E. Crawford. *Armed Conflict, International*. – F. Lachenmann, R. Wolfrum (eds). *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law*. Vol. 2. Oxford: Oxford University Press 2017, p. 48

<sup>152</sup> I. Detter. *The Law of War*. 2nd ed. Cambridge: Cambridge University Press 2000, p. 140

do not belong to the armed forces of the state.<sup>153</sup> If the combatant and civilian statuses are mutually exceptional and a person can be separately civilian or combatant,<sup>154</sup> then the question “who are the *levée en masse*” arises.

Legal scholar Emily Crawford explains that according to the 1949 Geneva Conventions members of *levée en masse* are granted the status of combatant.<sup>155</sup> Alternatively, Shannon Bosch believes that persons under the question have combatant status because of the reason that they act as combatants, and hence, distinguish themselves from the ordinary civilians.<sup>156</sup> Dr Bosch also emphasizes that the combatant status is awarded to the *levée* right after the autonomous decision to resist an enemy is confirmed, and then the *levée* can have the status of the prisoner of war.<sup>157</sup> In addition, the International Committee of the Red Cross clarifies that participants of the *levée en masse* are to carry arms, operate sporadically, and lack command, and hence, it cannot be classified as members of armed forces.<sup>158</sup> In essence, the *levée en masse* is not a grey area and, roughly speaking, the *levée* basically is civilians who have combatant status. In other words, the *levée en masse* are not combatants *sensu stricto* but have combatant status.

In order to establish whether the voluntary human shields may be considered the *levée en masse*, there is a need to find out whether the shields meet the requirements of the *levée*. The main criteria are distinctive features. William H. Boothby and Wolf Heintschel Von Heinegg explain *levée en masse* supposes that since it is spontaneously formed, it does not have fixed, distinctive, and recognizable at distance sign.<sup>159</sup> Alternatively, Emily Crawford and Alison Pert clarify that there is a requirement for the *levée* to have a distinctive sign, and in contrast, the main feature is spontaneous nature.<sup>160</sup> At first sight, it may look like the voluntary human shields perfectly meet the requirements of the *levée en masse* since the shields do not have distinctive signs and are formed spontaneously.

---

<sup>153</sup> N. Melzer. The Principle of Distinction Between Civilians and Combatants. – A. Clapham, P. Gaeta (eds). The Oxford Handbook of International Law in Armed Conflict. Oxford: Oxford University Press 2014, p. 306

<sup>154</sup> Van Engeland. Civilian or Combatant, *supra* note 146, p. 102

<sup>155</sup> Crawford. Armed Conflict, *supra* note 151, p. 47

<sup>156</sup> Bosch. Voluntary Human Shields, *supra* note 131, p. 328

<sup>157</sup> *Ibid.*, p. 328

<sup>158</sup> Melzer. Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, *supra* note 145, p. 25

<sup>159</sup> W. H. Boothby, W. H. Von Heinegg. The Law of War: A Detailed Assessment of the US Department of Defense Law of War Manual. Cambridge: Cambridge University Press 2018, p. 76

<sup>160</sup> E. Crawford, A. Pert. International Humanitarian Law. Cambridge: Cambridge University Press 2015, p. 96

Nevertheless, the question whether the *levée* really does not have a distinctive sign is arguable. For example, Stefan Kirchner believes that the *levée* actually has the distinctive sign, and this sign is openly carrying arms.<sup>161</sup> Kirchner's argument is the Geneva Convention III requires to carry arms openly<sup>162</sup> for purpose of distinguishing.<sup>163</sup> As for the voluntary human shields in the context of "openly carrying arms", it should be noted that the shields are not tend to carry arms in principle. The key is that the shielding supposes, for example, preventing attack using their bodies as shields, but not by application of weapons. It may be metaphorically stated that the shields are weapons. If so, the weapons hold weapons. This is nonsense, however. Consequently, the voluntary human shields do not meet the requirement of openly carrying arms.

On one hand, it is clear the voluntary human shields have a lot in common with the *levée en masse*. For example, both of them are formed voluntarily, their members are not ordinary combatants, both of them are engaged in combat, their activity may be considered direct participation in hostilities, and so on. On another hand, the voluntary human shields and the *levée en masse* are not the same. The main reason of it is that the human shields do not meet the requirements of the *levée*. Consequently, the shields and the *levée* are two different categories, and even though, the shields have similarities with the *levée*, the shields do not enjoy the combatant status of the *levée*.

### **2.2.3. Persons accompanying armed forces and status of voluntary human shields**

At first sight, it is possible to suppose that the voluntary human shields can be considered "persons accompanying armed forces" because of the reason that voluntary shields are engaged in combat in order to support the armed forces of the party to the conflict and basically are side by side with combatants, for example. In order to discover whether the voluntary human shields fall under the category of persons who accompany the armed forces, there is a primary need to establish who are these persons under the question and what are their distinctive features, and thus, what are requirements of the category of persons accompanying armed forces.

---

<sup>161</sup> S. Kirchner. Modern International Humanitarian Law. – S. R. Silverburg (ed). International Law: Contemporary Issues and Future Developments. New York: Routledge 2011, p. 241

<sup>162</sup> Geneva Convention III, Art. 4.1(2)

<sup>163</sup> Kirchner. Modern International Humanitarian Law, *supra* note 161, p. 241

To begin with, persons who accompany the armed forces are a special category under international law. According to Knut Ipsen they are not members of armed forces and they are civilians by default.<sup>164</sup> Additionally, the legal expert highlights that in special circumstances civilians may gain the status of combatants, and these circumstances are that civilians under the question are considered resistance forces or the *levée en masse*.<sup>165</sup> The persons accompanying the armed forces do not represent the above-mentioned circumstances, however. They are civilians who have civilian status, and this is not a subject to large criticism.

There also is a peculiarity in respect to the status. It is significant to note that status of the prisoner of war is also granted to the persons accompanying armed forces by international instruments. For example, the Geneva Convention III explicitly says “prisoners of war ... [include] persons who accompany the armed forces”,<sup>166</sup> and the Annex to the Hague Convention IV states “individuals who follow the army without directly belonging to it ... are entailed to be treated as prisoners of war”.<sup>167</sup> It should be noted that this approach gained wide support from the doctrinal studies.

For example, according to Giulio Bartolini the persons accompanying armed forces may enjoy the prisoners of war status,<sup>168</sup> and Ben Saul explains it is so because of the strong correlation between the armed forces and the persons who are attached to the forces.<sup>169</sup> In addition, legal expert W. Hays Parks stated that there is no practice showing that persons accompanying armed forces may not enjoy the status of prisoner of war and were denied the mentioned status.<sup>170</sup> In respect to all the above stated the following should be concluded. The persons, who accompany the armed forces, are civilians, who have civilian status, but in case of detention they may possibly have the prisoners of war status.

---

<sup>164</sup> K. Ipsen. Combatants and Non-Combatants. – D. Fleck (ed). The Handbook of International Humanitarian Law. 3d Ed. Oxford: Oxford University Press 2013, p. 79

<sup>165</sup> *Ibid.*, p. 79-80

<sup>166</sup> Geneva Convention III, Art. 4.A(4)

<sup>167</sup> The Hague Convention IV, Annex, Art. 13

<sup>168</sup> G. Bartolini. Private Military and Security Contractors as ‘Persons who Accompany the Armed Forces’. – F. Francioni, N. Ronzitti (eds). War by Contract: Human Rights, Humanitarian Law, and Private Contractors. Oxford: Oxford University Press 2011, p. 231

<sup>169</sup> B. Saul. The International Protection of Journalists in Armed Conflict and Other Violent Situations. – Austrian Journal of Human Rights 2008/14 (1), p. 103

<sup>170</sup> W. Hays Parks. Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces. Available at <https://www.icrc.org/data/rx/en/assets/files/other/2005-07-expert-paper-icrc.pdf> (12.02.2020), p. 9

Alternatively, the Geneva Convention III considers the persons accompanying the armed forces as “civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces”.<sup>171</sup> These categories of persons may theoretically form voluntary human shields. However, the common approach to the shields supposes that the shielding is conducted by the average civilians, who spontaneously decide to form the shield and whose link with armed forces is occasional shielding and, hence, who do not have a strong link with the armed forces. As a matter of fact, the voluntary human shields do not really fall under the categories of persons defined by the Geneva Convention III.

Additionally, the Geneva Convention III defines that persons, who accompany the armed forces, should have authorization to accompany and this authorization should be supported by the document, which is the identity card.<sup>172</sup> As for the voluntary human shields, they may not receive authorization for the shielding, and this defined in the Geneva Convention IV and the Additional Protocol I to the 1949 Geneva Conventions.<sup>173</sup> As for the identity cards, the statement that the shields have them would probably receive large criticism, and this is justified. This is because of the reason that in contrast to the persons accompanying the armed forces, the voluntary human shields do not have the identity card likewise the persons accompanying the armed forces do.

Among other things, it will not be correct to omit the fact that the persons accompanying the armed forces and the voluntary human shields have a number of similarities. For example, Shannon Bosch defined that both persons accompanying the armed forces and the voluntary human shields do not carry arms, do not have permission to directly participate in hostilities, and do not wear special uniform, and the conduct of both of them may be possibly counted as the same kind of assistance.<sup>174</sup> Nevertheless, the legal expert clarifies that the key is identity cards, and the voluntary human shields do not obtain them and, thus, are not amounted to the category of the persons accompanying the armed forces.<sup>175</sup> In total, it shows that despite the fact that voluntary human shields and the persons accompanying armed forces have common features, the shields are not considered the persons accompanying armed forces.

---

<sup>171</sup> Geneva Convention III, Art. 4.A(4)

<sup>172</sup> *Ibid.*, Art. 4.A(4)

<sup>173</sup> Geneva Convention IV, Art. 28; Additional Protocol I, Art. 51(7)

<sup>174</sup> Bosch, Voluntary Human Shields, *supra* note 131, p. 335

<sup>175</sup> *Ibid.*, p. 337

#### 2.2.4. Civilian status of voluntary human shields

All the above provided analyses enable to suppose that the voluntary human shields have civilian status. To begin with, that the Additional Protocol I to the 1949 Geneva Conventions negatively defines who are civilians and, in principle, civilians can be positively defined as those who are not combatants.<sup>176</sup> The category of civilians is quite broad one, and this can be explained by the fact that this category includes as civilians who are not guaranteed the right to take part in hostilities as civilians who are guaranteed to participate in hostilities and to have the status of the prisoners of war.

