

Voluntary Human Shields in International Humanitarian Law: A Proposal for Suitable Future Regulation

An analysis of the current international humanitarian law regulation of
voluntary human shields in international armed conflict.

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DECLARATION

This thesis has not previously been submitted for a degree in this, or any other university. It is wholly my own original work and hereby also made available for photocopying and inter-library loan.



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ABSTRACT

The paper examines the international humanitarian law framework, the Geneva Conventions, the Additional Protocols thereto, and the subsequent filtration of these norms into the domestic laws and practices of states around the globe. More specifically, it looks at the status and regulation of the voluntary human shield in international armed conflicts. The current body of writing on the prevalence of voluntary human shields indicate a bifurcated application of the international laws, culminating in uncertainty for commanders during the conduct of hostilities. The paper looks at the basic principles of international humanitarian law, the prohibition on human shielding, the international law classification of a voluntary human shield, whether or not a voluntary human shield is a direct participant in hostilities, whether and how the principle of proportionality applies in cases of voluntary human shielding, whether the current regulation of voluntary human shields compliments the delicate balance sought between military necessity and humanitarian considerations, and finally looks at suggestions of a more suitable future regulation of voluntary human shields. Ultimately, the paper is a review of the current regulation with an aim to settle the uncertainty and hopefully provide clarity as to the best way forward for regulating voluntary human shields in international armed conflict.

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CHAPTER I

INTRODUCTION

Modern international armed conflicts (IAC), increasingly playing out in zones inhabited by civilians, have brought to the fore a new actor known as the voluntary human shield (VHS) which international humanitarian law (IHL) has not adequately regulated. The prevalence of this actor, especially in situations of asymmetric warfare, has brought about a growing bifurcation in expert opinion on the appropriate classification of VHSs. These VHSs have been known to guard military objectives and often constitute societies most vulnerable individuals: women and children. Whilst IHL expressly forbids the use of involuntary human shields (IHSs), the same cannot be said of VHSs as it stands at present.

(a) Research hypothesis and rationale

Less scrupulous heads of state have been known to encourage VHSs to position themselves in or near various military objectives, in an attempt to deter enemy attacks. The citizens who had acted upon such requests were lauded as patriots and were thanked for their bravery. With individuals voluntarily assuming such influential shielding positions the lines between what may be lawfully and justifiably targeted, and what is protected from attack, have been blurred. This is a dangerous ploy running counter to IHL's objective of reducing the loss of innocent lives. IHL requires those present in theatres of armed conflict to distinguish themselves as either combatants or civilians, and then having those classified as civilians removed from the scene of conflict in order to ensure their safety. However, VHSs are lured into the theatre of conflict and their exploitation is unfortunately sustained by the default protections afforded to them through IHL. VHSs are by default classified as civilians and accordingly are encouraged not to participate directly in the hostilities. Accordingly, they are further protected through the principle of proportionality against incidental harm

in the event that the enemy attacks the legitimate military objective they are shielding. If an armed force attacks the legitimate military target and harms VHSs in the process, they face potential prosecution for crimes of war in the event the harm is disproportionate to the military advantage gained. However, if the armed force in question refrains from launching the attack as a consequence of the presence of VHSs, the ploy by the opposing state becomes very effective. Therefore, notwithstanding their passive conduct during IAC, VHSs have the ability to significantly affect the outcome of war. The presence of VHSs has the potential to disturb the equilibrium sought between the interests of military necessity and humanity. If the current situation is to continue, where the status and use of VHSs is unregulated, it has the potential to undermine some of the very foundational principals of IHL. If the use of VHSs are seen to be an effective strategy, it will greatly incentivise weaker states seeking to preserve their military objectives to employ their services, even in contravention of IHL. This in turn will result in the continued prevalence of civilians in IAC and, consequently, a higher risk of collateral damage. The fact that it is IHL itself that perpetuates such an undesirous sequence of events in modern armed conflict should be cause for concern.

Experts cannot agree as to whether or not the current laws are adequate to deal with VHSs. IHL is at a want for express regulation of the prevalence of VHSs and leaves VHSs in a legal grey area in IHL. Armed forces are obliged to respect the protections afforded to VHSs or else face legal ramifications and the criticism of the international community. Real-time media coverage captures every moment of the conflict and heightens the tensions for belligerent parties having to make tough targetting decision where VHSs are implicated and risk injury. Therefore, belligerents are unable to pursue their legitimate military ends on account of the VHSs who exploit the laws of international armed conflict (hereafter LOIAC) in order to advance the cause of the shielded party. It is this outcome that is not in line with the spirit and purport of IHL.

Furthermore, VHSs are not merely limited to citizens of the country in support of which they are shielding, but also constitute citizens from other countries, sometimes even the country against whose attacks they are shielding. Where the conflict initially concerned only two nations, the practice of voluntary human

shielding has opened up IAC to all those wanting to somehow affect its outcome, whether it be for the sake of humanity or in support of another nation. This has the added effect of states deliberating whether their citizen's attempts to shield legitimate military objectives of enemy states might constitute a form of treason or alternatively justify a revocation of their citizenship.

A clear gap exists in literature on this very topic. On the one hand we have those who are essentially in favour of protecting the human shield in the event that it turns out to be an IHS. The experts on this side of the table argue that the presumption of civilian status be invoked where doubt exists, and that states should refrain from targeting human shields with the sole exception that they shield legitimate military targets, in which case the military object itself may be targeted directly. The advantage gained, it is argued, will justify the collateral loss of civilian lives which result.

On the opposite side of the debate we find those who are taking a more pragmatic, military stance. These experts argue that the shields are affecting the outcome of the conflict in ways which are sometimes more significant than the actions of actual combatants. Thus, they assert further, these shields are not typically passive civilians, who have no direct impact on hostilities. These scholars argue that VHSs should at least be discounted during the proportionality assessment, a proposal which was not received with much enthusiasm. It is also argued that these shields should be considered to be participating directly in the hostilities.

A consequence of the uncertainty surrounding the VHS is that the law seems to act after the fact, which means combatants may legitimately think they have acted within the boundaries of what is allowed, and then later face prosecution for the targeting decisions which they have taken. It is necessary that the law be as unequivocal as possible in order for belligerents to conduct themselves in accordance with international law.

(b) Research limitations and rationale

i. International armed conflict

The thesis will be confined to IAC and the effect VHSs had been reported to have on the outcome of these conflicts. An IAC is a conflict between two opposing nation-states. The rationale for this limitation is the fact that the laws regulating IACs are far more settled and uncontroversial than that which apply to non-IAC. It is only under IAC that we find a variety of defined actors who are present at times of conflict, and with an increased amount of non-state actors becoming involved, there exists a need for IHL regulation¹. These new actors need to be classified as either civilian or combatant, as it is vital in determining whether or not a VHS is targetable, whether or not a VHSs may target other combatants, and what happens to them upon capture by enemy forces.

The differences between IAC and non-IAC are too many to mention in a single LLM and, accordingly, time would be better applied to a focused study of the prevalence of VHSs in IAC. States are more likely to accept a practice in IAC and in so doing greater uniformity is most likely to emanate from a development here, which then might trickle down and find application in non-IAC.

ii. Voluntary human shields

A further limitation to this study is that the shields in question are those who act voluntarily as opposed to those who act under duress or force. The latter is strictly prohibited under IHL. Moreover, there are two types of VHSs: the VHSs proper, and what I refer to as 'proximity shields'. The thesis will look only at VHSs proper, that is, those who freely take up shielding positions in front of legitimate military objectives. Thus, the thesis at its broadest concerns the status of VHSs in IAC.

¹ Cherif Bassiouni M 'The new wars and the crisis of compliance with the law of armed conflict by non-state actors' (2008) 98 *The Journal of Criminal law and Criminology* 711 720-743.

(c) The aim of the paper

This paper studies the relevant principles in order to highlight not only the bifurcation in expert opinion, but also the weaknesses in the arguments raised by both schools of thought. The study will allow for a thorough and informed analysis of the various expert proposals as to how IHL could alleviate the problem currently experienced with voluntary human shielding. In conclusion, this paper will seek to uncover the most appropriate future regulation of VHSs and elucidate on how this proposal is also easily implementable, both in theory and in the realities of combat.