Because of the reason that provided above analyses have shown that the voluntary human shields cannot be considered the *levée en masse* and the persons who accompany the armed forces, here the voluntary human shields are viewed through the prism of civilians who do not have official authorization to take part in hostilities. The negative definition of civilians, which is provided in the Additional Protocol I, enables to determine key characteristics of the civilians. The Protocol I explicitly says that “civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol”,<sup>177</sup> the verification – whether the voluntary human shields fall under the meaning of the mentioned exclusions – enables to establish whether the shields are or are not civilians.

The section 1 of the Article 43 mentions organized armed forces, groups which are under the responsible command, which are subject to the internal system of discipline.<sup>178</sup> As for the voluntary human shields, it should be understood the following. Even though their members act as organized persons, this does not suppose that the shields are organized forces and the key is that the shielding happens occasionally. In addition, members of the human shields are people who do not belong to the organization with internal disciplinary system. Consequently, there can be no talk about the internal disciplinary system of the human shields. One more mentioned feature is being under the responsible command. Even though the shield may be commanded, the shield is not the kind of organization where the superior and the subordinates are. Hence, in the context of the voluntary human shields there is no responsible command.

---

<sup>176</sup> Additional Protocol I, Art. 50

<sup>177</sup> *Ibid.*, Art. 50.1

<sup>178</sup> *Ibid.*, Art. 43.1



The section 2 of the Article 43 explicitly mention “members of the armed forces of a Party to a conflict (other than medical personnel and chaplains ...)”,<sup>179</sup> and this means that these persons are excluded from the meaning of the civilians. To begin with the most simple and obvious. Being a member of the armed forces supposes that the member should have and wear a special defined uniform. As a rule, civilian as members of the voluntary human shields do not wear the uniform. The second feature is that members of armed forces have authorization from the state, for example, and this authorization is a prove that specific person is a member of armed forces. The voluntary human shields do not have such authorization. Altogether, human shields are not that members of the armed forces, which are mentioned in the Article 43.2 of the Additional Protocol I.

After the above analysis it is acceptable to move to the article of the Geneva Convention III the Additional Protocol I makes reference to. The section 1 of the Article 4.A says “members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces”.<sup>180</sup> To be with, the voluntary human shields satisfy only one requirement, and this is the word “volunteer”. As for another criteria, the human shields are totally different. The analysis above made it crystal clear that human shields cannot be considered the members of armed forces. The militias as well as volunteer corps, which form the part of the armed forces, suppose internal discipline and responsible command. As it was already shown, the internal discipline and responsible command are not applicable to the voluntary human shields.

The section 2 of the Article 4.A says about militias and organized resistance movements,<sup>181</sup> which meet the criteria of being under the responsible command, having fixed distinctive and recognizable at distance sign, carrying arms openly, act in respect to the laws and customs of war.<sup>182</sup> Since these criteria are definable, it is proper to directly define whether the voluntary human shields meet them. Civilians as human shields are not subordinates belonging to the armed forces and, hence, there is no commander responsible for their conduct as conduct of his subordinates. As for the sign, civilians as human shields do not have such sign as the armed forces or medical personnel have, for example. As for the carrying arms openly, the human shields do not carry weapon in principle. As for the laws and customs of law, the human shielding contradicts them and, hence, the conduct of the voluntary human shields cannot be

---

<sup>179</sup> *Ibid.*, Art. 43.2

<sup>180</sup> Geneva Convention III, Art. 4.A(1)

<sup>181</sup> *Ibid.*, Art. 4.A(2)

<sup>182</sup> *Ibid.*, Art. 4.A(2)(a), 4.A(2)(b), 4.A(2)(c), 4.A(2)(d)

considered as activity done according to the laws and customs of war. Basically, the voluntary human shields are not these persons, which are mentioned in the Article 4.A(2) of the Geneva Convention III.

The section 3 of the Article 4.A refers to the “members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power”.<sup>183</sup> The key wording is “members of regular armed forces”. As it was already and repeatedly shown, the voluntary human shields are not members of the armed forces at all. Hence, the human shields are not these people which are defined by the mentioned article. Alternatively, the last article, which should be analyzed, is the Article 4.A(6). It says “inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war”.<sup>184</sup> The key is that voluntary human shields do not carry arms, do not act with respect to the laws and customs of war, and do not act to resist, but they act to shield, first of all. Consequently, the voluntary human shields do not meet requirements, which are set in the Article 4.A(6) of the Geneva Convention III.

The analysis made it clear and substantiated that the voluntary human shields have civilian status. Also, it should be mentioned that opinions on the civilian status of voluntary human shields are divided, however. For example, Marco Sassòli believes that treating voluntary human shields as civilians is self-defeating.<sup>185</sup> On another hand, Yoram Dinstein believes that voluntary human shields lose original civilian status.<sup>186</sup> However, such believes turn the status of the voluntary human shields into the grey area and basically make the shields status-less, what is not expectable. Alternatively, the legal experts and scholars still show a large support to the idea that voluntary human shields have civilian status,<sup>187</sup> and Josiane Haas, for example, believes that voluntary human shields retain civilian status even when they directly participate in hostilities.<sup>188</sup> In total, all the above-mentioned showed that civilian status of voluntary human shields is justified despite the existing contrary believes.

---

<sup>183</sup> *Ibid.*, Art. 4.A(3)

<sup>184</sup> *Ibid.*, Art. 4.A(6)

<sup>185</sup> Sassòli. International Humanitarian Law, *supra* note 19, p. 371

<sup>186</sup> Y. Dinstein. Distinction and Loss of Civilian Protection in International Armed Conflict. – M. D. Carsten (ed). International Law and Military Operations. Vol. 84. Newport: U.S. Naval War College 2008, p. 183

<sup>187</sup> See N. Gordon, N. Perugini. Human Shields, Sovereign Power, and the Evisceration of the Civilian. – American Journal of International Law Unbound 2016/110, p.329; N. Al-Duaij. The Volunteer Human Shields in International Humanitarian Law. – Oregon Review of International Law 2010/12 (1), p. 124-126

<sup>188</sup> J. Haas. Voluntary Human Shields: Status and Protection under International Humanitarian Law. – R. Arnold, P.-A. Hildbrand (eds). International Humanitarian Law and the 21st Century's Conflicts: Changes and Challenges. Lausanne: Editions interuniversitaires suisses – Edis 2005, p. 200

### **3. PROTECTION PRESCRIBED TO HUMAN SHIELDS**

Protection is always a complex issue, and the protection of the human shields is not an exception. The key is that protection in the context of human shields is not limited to the couple provision on prohibition to do something. When it is legal protection of the human shields, it relates general provisions on protection, provisions on deterring from doing something, provisions on obligations to do something, provisions on liability, and several sharp issues which pose challenges to the protection. Considering the complexity of the protection question and the peculiarities of the human shields, this chapter focuses on the protection of human shields and the perspectives of legal developments in respect to the protection. First, it analyses the protection of human shields with special respect to their nature. Second, it discovers the obligations of the parties to the conflict in the context of the human shields protection. At last, this chapter analyses the questions which challenge the protection of human shields.

#### **3.1. Protection of human shields depending on their nature**

The constant analysis of human shields shows that the nature of human shields plays one of the key roles in the whole system of human shields concept. In other words, both involuntariness and voluntariness of human shields influence several issues, and the protection may possibly be not an exception. Considering the importance of the fact that shields may be formed voluntary or involuntary, this sub-chapter discovers the protection of human shields, which are formed under the pressure and constitute involuntary human shields, at first. Then, it finds out the protection which is prescribed to the human shields which are formed voluntarily by civilians.

##### **3.1.1. Protection of involuntary human shields**

The protection of the involuntary human shields is probably one of the clearest issues in the concept of human shields in general. The above provided analysis showed that the conduct of involuntary human shields is not amounted as direct participation in hostilities, participants retain their original status and there is no loss of status. Hence, there is no actual ground to argue on the protection issues. This supposes that participants of the involuntary human shields should enjoy the general protections which are prescribed to their status. For example, civilians used as involuntary human shields should have the full range of protections prescribed to their civilian status.

The very first protection in relation to the civilians as human shields is prohibition to resort to the usage of human shields, which is set in the Additional Protocol I,<sup>189</sup> for example. The International Committee of the Red Cross adds that this prohibition is also a custom in international humanitarian law.<sup>190</sup> Nevertheless, it should be noted, as Marco Sassòli believes, the prohibition to use civilians as shields is applicable only to the civilian persons, and it does not apply to the civilian objects.<sup>191</sup> Alternatively, it should be noted that the customary rule on prohibition against using the human shields is applicable in both types of armed conflict – international and non-international,<sup>192</sup> and is not a precautionary measure, which is passive.<sup>193</sup> In general, this shows that even in non-international armed conflict, where the application of international humanitarian law is a sharp question, the human shields remain protected in some extent.

Another protection in the context of civilians is that human shields may not be considered combatants. Hence, in case of doubt whether it is conduct of combatants or civilians, the members of the shields should be considered as civilians. This rule is set in the Additional Protocol I<sup>194</sup> too. All that references to the principle of distinction. The International Committee of the Red Cross defines this principle as a norm of customary law and which should be applicable in both types of conflict.<sup>195</sup> Alternatively, Marco Alberto Velásquez-Ruiz describes the principle of distinction as this which should be understood as explicit prohibition of attack directed against civilians, and violation is a war crime.<sup>196</sup> The same prohibition of attack against civilians was also emphasized by the International Court of Justice.<sup>197</sup> Consequently, all the above mentioned defines that involuntary human shields should be not be directly attacked.

One more thing, which relates to the issue of distinction but more to the distinction in general, is that distinction should also be necessarily made in relation to the nature of human shields – whether the shielding is voluntary or involuntary. The key is that protection framework of voluntary human shields and involuntary human shields differs, and thus results in different kind and extent of protection. As of today, the search on question – how to determine the nature

---

<sup>189</sup> Additional Protocol I, Art. 51(7)

<sup>190</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 337

<sup>191</sup> Sassòli. International Humanitarian Law, *supra* note 19, p. 369

<sup>192</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 337

<sup>193</sup> Sassòli. International Humanitarian Law, *supra* note 19, p. 369

<sup>194</sup> Additional Protocol I, Art. 50(1)

<sup>195</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 3

<sup>196</sup> M. A. Velásquez-Ruiz. The Principles of Distinction and Proportionality under the Framework of International Criminal Responsibility. – International Law Revista Colombiana de Derecho Internacional 2009/14, p. 30-31

<sup>197</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 78

of human shields – does not bring fruits. Moreover, it is also believed that during the course of hostilities differentiation is not possible to be done.<sup>198</sup> Consequently, the question – how to make distinction between the human shields easy and efficient – is separate one and deserves a separate research with future proposal.

Another protection, which should work in the benefit of civilians forming involuntary human shields, is the principle of proportionality. Ian Henderson and Kate Reece clarify that the principle is to prevent attack against civilian persons and objects.<sup>199</sup> Alternatively, in the *Kupreskic* case the court noted that even if it is incidental attack against civilians, this attack should still be in accordance with the principle of proportionality.<sup>200</sup> It also should be noted that the test of proportionality is set in the Additional Protocol I.<sup>201</sup> Even though the principle is officially recognized and set in international instrument, the principle of proportionality is still a sharp question. For example, Yoram Dinstein believes that test of proportionality should be “relaxed” in the context of civilians as human shields.<sup>202</sup> In contrast, Marco Sassòli states that it is unclear how the test on proportionality should be made in respect to the involuntary human shields, but these shields should not have less weight than any other civilians.<sup>203</sup> In total, it is possible to see that the principle of proportionality should work in the benefit of protection of human shields, but the principle has certain peculiarities and uncertainties.

One more detail in relation to the protection of involuntary human shields is the following. Participants of involuntary human shields are forced to shield and because of that reason they act contrary to the laws and customs of war. The members of the involuntary human shields are basically victims and, consequently, they may not be responsible for the shielding. The members may apply to the court for justice and because they were used as shields. For example, in the *Demiray* case the claim was made by the wife of victim, and she stated that her husband was used as a shield.<sup>204</sup> As for those, who force people to form human shields and actually use

---

<sup>198</sup> Sassòli. International Humanitarian Law, *supra* note 19, p. 371

<sup>199</sup> I. Henderson, K. Reece. Proportionality Under International Humanitarian Law (IHL): The ‘Reasonable Military Commander’ Standard and Reverberating Effects. – Vanderbilt Journal of Transnational Law 2018/51 (3), p. 836

<sup>200</sup> ICTY IT-95-16-T, *Prosecutor v. Zoran Kupreskic et al*, Judgment, 14 January 2000, para. 524

<sup>201</sup> Additional Protocol I, Art. 51(5)(b), 57(2)(a)(iii), 57(2)(b)

<sup>202</sup> Y. Dinstein. The Conduct of Hostilities under the Law of International Armed Conflict. Cambridge: Cambridge University Press 2004, p. 131

<sup>203</sup> Sassòli. International Humanitarian Law, *supra* note 19, p. 370

<sup>204</sup> ECtHR. 27308/95, *Demiray v Turkey*, *supra* note 5, para. 38, 44

human shields, they bear criminal responsibility. They may be responsible at the International Criminal Court, for example, or at national courts, and the responsibility will be for the committing a war crime.

All the above mentioned enables to make a conclusion that participants of involuntary human shields have extent of protections. These protections are based on their status, and the direct participation in hostilities does not influence neither status nor protections under the status. These protections basically represent the rule of customary law, which is set in the international instruments and which prohibits the usage of human shields. These protections are also represented by the principles of international humanitarian law, which are principles of distinction and proportionality. Theoretically, these both principles should work in favor of human shields, but the application of them is a subject to discussion in scientific circles. However, the discussion does not and should not preclude the application. Hence, looking at all the above mentioned, it is possible to conclude that involuntary human shields have protection framework and this framework is quite good but has some peculiarities.

### **3.1.2. Protection of voluntary human shields**

The protection of the voluntary human shield is complex issue, and there are several approaches. The first approach is that voluntary human shields lose their civilian protection in time of shielding. Shannon Bosch suggests that civilians as human shields lose the protection, which is prescribed to the civilian status, and this is because of direct participation in hostilities.<sup>205</sup> It is understandable that such attitude is influenced by the Additional Protocols to the 1949 Geneva Conventions, which explicitly state that civilians do not have legal protection from attack if they take direct part in hostilities.<sup>206</sup> This approach has peculiarity, however.

For example, Dapo Akande states that the provision, which enables to attack the civilians who directly participate in hostilities,<sup>207</sup> is difficult to apply in practice. According to him, it is not easy because even the concept of the direct participation in hostilities is not enough clear.<sup>208</sup> In

---

<sup>205</sup> S. Bosch. The International Humanitarian Law Notion of Direct Participation in Hostilities – A Review of the ICRC Interpretive Guide and Subsequent Debate. – Potchefstroom Electronic Law Journal 2014/17 (3), Summary, p. 1

<sup>206</sup> Additional Protocol I, Art. 51(3); Additional Protocol II, Art. 13(3)

<sup>207</sup> D. Akande. Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities. – International and Comparative Law Quarterly 2010/59 (1), p. 181

<sup>208</sup> *Ibid.*, p. 181

total, according to the first approach, there can be no talk about civilian protection at all. Hence, voluntary human shields may not rely on such civilian protections as the involuntary human shields have.

The second approach does not agree that kind of participation does not play a role in the context of the protection of the voluntary human shields. According to the approach, there are still situations, where voluntary human shields may immune from attack, and this is because of the reason that voluntary human shields may practically participate in hostilities in both ways – directly and indirectly. For example, according to the research conducted by Marco Sassòli the voluntary human shields may take direct participation in hostilities only when the shield is really harming.<sup>209</sup> However, this does not exclude the indirect participation in hostilities.

Additionally, Michael L. Gross gives particle examples in support of this approach. Gross states that voluntary human shields may immune from attack when their conduct is indirect participation in hostilities and is, for example, “shielding military HQ or supply depot, protecting retreating troops, political wing activities”.<sup>210</sup> Alternatively, according to Michael L. Gross the voluntary human shields do not immune from attack in time of such direct participation in hostilities as “shielding a primed missile launcher, protecting attacking troops”.<sup>211</sup> It should be noted that the above provided division on the direct and indirect participation in hostilities results in loosing or retaining protection from the direct attack.

The third approach is that voluntary human shields do not lose protection prescribed to their status. Nils Melzer stated that conduct of the voluntary human shields remains indirect.<sup>212</sup> The legal adviser also explains that the conduct of the voluntary human shields still does not result in losing the civilian protection, the attacker is responsible for the attack directed against the shields, but the death of voluntary human shields may be considered a subject to incidental deaths.<sup>213</sup> Along with Nils Melzer, Shannon Bosch has one more suggestion and highlights that despite the participation and aspiration, the voluntary human should not be considered a legitimate target.<sup>214</sup>

---

<sup>209</sup> Sassòli. International Humanitarian Law, *supra* note 19, p. 371

<sup>210</sup> Gross. The Ethics of Insurgency, *supra* note 65, p. 143, Table 6.2.

<sup>211</sup> *Ibid.*, p. 143, Table 6.2.

<sup>212</sup> Melzer. Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, *supra* note 145, p. 57

<sup>213</sup> *Ibid.*, p. 57

<sup>214</sup> Bosch. Voluntary Human Shields, *supra* note 131, p. 348

Bosch provides an example with children used as human shields, and she states that children never lose protection prescribed by law.<sup>215</sup> It is also important to note that according to the scholar, the retention of the status of the voluntary human shields supposes that attack against them may be done with relaxed calculation of collateral damage than it actually is with average civilians, who do not form human shields but are located close to the military objectives.<sup>216</sup> In general, it shows that the third approach is to be about the relaxing the tests applicable to the situations with attack against the human shields.

Alternatively, none of the mentioned approaches does not preclude liability. The sub-chapter 1.1. of this work has shown and made it crystal clear that resorting to the use of human shields is prohibited method of warfare under international humanitarian law and is a war crime under the international criminal law. Hence, the members of the armed forces of party to the conflict, who resorted to the usage of the voluntary human shields, are responsible for the violation of the laws and customs of war and committing a war crime. These people may bear criminal responsibility and be convicted under international criminal law at the International Criminal Court, for example. The International Criminal Court is not the only one possible institution where combatants may be convicted for the committing a war crime, however. They may also be convicted at national tribunals, for example.

When it is voluntary human shields, it is not only about the responsibility of the combatants. In contrast to the involuntary human shields, the voluntary human shields do not have immunity from prosecution. The key is that involuntary human shields are shielding because they are forced to do so while voluntary human shields are shielding on the base of their personal will. It is important to understand that voluntary human shields are not legitimate combatants and, thus, they are not responsible for the conduct at the same extent as combatants usually do. Also, participants of voluntary human shields may not be responsible at the International Criminal Court, for example.

The thing is that war crime of human shielding under the Rome Statute supposes the usage of human shields by belligerents, but it does not suppose the liability for the voluntary forming of the human shields by civilians. Such conclusion is analytically made on the base of the provision on prohibition to use human shields, which is “utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military

---

<sup>215</sup> *Ibid.*, p. 348-349

<sup>216</sup> *Ibid.*, p. 348



operations”.<sup>217</sup> In addition, it should be emphasized that members of voluntary human shields are responsible for their conduct under the national laws. Hence, it depends on the domestic legislation the extent of liability which voluntary human shields have.

All the above mentioned showed that protection of the voluntary human shields is a sharp question. The common approach is that voluntary human shields are to lose protections which are prescribed to their original status, and this is understandable. The direct participation in hostilities influences the issue of protection, but the voluntariness of the human shields also does not play the last role. Moreover, these participation and aspiration result in the fact that even protections, which are prescribed to the voluntary human shields, do not preclude the liability for the shielding. The liability may be considered justified, however. This is because of the reason that in fact, voluntary human shields commit a crime themselves while involuntary human shields are result of crime committed by the belligerent.

### **3.2. Obligations of belligerents in regard to human shields protection**

It is important to understand that protection is not limited to the rule prohibiting the use of human shields. Prohibition should also entail other connected issues. It is understandable that parties to the conflict should bear certain responsibilities in respect to the human shields’ protection apart from the obligation to not resort to the usage of any kind of human shields. This sub-chapter is to establish what obligations parties to the conflict have in respect to the human shields’ protection. First, it discovers what obligations are had by defender. Second, it finds out what obligations are had by attacker.

#### **3.2.1. Obligations of the belligerent using human shields**

To begin with, the collocation ‘belligerent using human shields’, which is used in the headline, is to mark a party to the conflict who plays a role of defender in the armed conflict. It is also important to highlight that it does not matter who are party to the conflict – defender or attacker – and it is not allowed to resort to the use of human shields in any case. Hence, the very first obligation of the defender in respect to the civilians as human shields is deterring from the use of human shields. This obligation reflects the customary international humanitarian law.<sup>218</sup> It is

---

<sup>217</sup> Rome Statute, Art. 8.2(b)(xxiii)

<sup>218</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 337

also set the Geneva Convention IV and the Additional Protocol I to the 1949 Geneva Conventions.<sup>219</sup> Considering the wording of both documents in respect to the human shields, the following should be mentioned.

The wording of both documents addresses the human shields as those, who are involuntary, but the spirit of the documents has a slightly different approach to the shields. The spirit suggests that documents contain the prohibition to use both types of human shields – voluntary and involuntary. If it was not in that way, the voluntary human shields would remain a somewhat of gray area in the context of modern humanitarian law or they were addressed separately in the instruments on the humanitarian law. Consequently, the defender has an obligation to refrain from the use of both voluntary and involuntary human shields.