CHAPTER II

CASE STUDIES ON THE PREVALENCE OF VOLUNTARY HUMAN SHIELDS

(a) Introduction

In an era where the news of an impending armed battle can travel around the globe in a matter of minutes, the international media has the potential to exert enormous pressure on states. Military commanders are ordinarily tasked with making tough life-or-death decisions, but the greatest source of pressure and influence, in modern warfare, must be the appreciation that in a minute of making a decision the world would be able to scrutinize every detail of such decision and its consequences.

The impact of the media is just one of the accumulating factors that leads to the current issue faced regarding VHSs in IHL, as journalists are never far from the conflict to capture the story as it unfolds. The prevalence of a highly protected non-state civilian actor such as the VHS in the midst of IAC will undoubtedly attract media attention. Accordingly, it is not difficult to envisage exactly how the presence and actions of VHSs has an influence on the decision making of military commanders and other belligerents involved in the war effort.

In the following subsection the various types of human shields will be juxtaposed to illustrate the factors that differentiate them. Thereafter, a few case studies will highlight the fact that voluntary human shielding is not a novel practice under IHL and has been utilized increasingly over the last two decades. After the case studies a summary would illuminate the commonalities uncovered in the various instances VHSs were prevalent in IAC.

(b) The various types of human shields

The term ‘human shield’ under IHL denotes a heterogeneous class of protected persons and can be either a civilian or person rendered *hors de combat* who conducts shielding activities². There are different types of human shields³. Broadly, they are classed into two categories, IHSs and VHSs.

i. Involuntary human shields

Involuntary human shielding encompasses instances where the protected person in question cannot be held liable for his or her shielding activities on the basis that it is committed without the actor having any intention to do so. The category can be further divided into two sub-categories, namely: protected persons who effectively shield a potential target through their proximity to the potential target and those who are forced to maintain a presence near a potential target through coercive means⁴.

Shielding effected through a protected person’s proximity to a potential target

A proximity shield is a person who effectively shields an object from attack through his or her presence near a potential target that causes the attacking commander to consider the possible collateral damage⁵. The proximity shield does so without being coerced and without any intention to shield. In most cases the proximity shield would not even be aware that he or she is effectively

² Artz M ‘A chink in the armor: how a uniform approach to the proportionality analysis can end the use of human shields’ (2012) 45 *Vanderbilt Journal of Transnational Law* 1447, 1459.

³ Ezzo M & Guiora A ‘A critical decision in the battlefield – friend foe or innocent bystander’ (2008) Legal studies research paper series *Department of the Navy and the University of Utah* 1,11-14 available at http://papers.ssrn.com/sol3/JelJour_results.cfm?form_name=Pip_jrl&journal_id=727504&Netw_ork=no&SortOrder=ab_title&stype=asc&lim=false (accessed 22 April 2015).

⁴ *Ibid.*

⁵ *Ibid* 12.

shielding an otherwise legitimate military objective. Proximity shielding occurs in instances where ‘a belligerent force has chosen to co-mingle with the civilian population in an effort to gain protective cover provided by a surrounding civilian population’⁶.

Shielding effected through coercing a protected person to maintain his or her presence near a potential target

The other type of IHS is a protected person taken hostage by a belligerent and forced to maintain a presence near a potential target⁷. Accordingly, the attacking commander is once again required to consider the IHS before attacking to contemplate whether any collateral damage would be justified in the circumstances⁸.

ii. Voluntary human shields

Voluntary human shielding encompasses instances where the protected person in question assumes a shielding position on his or her own volition. The voluntariness of the actor’s conduct of shielding an otherwise legitimate military objective gives rise to debate as to whether the actor should be considered as a direct participant in hostilities and, accordingly, be stripped of his or her protection against attack. Furthermore, the voluntary conduct of placing himself or herself near the conflict also raises questions as to whether the principle of proportionality should be applied in instances where VHSs are incidentally harmed during strikes on legitimate military objectives.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid 13.