The above-mentioned obligation is not the only one, however. The defender should refrain from the pretending civilians by the means of dressing combatants in civilian clothes. René Värk provides with practical example when this obligation was violated, and this example is that forces of the Fedayeen Saddam worn civilian clothes and plus used human shields.<sup>220</sup> When combatants dress in civilian clothes, it is a perfidy. The prohibition of perfidy is a norm of customary law<sup>221</sup> and is set in the Protocol Additional I to the 1949 Geneva Conventions.<sup>222</sup> The Protocol defines perfidy as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray this confidence”,<sup>223</sup> and this perfectly reflects the situation when combatants dress civilian clothes in order to confuse the enemy.

Additionally, when combatants dress in civilian clothes, they challenge the application of the principle of distinction between the combatants and civilians. This principle is set in the both Additional Protocols to the 1949 Geneva Conventions.<sup>224</sup> Gabriel Swiney explains the principle of distinction suggests that persons, who do not belong to armed forces, may not be a subject of attack.<sup>225</sup> When combatants dress in civilian clothes, they do not have a fixed distinctive sign, which should be had by combatants in order to distinguish them from civilians and other

---

<sup>219</sup> Geneva Convention IV, Art. 28; Additional Protocol I, Art. 51.7

<sup>220</sup> R. Värk. The Status and Protection of Unlawful Combatants. – *Juridica International* 2005/X, p. 193

<sup>221</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 221

<sup>222</sup> Additional Protocol I, Art. 37.1(c)

<sup>223</sup> *Ibid.*, Art. 37.1

<sup>224</sup> *Ibid.*, Art. 48, 51.2, 52.2; Additional Protocol II, Art. 13.2

<sup>225</sup> G. Swiney. The Principle of Distinction and the Realities of Modern War. – *The International Lawyer* 2005/39 (3), p. 734

persons. Hence, in the course of hostilities it obviously is difficult to establish the truth – whether it is forced civilians or actual combatants – and therefore the application of the principle is challenged.

In order to follow and simplify the application of the above-mentioned principle, the defender may change the location of civilians. Such change supposes legitimate evacuation, but not forced deportation of persons in order to change the population of certain area. The Geneva Convention IV provides that “total or partial evacuation of a given area if the security of the population or imperative military reasons so demand”.<sup>226</sup> However, Michael N. Schmitt explains that there is a peculiarity. According to him, when belligerent evacuates people in order to shield forces from attack in the time of changing location, then it is a violation of law.<sup>227</sup> And this is understandable, because than it basically is a usage of human shields.

The concept of human shielding intersects with the concept of hostage-taking. The provision on prohibition to take hostages is contained the 1949 Geneva Conventions<sup>228</sup> and the Additional Protocol II.<sup>229</sup> Additionally, The International Committee of the Red Cross defines hostages as people who in/voluntary are in power of belligerent and answer with freedom/physical integrity/life “for the execution of orders given by those in whose hands they have fallen, or for any hostile acts committed against them”.<sup>230</sup> As for the human shields in the context of hostages, Michael N. Shmitt explains that persons who are seized and then forced to shield are considered hostages.<sup>231</sup> Hence, defender has an obligation to deter from taking hostages, which in its turn, prevents the usage of human shields.

One more obligation of the defender relates to the presence of militias nearby the civilians and civilian objects. The Additional Protocol I defines that belligerents should “avoid locating military objectives within or near densely populated areas”,<sup>232</sup> and this is considered to be the norm of customary law.<sup>233</sup> When the belligerent follows this rule, it prevents the possibility of

---

<sup>226</sup> Geneva Convention IV, Art. 49

<sup>227</sup> M. N. Schmitt. Human Shields in International Humanitarian Law. – Columbia Journal of international Law 2009/47 (2), p. 303

<sup>228</sup> Geneva Convention I, Art. 3(1)(b); Geneva Convention II, Art. 3(1)(b); Geneva Convention III, Art. 3(1)(b); Geneva Convention IV, Art. 3(1)(b)

<sup>229</sup> Additional Protocol II, Art. 4.2(c)

<sup>230</sup> Y. Sandoz, C. Swinarski, B. Zimmermann (eds). Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. Geneva: International Committee of the Red Cross 1987, para. 4537

<sup>231</sup> Schmitt. Human Shields in International Humanitarian Law, *supra* note 229, p. 306

<sup>232</sup> Additional Protocol I, Art. 58

<sup>233</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 71

appearance of the voluntary human shields and simplifies the application of the principles of international humanitarian law, for example. Hence, the defender has an obligation to take necessary steps to prevent the location of military objectives close to the civilian inhabitants.

Alternatively, the duties of the defender may be conditionally divided into the negative and positive obligations. Among the negative obligations, Vera Rusinova defines deterring from moving civilian persons to gain military advantage and/or to shield military object and operations, and from placing military objectives close to the civilian objects.<sup>234</sup> As for the positive obligations, Rusinova defines removing civilians from the places of military objectives, refraining from locating military objectives near places where civilians are located, to defend civilians from dangers which may be result of military operations.<sup>235</sup> Division on the types enables to see the whole spectrum of the obligations of the defender in respect to the civilians as human shields.

### **3.2.2. Obligations of the belligerent attacking human shields**

To begin with, the collocation ‘belligerent attacking human shields’, which is used in the headline, is to mark a party to the conflict who plays a role of attacker in the armed conflict. As it was mentioned before, when it is context of the human shields, it does not matter – whether the party to the conflict is defender or attacker – and both parties to the conflict should refrain from the use of human shields. Thus, the attacker also has an obligation to not use human shields. In the context of civilians this obligation is set in the Geneva Convention IV<sup>236</sup> and the Additional Protocol I to the 1949 Geneva Conventions.<sup>237</sup> Also, according to the research of the International Committee of the Red Cross, this obligation reflects customary law.<sup>238</sup> However, it is important to note that attacker’s obligations in relation to human shields is not limited to the prohibition to use the shields.

Attacker is that party to the armed conflict, that may possibly face the usage of human shields by enemy and indeed has certain obligations regarding this matter. The very first obligation is the following the principle of distinction. The sense of this principle is that attacker’s forces should refrain from the directing attack against civilians but only combatants may be targeted. This principle is established in the both Additional Protocols to the 1949 Geneva

---

<sup>234</sup> Rusinova. Human Shields, *supra* note 86, p. 456

<sup>235</sup> *Ibid.*, p. 456

<sup>236</sup> Geneva Convention IV, Art. 28

<sup>237</sup> Additional Protocol I, Art. 51.7

<sup>238</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 337

Conventions,<sup>239</sup> and according to the International Committee of the Red Cross the rule reflects customary law.<sup>240</sup> However, it should be understood that human shields are special circumstance in the hostilities and the military operation may possibly be cancelled because of the presence of human shields, but there are certain legal peculiarities which can enable attack on the area with human shields.

Hence, another principle, which should be followed by the attacker, is the principle of proportionality. It is set twice in the Additional Protocol I to the 1949 Geneva Conventions.<sup>241</sup> Also, the assessment of the International Committee of the Red Cross showed that this principle is a norm of customary law.<sup>242</sup> To make it clear, the principle supposes that civilian losses may not exceed the value of the military objective. This 'value' is not about price but it is about necessity. Additionally, in the *Targeted Killing* case the court also called upon the application of the proportionality principle in relation to the civilians taking direct part in hostilities,<sup>243</sup> which can be considered human shields, for example.

The court highlighted the necessity to use means, which do not cause necessary damages, regarding the civilians directly participating in hostilities.<sup>244</sup> This suggests that the type and method of warfare as well as degree of force are the matter of question. According to the research of Nils Melzer, belligerent should act in the manner which does not put civilians in unnecessary risks, and it should not use lethal force when no need exists.<sup>245</sup> Additionally, Michel N. Schmitt provides with practical example how it can be made. This example is if human shields are at facility which produces electric energy, the first thing done by the attacker should be cutting electricity to the facility and only after to start fully-functioning military operation.<sup>246</sup> It should be understood that cutting electricity would deter the shields from the harm and damage, which could be caused by the electrical energy.

Alternatively, Michel N. Schmitt states that human shields should be counted as civilians whose presence is just a coincident, or in other words, is incidental.<sup>247</sup> The legal expert explains that, therefore, the deaths of and injuries to the participants of human shields are to be considered

---

<sup>239</sup> Additional Protocol I, Art. 48, 51.2, 52.2; Additional Protocol II, Art. 13.2

<sup>240</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 3

<sup>241</sup> Additional Protocol I, Art. 51.5(b), 57.2(a)(iii)

<sup>242</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 46

<sup>243</sup> Supreme Court of Israel. Targeted Killings, *supra* note 1, para. 40

<sup>244</sup> *Ibid.*, para. 40

<sup>245</sup> Melzer. The Principle of Distinction Between Civilians and Combatants, *supra* note 153, p. 331

<sup>246</sup> Schmitt. Human Shields in International Humanitarian Law, *supra* note 229, p. 325, note 157

<sup>247</sup> *Ibid.*, p. 325

incidental, and it is in accordance with the Additional Protocol I.<sup>248</sup> This statement on counting the human shields as incidental losses is arguable, however. This is because of the reason it, *ipso facto*, enables to ignore the presence of civilians on the battlefield, but ignoring the civilian presence is contrary to the basics of protections prescribed to the persons who have civilian status.

In general, obligations of the attacker in respect to the human shields are basically situated on the precautionary measures. The legal expert Marco Sassòli highlights that specifically attacker has primary responsibility for the taking all measures which are precautionary, and both state practice and the Additional Protocol I to the 1949 Geneva Conventions are in a line with this believe.<sup>249</sup> As for the precautions, they may be viewed as positive and negative obligations. Marco Sassòli, for example, believes that passive precautions are not strong, and it is disputable whether they have customary character since they are not a subject of frequent taking.<sup>250</sup> However, such precautions still exist despite criticism.

Passive precautions are about the effects of attacks and are set in the Additional Protocol I<sup>251</sup> as it was mentioned before. According to the Protocol, there are three negative obligations, which suggest removing civilians from areas where military objectives are situated, avoid placing the facilities having military value close to the places of civilian behavior, taking precautions in order to deter civilian people and objects from damages resulting from the conducting military operations.<sup>252</sup> According to Marco Sassòli, when specifically attacker does not take these passive precautionary measures, it constitutes the grave breaches under the Protocol, where precaution are specified, and it also constitutes a war crime under the Rome Statute.<sup>253</sup> In total, it emphasizes the actual need and obligation to take passive precautionary measures.

However, the precautions are not limited to passive only. Precautions also are ‘active’ and may possibly be considered positive obligations of attacker. They are set in the Additional Protocol I too. According to the Protocol, these obligations are ensuring avoiding the attack against civilians, refraining from causing unnecessary harm and damage, cancelling/suspension of

---

<sup>248</sup> *Ibid.*, p. 325

<sup>249</sup> Sassòli. International Humanitarian Law, *supra* note 19, p. 372

<sup>250</sup> *Ibid.*, p. 372

<sup>251</sup> Additional Protocol I, Art. 58

<sup>252</sup> *Ibid.*, Art. 58(a), 58(b), 58(c)

<sup>253</sup> Sassòli. International Humanitarian Law, *supra* note 19, p. 372

attack to prevent attacking civilian people and objects, making warnings in advance.<sup>254</sup> This list is not exhaustive, and there are two more positive obligations. They are choosing to attack the military objective which will result in less extent of civilian losses if the choice is available, and the belligerents should avoid causing losses of and damages to civilian objects during hostilities at sea.<sup>255</sup> In total, it shows that attacker has a number of obligations, which are not limited to the prohibition to use human shields.

### **3.3. Challenges to protection of human shields**

The concept of human shields is not a simple one in principle, and the protection of human shields as a part of this concept is not simplified too. The thing is that system of protection of human shields may be considered developed, but there are still some issues which remain uncertain, are not in favor of human shields, and may be a source of confusions. This sub-chapter is to analyze the challenges to the protection of human shields. First, it analyses the dilemma of the principle of proportionality. Second, it refers to the basics of the protection of human shields in the context of non-international armed conflict and analyses the problems which appear in respect to the human shields protection in the mentioned kind of armed conflict.

#### **3.3.1. Dilemma of proportionality principle**

The principle of proportionality is set in the Additional Protocol I<sup>256</sup> and is believed to be a norm of customary law.<sup>257</sup> It was already mentioned multiple times that following the principle of proportionality amounts to the obligations of belligerents. However, there is a peculiarity regarding the human shields in the context of principle of proportionality. This peculiarity is that there is not only one officially recognized, established and accepted approach to the place of human shields in the test on proportionality. The thing is that believes about the role of human shields vary. Basically, there are three approaches the legal experts argue about.

The first approach supposes that principle of proportionality is applicable to the human shields and human shields has the same weight as any other civilians. According to this approach, both types of human shields – voluntary and involuntary – are subject of counting in proportionality

---

<sup>254</sup> Additional Protocol I, Art. 57.2

<sup>255</sup> *Ibid.*, Art. 57.3, 57.4

<sup>256</sup> *Ibid.*, Art. 51.5(b), 57.2(a)(iii)

<sup>257</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 46

test. To begin with, Michael Newton and Larry May state that principle is applicable to the human shields because of the reason that participants of human shields are civilians.<sup>258</sup> However, there is not the only one argument which they made.

As for voluntary human shields, Michael Newton and Larry May explain that their participants do not wave their right to life during shielding, they could possibly be manipulated by the state and political parties.<sup>259</sup> As for involuntary human shields, scholars believe that this kind of human shields are subject to the principle of proportionality and have full weight in counting, because involuntary human shields retain their civilian immunity and do not act willing fully.<sup>260</sup> However, there is one detail which deserves to be mentioned.

It is important to note, the above-mentioned approach does not totally preclude the attack. In other words, principle of proportionality is applicable to all kinds of human shields, but there is no group of persons, which supposes that test on proportionality should always be in favor of them. For example, Hilly Moodrick-Even Khen explains that children as human shields are not considered legitimate targets but attacking the place shielded by them is legitimate, and the principle of proportionality should be applied.<sup>261</sup> Consequently, it is possible to see that the first approach supposes the application of principle of proportionality to both voluntary and involuntary human shields, but it also precludes the usage of status of human shields for the personal benefit of members of human shields.

The second approach is about the following. The human shields should not be a subject of the principle of proportionality. Ian Henderson and Patrick Keane explain that proportionality is not applicable to human shields because of the reason that their members take direct part in hostilities.<sup>262</sup> However, experts do not show support to this approach. According to them, such approach enables some civilians to take advantage of civilian status for voluntary being present at military objective, and other civilians as human shields loose the advantages.<sup>263</sup> To be more

---

<sup>258</sup> M. Newton, L. May. *Proportionality in International Law*. Oxford: Oxford University Press 2014, p. 215

<sup>259</sup> *Ibid.*, p. 215

<sup>260</sup> *Ibid.*, p. 216

<sup>261</sup> H. M. E. Khen. *Children as Direct Participants in Hostilities: New Challenges for International Humanitarian Law and International Criminal Law*. – W. C. Banks (ed). *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare*. New York: Columbia University Press 2011, p. 141

<sup>262</sup> I. Henderson, P. Keane. *Air and Missile Warfare*. – R. Liivoja, T. McCormack (eds). *Routledge Handbook of the Law of Armed Conflict*. Abingdon: Routledge 2011, p. 292

<sup>263</sup> *Ibid.*, p. 292



specific, civilian working at the military munition factory is not a subject to the loss of protection while the shields loose.<sup>264</sup> However, the above-mentioned scholars, Ian Henderson and Patrick Keane, are not the only persons, who find civilians to suffer from this approach.

Banu Bargu had a research on such approach and according to the results, the approach makes the civilians, who form human shields, vulnerable if to compare with other civilians.<sup>265</sup> Additionally, Michael N. Schmitt states that such approach is to prevent gaining benefits by the members of human shields.<sup>266</sup> In essence, this approach should discourage civilians from forming human shields, and it actually simplifies the calculations applicable to the proportionality test since in this approach human shields are the factor which is allowed to be ignored.

The third approach supposes that principle of proportionality is applicable to the human shields and they do not loose protections, but their role in proportionality test is discounted. According to the research conducted by Ian Henderson and Patrick Keane, the involuntary human shields are supposed to be equally treated with the voluntary human shields under this approach.<sup>267</sup> This is because of the reason, that law does not suppose that life of different categories and types of people may have different value.<sup>268</sup> This approach is not limited to the above provided argument, however.

Alternatively, Michael N. Schmitt believes that this approach also does not contradict the Article of 51(8) of the Additional Protocol I, which states that belligerent, who bumped into the human shields, should be still bound by the norms on protections prescribed to civilians.<sup>269</sup> Moreover, the legal expert believes this approach facilitates the concept that human shields should be considered civilians and the application of proportionality principle to them.<sup>270</sup> However, this approach is also a subject to criticism. Marco Sassòli is one of those who does not agree. The scholar directly states that human shields should not have less value then other civilians,<sup>271</sup> for example.

---

<sup>264</sup> *Ibid.*, p. 292

<sup>265</sup> B. Bargu. Human Shields. – Contemporary Political Theory 2013/12 (4), p. 285

<sup>266</sup> Schmitt. Human Shields in International Humanitarian Law, *supra* note 229, p. 327

<sup>267</sup> Henderson, Keane. Air and Missile Warfare, *supra* note 264, p. 292

<sup>268</sup> *Ibid.*, p. 292

<sup>269</sup> Schmitt. Human Shields in International Humanitarian Law, *supra* note 229, p. 331

<sup>270</sup> *Ibid.*, p. 331

<sup>271</sup> Sassòli. International Humanitarian Law, *supra* note 19, p. 370

The author of this study believes that voluntary human shields should lose their protection from the attack, which comes from the principle of proportionality. The key is that according to the Additional Protocol I the civilians taking part in hostilities lose the protection from the dangers of attack,<sup>272</sup> and the voluntary human shields are civilians who take direct part in hostilities. Consequently, it is a logical outcome coming from the provision of the Protocol I when the human shields stop having protection from attack.

### **3.3.2. Protection of human shields under non-international armed conflict**

The question how to make the armed non-state actors follow the humanitarian law is quite sharp. To begin with, the Additional Protocol II to the 1949 Geneva Conventions, which is a document specifically designed to regulate the conduct of hostilities in non-international armed conflict, does not have an explicit prohibition to use human shields as the Additional Protocol I does, for example. However, there is a provision in the Protocol II, which can be possibly used as somewhat of an umbrella close in relation to the human shields. This provision says that civilians should be protected from the dangers of war and may not be directly targeted.<sup>273</sup> Since it is not an explicit prohibition, it does not look self-evident in respect to human shields. Hence, the question – whether armed non-state actors are bound under the international humanitarian law regulations – raises.

Legal expert William T. Worster believes that the actors may have obligations under the instruments of international humanitarian law.<sup>274</sup> Alternatively, Sandesh Sivakumaran explains that obligations of the actors in relation to the laws governing the armed conflict do not come from international instruments, but they come from customary character of the provisions set in the instruments.<sup>275</sup> However, in this context it is reasonable to note that not all provisions of the 1949 Geneva Conventions reflect customary law. As for the prohibition to use human shields, the International Committee of the Red Cross considers it as a rule of customary law.<sup>276</sup> Consequently, if the armed non-state actors are bound by customary law, they are bound by prohibition to use particularly human shields.

---

<sup>272</sup> Additional Protocol I, Art.53.1

<sup>273</sup> Additional Protocol II, Art. 13

<sup>274</sup> W. T. Worster, Relative International Legal Personality of Non-State Actors. – Brooklyn Journal of International Law 2016/ 41 (1), p. 230

<sup>275</sup> S. Sivakumaran. Binding Armed Opposition Groups. – International and Comparative Law Quarterly 2006/55 (2), p. 372;

<sup>276</sup> Henckaerts, Doswald-Beck (eds). Customary International Humanitarian Law, *supra* note 3, p. 337

Another approach supposes that armed non-state actors may be bound international law if they decide to do so. Michelle Mack states that actors may show their desire and decision to follow the regulations by making the unilateral declaration.<sup>277</sup> According to the researches made by Sandesh Sivakumaran, they were made by Kurdistan Workers' Party, the National Liberation Army of the Former Yugoslav Republic of Macedonia, the Kosovo Liberation Army, and Sudan Liberation Movement-Unity,<sup>278</sup> for example. As for judicial practice, the courts show support to this idea of unilateral declarations. It was emphasized that the declaration was made in the *Akayesu* case,<sup>279</sup> for example. Additionally, in the *Israeli Wall* case the such declaration was considered valid by the International Court of Justice.<sup>280</sup> Such *ad hoc* declarations are widely accepted practice, in fact. Hence, the following becomes crystal clear. If the armed non-state actors make a unilateral declaration, they may become obliged under the 1949 Geneva Conventions and, thus, have obligation to not use human shields.

In addition to all the above-mentioned, there is one more approach. According to it, the armed non-states actors may become obliged under the certain international regulations if they concluded special agreement with another party to the conflict, which is state. Michelle Mack explains that possibility conclude such agreement on obligations is provided under the common article 3 of the 1949 Geneva Conventions.<sup>281</sup> One of the mentioned agreements was concluded between the Burundian government and the National Forces of Liberation,<sup>282</sup> for example. As for the judicial practice, the courts take this kind of agreement into consideration during the proceedings. For example, in the *Tadic* case it was purposely stressed that Royalists as well as the President of the Republic in Yemen decided to abide the Geneva Regulations.<sup>283</sup> Hence, it is possible to see that concluding agreement with armed non-state actors is also acceptable in order to prevent the use of human shields.

---

<sup>277</sup> M. Mack. Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts. Geneva: International Committee of the Red Cross 2008, p. 19

<sup>278</sup> S. Sivakumaran. Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War. – International Review of the Red Cross 2011/93 (882), p. 3-4; S. Sivakumaran. The Law of Non-International Armed Conflict. Oxford: Oxford University Press 2012, p. 122; S. Sivakumaran. Implementing Humanitarian Norms Through Non-State Armed Groups'. – H. Krieger (ed). Including Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region. Cambridge: Cambridge University Press 2015, p. 127

<sup>279</sup> ICTR. Prosecutor v. Jean-Paul Akayesu, *supra* note 61, para. 627

<sup>280</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 91

<sup>281</sup> Mack. Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts, *supra* note 279, p. 16-17

<sup>282</sup> Comprehensive Ceasefire Agreement between the Government of Republic of Burundi and the Palipehutu-FNL, Dar Es-Salaam 07 September 2006, e.i.f. 10 September 2006

<sup>283</sup> ICTY ICTY-94-1, *Prosecutor v. Dusko Tadic a/k/a "Dule"*, Decision, 2 October 1995, para. 103

In addition, Michel N. Gross conducted the analysis on the obligations of such type of armed non-state actors as guerrillas and the analysis was in respect to the human shields. According to the research, guerrillas resorting to the use of human shields have 5 basic obligations. They are the using of human shields may take place when other means are not available, not resorting to imposing brutal penalties on members of the shield who do not wish to cooperate, ensuring that the quantity of human shields may result in disproportionate attack, refrain from the use of human shields if tactic is about to fail, and refraining from the use of human shields if there is an exaction that the shielding will not succeed.<sup>284</sup> However, offering these obligations, Michel N. Gross did not explain how to make guerrillas obliged under these obligations, and the source of them also remains unclear.

In general, it is possible see that armed non-state actors may be obliged by the norms of international humanitarian law. However, there is no perfectly working mechanism which could ensure that they are obliged regardless their will. It also remains unclear how to make the actors believe and follow customary law. Alternatively, it became clear that being obliged under the humanitarian law by the armed non-state actors mostly depends on their decision to cooperate and willingness to show the desire to have obligations and conduct hostiles considering the norms of international humanitarian law. Hence, the protection of the human shields in the context of the obligation of the armed non-state actors to not resort to the use of the shields remains a sharp a question. It is also not possible to conclude that prohibition to use human shields in non-international armed conflict is quite developed. As a result, it challenges the protection of human shields.

---

<sup>284</sup> Gross. *The Ethics of Insurgency*, *supra* note 65, p. 143-145

## CONCLUSION

To begin with, the conducted analysis made it clear that the concept of human shields has the features of originality but still overlaps with other concept under international law. Now it is clear that the concept of human shields and perfidy should be distinguished from each other, because they have different sense. It is understandable that occasion, when the combatants pretend civilian during combat, does not constitute human shielding. Additionally, it became clear that the concept of human shields has tight connections with the concept of direct participation in hostilities. Therefore, the development of human shields concept party depends on the development of the concept of direct participation in hostilities. Also, the human shields concept relates to the concept of principles of humanitarian law. The correlation is granted on the base that the principles provide human shields with protections.

As for the status of human shields, the following should be noted. The status of involuntary human shields is always same to the status, which the members of the shield had before they formed the shield. In other words, civilians, who are forced to form the human shields, remain civilian having civilian status, and this applies to all categories of persons. Hence, the *hors de combat*, who formed involuntary human shields, remain *hors de combat* and they do not become active combatants engaged in combat. Also, it should be noted that since the involuntary human shields do not have an intent of assisting the belligerent, it is additional reason for the saving status.

As for the United Nations peacekeepers in regard to the status of involuntary human shields, they are not an exception to the rule. It was established that the peacekeepers have double status. This double status does not influence the human shields status, however. Hence, when the peacekeepers originally had civilian status, then in time of shielding they remain civilians. As for the situation when the peacekeepers originally have combatant status, they will have the status of *hors de combat* in time of the shielding. The reason for that is the combatant status was changed to the *hors de combat* when the peacekeepers were taken as hostages.

As for the voluntary human shields, the intent to help the belligerent and the conduct, which is widely accepted as direct participation in hostilities, make doubt whether the voluntary human shields may be classified as any persons who have a right to be actively engaged in hostilities. According to this study, the voluntary human shields may not be considered combatants in both

international and non-international armed conflicts. In international armed conflict they cannot be considered combatants because of the reason that they do not meet the requirements of combatant status.

Along with the mentioned, the voluntary human shields are not authorized members of the armed forces, do not wear uniform, do not carry arms openly, do not have a fixed distinctive sign, and do not act in the light of laws and customs of war. As for the non-intentional armed, there is no legal term “combatant”. If to consider whether voluntary human shields meet the criteria of persons, who are regularly considered combatants, it is possible to see that human shields do meet the requirements. They are still not the members of regular armed forces, they do not carry arms openly, and they are engaged in combat temporary. In fact, voluntary human shields cannot be considered combatants.

The voluntary human shields may not be considered the *levée en masse* having combatant status, even though the *levée en masse* basically are civilians engaged in combat. The reason for that is quite simple. The voluntary human shields do not meet the requirements of *levée en masse*. This is because of the reason that voluntary human shields do not carry arms and do not act as the laws and customs of war prescribe. Alternatively, the analysis has showed that voluntary human shields may not be considered as persons accompanying the armed forces. On one hand, both of them have a number of similarities. They do carry arms openly and are side-by-side with combatants. On another hand, in contrast to the persons accompanying the armed forces, the voluntary human shields do not have special identity card, which certifies that they are officially authorized to accompany.

However, voluntary human shields perfectly meet the requirements of civilian status. First, they are not members of the armed forces which belong to the party to armed conflict. They are not authorized to take part in hostilities. Also, the shields do not have fixed distinctive recognizable at distance sign. The human shields do not carry arms and do not act in the light of the laws and customs of war. Additionally, when the voluntary human shields are engaged in combat and essentially act as the shields, they do not have the commander responsible for them as for the subordinates. In a line with having no responsible command, the voluntary human shields are not subject of internal system of discipline. They are formed spontaneously, without authorization, and there is no internal disciplinary system.

The direct participation in hostiles and the intent do not cause changes of and do not affect the status of voluntary human shields. Hence, civilian status of voluntary human shields remains civilian. In other words, civilians as human shields do not become combatants. There are already some proposals to make changes in respect to this status and make voluntary human shields be considered combatants. On one hand, it is a good proposal because it develops the concept of human shields in general. Alternatively, the bringing of voluntary human shields to the combatant status will change the degree of and kind of responsibility, which the human shields have.

On another hand, changes to the status enables changes to the provision on prohibition to use human shields. The rule prohibiting the use of human shields is customary rule and is prohibited method of warfare. When the human shield legitimately changes status to the combatant status, this says about the acceptance of the use of human shields as method of warfare. Such consequence is not acceptable not because of the reason that the 1949 Geneva Conventions will probably suffer changes. But because of the reason that such change will harm the basics of the protection prescribed to civilians. Also, one more reason, why human shields should not change status, is that human shields are not grey area in humanitarian law and the responsibility for the shielding already comes from their original status.

As for the issue of human shields protection, the situation is the following. When it is the issue of protection, the division of human shields on voluntary and involuntary plays one of the essential roles. The thesis made it clear that involuntariness enables to exclude the influence of direct participation in hostiles on the protections prescribed to human shields. Therefore, the involuntary human shields have the full extent of protections, which are originally prescribed to civilians in general. Members of human shields as civilians are amount in full extent in the proportionality test, and the principle of proportionality is fully applicable to the involuntary human shields. Additionally, the principle of distinction should be applicable in full extent to the involuntary human shields since they are civilians without combatant status. Also, the taking of all kinds of precautionary measures is required in respect to the involuntary human shields.

As for the protection of voluntary human shields, the thesis made it possible to establish that this issue is highly disputable. To begin with, there are several approaches to this question. One approach suggests that voluntary human shields should not be granted protections prescribed to civilian status, because of the reason that voluntary human shields take direct part in hostilities. Alternative approach is that voluntary human shields have intent, the kind of

participation does not matter, and there should be no protection granted. One more approach suggests that voluntary human shields may retain and may lose protections, but the retention and the loss depend on the kind of participation in hostilities. Therefore, when it is direct participation in hostilities, the shield loses its protections. Consequently, when it is not direct participation in hostilities, then the shield retains its civilian protection. In its turn, the last approach suggests that voluntary human shields should not lose protection. The argument is that voluntary human shields remain civilians.

The protection of both types human shields does not preclude the liability. International humanitarian law does not allow the use of voluntary and involuntary human shields while international criminal law also prosecutes the use of voluntary and of involuntary human shields. The belligerent, which resorted to the use of human shields, may be prosecuted at the court. As for the members of human shields, the situation is not unambiguous. If the involuntary human shields have total protection from the prosecution for being member of the shield, and moreover, may seek justice for being used; the voluntary human shields may not be that careless. Voluntary human shields contradict the law, and therefore become responsible. Since the voluntary human shields are combatants, they do not bear the same responsibility as combatants do. However, the voluntary human shields may be responsible at domestic courts.

As for the issue of developments, it became possible to conclude the following. The international legal regulation is enough developed in the context of the human shields status. Altogether, it was determined the status of human shields and established that human shield do not suffer the changes of status and do not lose the status at all when they take part in hostilities. Hence, it went clear that human shields retain the status and this rule is applicable to both types of human shields – voluntary and involuntary. In simple words, involuntary human shields always have status, which its members had had before they formed the shield. At the same time, voluntary human shields keep having the original civilian status. There is no place for development and changes in the context of human shields status. This is due to the fact the changes in status may result in the legitimizing the use of human shields and comprising the general protections of civilian population.

Along with the developments, the international legal regulation of human shields has legal gaps too. One of the determined gaps is the official definition of human shields, which does not exist. The proposed alternative to the absence of definition can be the actual proposal of definition. Therefore, it is suggested to the definition of human shields to be as following. Human shields



are person or group of persons, who are civilians or another protected person, who voluntary or involuntary are utilized by belligerents in a certain area in order to achieve certain military objectives e.g. deter attack.

Legal gaps were determined in the context of human shields protection. The application of proportionality principle is one of them. There is no common approach to the application and believes are divided. There is an opinion that the principle of proportionality should be applicable to and have no discount to voluntary human shields. The argument is that members of voluntary human shields are civilians having the right of life, being possibly manipulated to form the shields, and have the same protection as any other civilian. Another believe is that principle is not applicable to voluntary human shields, because they take direct part in hostilities. The alternative believe is that the principle is applicable, but relaxed.

Possible solution to this issue is application of the regulations as it should be. In the view of the fact the voluntary human shields are civilians directly taking part in hostilities, it is logical and acceptable that they lose protections as it is defined by the Additional Protocol I to the 1949 Geneva Regulations. Furthermore, this approach shows that there is no need for the developments and changes in the international legal regulation. This is because of the reason the legislation in force efficiently tackles with the issue of human shields protection and provides with the clear answer how the protection is supposed to be done.

Another concern is the following. The armed non-state actors are not obliged under the international instruments, which preclude the use of human shields. However, there are several ways how to make them bear responsibility. The armed non-state actors should basically show the willingness to be obliged and to make a unilateral declaration or conclude an agreement with another party to the conflict. Alternative approach says that these actors may be obliges under the customary international law. However, in the non-international armed conflict the protection of human shields mostly depends on the decency and willingness of the party to armed conflict. The solution to this challenge is engagement of the armed non-state actors in the process of concluding agreement making them binding under the rules of international humanitarian law.

## BIBLIOGRAPHY

### Books

1. Banks W. *Counterinsurgency Law: New Directions in Asymmetric Warfare*. Oxford: Oxford University Press 2013
2. Boothby W. H., Von Heinegg W. H. *The Law of War: A Detailed Assessment of the US Department of Defense Law of War Manual*. Cambridge: Cambridge University Press 2018
3. Bowyer R. *Dictionary of Military Terms*. 3d Edition. London: A&C Black 2007
4. Crawford E. *Identifying the Enemy: Civilian Participation in Armed Conflict*. Oxford: Oxford University Press 2015
5. Crawford E., Pert A. *International Humanitarian Law*. Cambridge: Cambridge University Press 2015
6. Department of Peacekeeping Operations, Peacekeeping Best Practices Unit. *Handbook on United Nations Multidimensional Peacekeeping Operations*. New York: UN 2003
7. Detter I. *The Law of War*. 2nd ed. Cambridge: Cambridge University Press 2000
8. Dinstein Y. *The Conduct of Hostilities under the Law of International Armed Conflict*. Cambridge: Cambridge University Press 2004
9. Dormann K., Doswald-Beck L., Kolb R. *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*. Cambridge: Cambridge University Press 2003
10. Engdahl O. *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' against the Background of General International Law*. Leiden: Brill Nijhoff 2007
11. Foley C. *UN Peacekeeping Operations and Protection of Civilians: Saving Succeeding Generations*. Cambridge: Cambridge University Press 2017
12. Garner B. A. *Black's Law Dictionary*. 11th Edition. St. Paul, MN: Thomson Reuters 2019
13. Gill T. D., Fleck D., Boothby W. H., Vanheusden A. (eds). *Leuven Manual on the International Law Applicable to Peace Operations*. Cambridge: Cambridge University Press 2017
14. Gross M. L. *The Ethics of Insurgency: A Critical Guide to Just Guerrilla Warfare*. Cambridge: Cambridge University Press 2015
15. Henckaerts J.-M., Doswald-Beck L. (eds). *Customary International Humanitarian Law*. Vol. I, Rules. Cambridge: Cambridge University Press 2005

16. Human Rights Watch. *Dead Men Walking: Convict Porters on the Front Lines in Eastern Burma*. New York: Human Rights Watch 2011
17. International Criminal Court. *Elements of Crimes*. The Hague: ICC 2011
18. Kolb R. *Advanced Introduction to International Humanitarian Law*. Cheltenham: Edward Elgar Publishing Limited 2014
19. Mack M. *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*. Geneva: International Committee of the Red Cross 2008
20. Melzer N. *International Humanitarian Law: A Comprehensive Introduction*. Geneva: International Committee of the Red Cross 2016
21. Melzer N. *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*. Geneva: International Committee of the Red Cross 2009
22. Newton M., May L. *Proportionality in International Law*. Oxford: Oxford University Press 2014
23. Romer J. *Killing in a Gray Area between Humanitarian Law and Human Rights: How Can the National Police of Colombia Overcome the Uncertainty of Which Branch of International Law to Apply?* Uelzen: Springer 2010
24. Sandoz Y., Swinarski C., Zimmermann B. (eds). *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: International Committee of the Red Cross 1987
25. Sassòli M. *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*. Cheltenham: Edward Elgar Publishing Limited 2019
26. Sivakumaran S. *The Law of Non-International Armed Conflict*. Oxford: Oxford University Press 2012
27. Solis G. D. *The Law of Armed Conflict: International Humanitarian Law in War*. Cambridge: Cambridge University Press 2010
28. Stevenson A. *Oxford Dictionary of English*. 3d Edition. Oxford: Oxford University Press 2010
29. Van Engeland A. *Civilian or Combatant? A Challenge for the Twenty-First Century*. Oxford: Oxford University Press 2011
30. Verri P. *Dictionary of the International Law of Armed Conflict*. Geneva: International Committee of the Red Cross 1992
31. Werle G., Jessberger F. *Principles of International Criminal Law*. 3d ed. Oxford: Oxford University Press 2014

## Journal Articles

32. Akande D. Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities. – *International and Comparative Law Quarterly* 2010/59 (1)
33. Al-Duaij N. The Volunteer Human Shields in International Humanitarian Law. – *Oregon Review of International Law* 2010/12 (1)
34. Bargu B. Bodies Against War: Voluntary Human Shielding as a Practice of Resistance. – *American Journal of International Law Unbound* 2016/110
35. Bargu B. Human Shields. – *Contemporary Political Theory* 2013/12 (4)
36. Bosch S. Targeting Decisions involving Voluntary Human Shields in International Armed Conflicts in Light of the Notion of Direct Participation in Hostilities. – *The Comparative and International Law Journal of Southern Africa* 2013/46 (3)
37. Bosch S. The International Humanitarian Law Notion of Direct Participation in Hostilities – A Review of the ICRC Interpretive Guide and Subsequent Debate. – *Potchefstroom Electronic Law Journal* 2014/17 (3)
38. Bosch S. Voluntary Human Shields: Status-Less in the Crosshairs. – *Comparative and International Law Journal of Southern Africa* 2007/40 (3)
39. Burke R. Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity. – *Journal of Conflict and Security Law*, 2011/16 (1)
40. David E., Engdahl O. Debate: How does the involvement of multinational peacekeeping force affect the classification of a situation? – *International Review of the Red Cross*, 2013/95 (891/892)
41. De Belle S.B. Chained to Cannons or Wearing Targets on Their T-Shirts: Human Shields in International Humanitarian Law. – *International Review of the Red Cross* 2008/90 (872)
42. Fleck D. The Legal Status of Personnel Involved in United Nations Peace Operations. – *International Review of the Red Cross*, 2013/95 (891/892)
43. Gilder A. The Effect of 'Stabilization' on the Mandates and Practice of UN Peace Operations. – *Netherlands International Law Review*, 2019/66
44. Gordon N., Perugini N. Human Shields, Sovereign Power, and the Evisceration of the Civilian. – *American Journal of International Law Unbound* 2016/110
45. Henderson I., Reece K. Proportionality Under International Humanitarian Law (IHL): The 'Reasonable Military Commander' Standard and Reverberating Effects. – *Vanderbilt Journal of Transnational Law* 2018/51 (3)

46. Hovsepyan E. Legality of Attacks Against Human Shields in Armed Conflict. – UCL Journal of Law and Jurisprudence 2017/6 (1)
47. Khalil M. A. Robust Peacekeeping – Not Aggressive Peacekeeping. – Proceedings of the ASIL Annual Meeting 2018/112
48. Lilly D. The United Nations as a Party to Armed Conflict: The Intervention Brigade of MONUSCO in the Democratic Republic of Congo (DRC). – Journal of International Peacekeeping, 2016/20
49. Melzer N. Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009. – International Review of the Red Cross 2008/90 (872)
50. Muller L. The Force Intervention Brigade – United Nations Forces beyond the Fine Line Between Peacekeeping and Peace Enforcement. – Journal of Conflict and Security Law, 2015/20 (3)
51. Pacholska M. (Il)legality of Killing Peacekeepers: The crime of Attacking Peacekeepers in the Jurisprudence of International Criminal Tribunals. – Journal of International Criminal Justice, 2015/13 (1)
52. Rewi L. Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States. – Melbourne Journal of International Law 2008/9 (2)
53. Saja C. Multinational Peace Operations in Armed Conflicts – Identifying the Party. – Institute for Human Rights Working Paper, 2017/1
54. Saul B. The International Protection of Journalists in Armed Conflict and Other Violent Situations. – Austrian Journal of Human Rights 2008/14 (1)
55. Schmitt M.N. Human Shields in International Humanitarian Law. – Columbia Journal of international Law 2009/47 (2)
56. Schmitt M.N. Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees. – Chicago Journal of International Law 2005/5 (2)
57. Sivakumaran S. Binding Armed Opposition Groups. – International and Comparative Law Quarterly 2006/55 (2)
58. Sivakumaran S. Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War. – International Review of the Red Cross 2011/93 (882)
59. Swiney G. The Principle of Distinction and the Realities of Modern War. – The International Lawyer 2005/39 (3)

60. Värk R. The Status and Protection of Unlawful Combatants. – *Juridica International* 2005/X
61. Velásquez-Ruiz M. A. The Principles of Distinction and Proportionality under the Framework of International Criminal Responsibility. – *International Law Revista Colombiana de Derecho Internacional* 2009/14
62. Vestner T. Addressing the Use of Human Shields. – *GCSP Strategic Security Analysis* 2019/8
63. Worster W. T. Relative International Legal Personality of Non-State Actors. – *Brooklyn Journal of International Law* 2016/ 41 (1)

### **Chapters in Books**

64. Bartolini G. Private Military and Security Contractors as ‘Persons who Accompany the Armed Forces’. – F. Francioni, N. Ronzitti (eds). *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*. Oxford: Oxford University Press 2011
65. Crawford E. Armed Conflict, International. – F. Lachenmann, R. Wolfrum (eds). *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law*. Vol. 2. Oxford: Oxford University Press 2017
66. De Mulinen F. Distinction Between Military and Civilian Objects. – C. Tomuschat (ed). *Kosovo and the International Community: A Legal Assessment*. The Hague: Martinus Nijhoff Publishers 2002
67. Dinstein Y. Distinction and Loss of Civilian Protection in International Armed Conflict. – M. D. Carsten (ed). *International Law and Military Operations*. Vol. 84. Newport: U.S. Naval War College 2008
68. Dinstein Y. The Principle of Proportionality. – K. Mujezinovic Larsen, C. G. Guldahl Cooper, G. Nystuen (eds). *Searching for a ‘Principle of Humanity’ in International Humanitarian Law*. Cambridge: Cambridge University Press 2013
69. Ezzo M. V., Guiora A. N. A Critical Decision Point on the Battlefield – Friend, Foe, or Innocent Bystander. – C. M. Bailliet (ed). *Security: A Multidisciplinary Normative Approach*. Leiden: Brill Nijhoff 2009
70. Geib R., Devaney J.G. Zealots, Victims and Captives: Maintaining Adequate Protection of Human Shields in Contemporary International Humanitarian Law. – Y. Dinstein (ed). *Israel Yearbook on Human Rights*. Vol. 47. Boston: Brill Nijhoff 2017
71. Haas J. Voluntary Human Shields: Status and Protection under International Humanitarian Law. – R. Arnold, P.-A. Hildbrand (eds). *International Humanitarian Law and the 21st*

- Century's Conflicts: Changes and Challenges. Lausanne: Editions interuniversitaires suisses – Edis 2005
72. Heintschel von Heinegg W. Asymmetric Warfare. – F. Lachenmann, R. Wolfrum (eds). The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law. Vol. 2. Oxford: Oxford University Press 2017
  73. Hellestveit C. The Geneva Conventions and the IAC/NIAC Dichotomy – K. Mujezinovic Larsen, C. G. Guldahl Cooper, G. Nystuen (eds). Searching for a 'Principle of Humanity' in International Humanitarian Law. Cambridge: Cambridge University Press 2013
  74. Henderson I., Keane P. Air and Missile Warfare. – R. Liivoja, T. McCormack (eds). Routledge Handbook of the Law of Armed Conflict. Abingdon: Routledge 2016
  75. Ipsen K. Combatants and Non-Combatants. – D. Fleck (ed). The Handbook of International Humanitarian Law. 3d Ed. Oxford: Oxford University Press 2013
  76. Khen H. M. E. Children as Direct Participants in Hostilities: New Challenges for International Humanitarian Law and International Criminal Law. – W. C. Banks (ed). New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare. New York: Columbia University Press 2011
  77. Kirchner S. Modern International Humanitarian Law. – S. R. Silverburg (ed). International Law: Contemporary Issues and Future Developments. New York: Routledge 2011
  78. McDonald A. Ghosts in the Machine: Some Legal Issues Concerning US Military Contractors in Iraq: Essays in Honor of Yoram Dinstein. – M. Schmitt, J. Pejic (eds). International Law and Armed Conflict: Exploring the Faultlines. Leiden: Martinus Nijhoff Publishers 2007
  79. Melzer N. The Principle of Distinction Between Civilians and Combatants. – A. Clapham, P. Gaeta (eds). The Oxford Handbook of International Law in Armed Conflict. Oxford: Oxford University Press 2014
  80. Nolte G. Targeted Killing. – F. Lachenmann, R. Wolfrum (eds). The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law. Vol. 2. Oxford: Oxford University Press 2017
  81. Rusinova V. Human Shields. – F. Lachenmann, R. Wolfrum (eds). The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law. Vol. 2. Oxford: Oxford University Press 2017
  82. Shrager D. The applicability of the laws of armed conflict to peacekeeping operations. – R. Liivoja, T. McCormack (eds). Routledge Handbook of the Law of Armed Conflict. Abingdon: Routledge 2016

83. Sivakumaran S. Implementing Humanitarian Norms Through Non-State Armed Groups'. – H. Krieger (ed). Including Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region. Cambridge: Cambridge University Press 2015
84. White N. D. Peacekeeping and International Law. – J. A. Koops, N. Macqueen, T. Tardy, P. D. Williams (eds). The Oxford Handbook of United Nations Peacekeeping Operations. New York: Oxford University Press 2015
85. Yang G. The Grave Breaches Regime of the 1949 Geneva Conventions: Origins, Developments and Prospects. – M. Bergsmo, C. Wui Ling, S. Tianying, Y. Ping (eds). Historical Origins of International Criminal Law. Vol. 3. Brussels: Torkel Opsahl Academic EPublisher 2015

## **Treaties**

86. Agreement between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti, Port-au-Prince 9.07.2004, e.i.f. 9.07.2004
87. Comprehensive Ceasefire Agreement between the Government of Republic of Burundi and the Palipehutu-FNL, Dar Es-Salaam 07 September 2006, e.i.f. 10 September 2006
88. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva 12.08.1949, e.i.f. 21.10.1950
89. Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva 12.08.1949, e.i.f. 21.10.1950
90. Convention Relative to the Protection of Civilian Persons in Time of War, Geneva 12.08.1949, e.i.f. 21.10.1950
91. Convention Relative to the Treatment of Prisoners of War, Geneva 12.08.1949, e.i.f. 21.10.1950
92. Convention respecting the Law and Customs of War on Land, The Hague 18.10.1907, e.i.f. 26.01.1910
93. Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II), Geneva 28.06.1977, e.i.f. 07.12.1978
94. Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), Geneva 08.06.1977, e.i.f. 07.12.1978
95. Rome Statute of the International Criminal Court, Rome 17.07.1998, e.i.f. 01.07.2002



## Jurisprudence

96. *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for an Advisory Opinion)*, Written Comments of the Kingdom of the Netherlands, International Court of Justice, 17.07.2009
97. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgement, I.C.J. Reports 2004, p. 12
98. *Case of the Santo Domingo Massacre v. Colombia*, Judgement, IACtHR, 30.11.2012
99. ECtHR 27308/95, *Demiray v Turkey*, 21.11.2000
100. ICTR ICTR-96-4-T, *Prosecutor v. Jean-Paul Akayesu*, Judgement, 2 September 1998
101. ICTY ICTY-94-1, *Prosecutor v. Dusko Tadic a/k/a "Dule"*, Decision, 2 October 1995
102. ICTY IT-03-68-T, *Prosecutor v. Naser Oric*, Judgement, 30 June 2006
103. ICTY IT-95-14-A, *Prosecutor v. Tihomir Blaskic*, Judgement, 29 July 2004
104. ICTY IT-95-14/2-A, *Prosecutor v. Dario Kordic and Mario Cerkez*, Judgement, 17 December 2004
105. ICTY IT-95-16-T, *Prosecutor v. Zoran Kupreskic et al*, Judgment, 14 January 2000
106. ICTY IT-95-5-I, *The Prosecutor of the Tribunal against Radovan Karadzic, Ratko Mladic*, Initial Indictment, 24.07.1995
107. ICTY IT-95-5/18-AR73.9, *Prosecutor v. Radovan Karadzic*, Public Decision on Appeal from Denial of Judgement of Acquittal for Hostage-Taking, 11.12.2012
108. ICTY IT-98-30/1-T, *Prosecutor v. Miroslav Kvocka et al.*, Judgement, 2 November 2001
109. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136
110. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226
111. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 803
112. SCSL SCSL-04-16-T, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused)*, Judgement, 20 June 2007
113. Supreme Court of Israel HCJ 769/02, *Public Committee v. Government of Israel (Targeted Killings)*, Judgement, 13 December 2006
114. WCS BiH 1st Inst. X-KR-03-16, *Prosecutor v. Dragole Paunovic*, Verdict, 26 May 2006

115. WCS BiH 1st Inst. X-KR-05-51, *Prosecutor v. Dragan Damjanovic*, Verdict, 15 December 2006
116. WCS BiH 1st Inst. X-KR-07/442, *Prosecutor v. Kujundzic Predrag*, Verdict, 30 October 2009
117. WTO WT/DS217/ARB/BRA, *United States – Continued Dumping and Subsidy Offset Act of 2000*, Decision by the Arbitrator, 31.08.2004
118. WTO WT/DS257/AB/R, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, Report of the Appellate Body, 17.02.2004
119. WTO WT/DS285/AB/R, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, 20.04.2005

### **Documents of international organizations**

120. International Criminal Court. Report on Preliminary Examination Activities 2013, 25.11.2013
121. UN Human Rights Council (UNHRC), Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1, Addendum : The human rights situation in the Occupied Palestinian Territory between 12 June and 26 August 2014, including the escalation in hostilities between the State of Israel and Palestinian armed groups in Gaza, 26 December 2014, A/HRC/28/80/Add.1
122. UN Secretary General (UNSG), Fifteenth Progress Report of the Secretary-General on the United Nations Observer Mission in Liberia, 23 January 1996, S/1996/47
123. UN Secretary-General (UNSG), Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, 6 August 1999, ST/SGB/1999/13
124. UN Security Council (UNSC), First Progress Report of the Secretary-General on the Situation in Sierra Leone, 12 August 1998, S/1998/750

### **Electronic resources**

125. Amnesty International, Israel - Lebanon: Out of All Proportion - Civilians Bear the Brunt of the War, 21 November 2006, AI Index: MDE 02/033/2006. Available at <https://www.amnesty.org/download/Documents/76000/mde020332006en.pdf> (27.01.2020)

126. Hays Parks W. Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces, 25 October 2005. Available at <https://www.icrc.org/data/rx/en/assets/files/other/2005-07-expert-paper-icrc.pdf> (12.02.2020)

## Non-exclusive licence to reproduce thesis and make thesis public

I, Taiia Avram \_\_\_\_\_,  
(author's name)

1. herewith grant the University of Tartu a free permit (non-exclusive licence) to reproduce, for the purpose of preservation, including for adding to the DSpace digital archives until the expiry of the term of copyright,

International Legal Regulation of Human Shields: Status, Protection and Perspectives of Legal Development \_\_\_\_\_,  
(title of thesis)

supervised by René Värk \_\_\_\_\_.  
(supervisor's name)

2. I grant the University of Tartu a permit to make the work specified in p. 1 available to the public via the web environment of the University of Tartu, including via the DSpace digital archives, under the Creative Commons licence CC BY NC ND 3.0, which allows, by giving appropriate credit to the author, to reproduce, distribute the work and communicate it to the public, and prohibits the creation of derivative works and any commercial use of the work until the expiry of the term of copyright.
3. I am aware of the fact that the author retains the rights specified in p. 1 and 2.
4. I certify that granting the non-exclusive licence does not infringe other persons' intellectual property rights or rights arising from the personal data protection legislation.

author's name  
dd/mm/yyyy

Taiia Avram  
29.04.2020