A voluntary human shield takes up a shielding position without any form coercion and is also fully aware of the effect his or her presence, in the vicinity of a potential target, might have⁹. The VHS is free to choose whether or not to shield. In the event of the VHS opting to assume a shielding position, he or she retains the freedom to cease such activity whenever he or she pleases.

The VHS willingly assumes a shielding position by deliberately placing himself or herself between two armed forces with an aim to deter or delay potential attacks on military objectives or before a civilian or civilian objective in order to bolster its protection against attack. As the VHS is responsible for the current controversy in IHL, the actor will be the primary focus of this thesis.

(c) Instances where voluntary human shields have been encountered in international armed conflict

i. 1997 – Iraq: voluntary human shields used to deter US military aggression

On the 14th of November 1997 CNN reported that Iraqi leaders refused to adhere to the demands of the United Nations to allow the US weapons inspectors to perform their searches on suspected weapon sites¹⁰. Instead, the inspectors were being expelled by the Iraqi officials. As the tensions between the two countries increased, media reports began mentioning how ‘thousands of Iraqis were volunteering to act as human shields throughout the country’¹¹ in an attempt to deter any possible US military aggression.

The shields were strategically placing themselves in and around industrial complexes and factories, as well as around the presidential palace of Saddam

⁹ Ibid.

¹⁰ “Clinton: Iraq expulsion order 'unacceptable'” *CNN World News* 13 November 1997 available at <http://edition.cnn.com/WORLD/9711/13/iraq.expel3/index.html> (accessed 22 April 2015).

¹¹ ‘Iraqis volunteering as human shields’ *CNN World News Special* 14 November 1997 available at <http://edition.cnn.com/WORLD/9711/14/iraq.al.sahhaf.presser/> (accessed 22 April 2015).

Hussein, 'vowing to put their lives on the line to prevent an attack'¹². Distressingly, the shields constituted mostly women and children, society's most vulnerable. Perhaps what was even more distressing is the observation that 'popular committees' were being proliferated with the purpose of deploying further VHSs¹³.

On the 20th November 1997, BBC News published an article, after the human shielding efforts subsided, stating that Saddam Hussein had thanked those who voluntarily assumed shielding positions around objects they felt were targets of potential US air strikes¹⁴. It was further mentioned that the Iraqi citizens had 'won the satisfaction' of their leader¹⁵. Accordingly, the 20th November was to be commemorated as the 'Day of the people'¹⁶, to recognise the day on which the 'Iraqis achieved victory over the enemies'¹⁷.

ii. 1999 – NATO's Kosovo campaign

The 9th of April 1999 would become arguably the most well-known instance where VHSs were deployed in an IAC. During NATO's Kosovo campaign thousands of Serbians placed themselves on bridges to prevent the locations from being targeted and destroyed by the NATO allied forces¹⁸ that consisted of 19 NATO member states¹⁹. The aggression from the NATO allied forces came as a result of alleged human rights violations by the then Serbian military leader Slobodan Milosevic, and a desire of the international community to put a

¹² Ibid.

¹³ Ibid.

¹⁴ 'Saddam thanks human shields; announces a day of victory' *BBC News World* 20 November 1997 available at <http://news.bbc.co.uk/2/hi/world/monitoring/33345.stm> (accessed 22 April 2015).

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Bouchie De Belle S 'Chained to canons or wearing targets on their T-shirts: Human shields in international humanitarian law' (2008) 90/872 *International Review of the Red Cross* 883, 884.

¹⁹ "15 years on: Looking back at NATO's 'humanitarian' bombing of Yugoslavia" *RT News* 24 March 2014 available at <https://www.rt.com/news/yugoslavia-kosovo-nato-bombing-705/> (accessed 21 September 2015).

stop thereto²⁰. The campaign also marked the first time NATO had used force without UN Security Council approval²¹.

It was reported that Milosevic was oppressing the Albanian inhabitants of Serbia and this sparked NATO allied forces to intervene in an attempt to prevent a repeat of the ethnic cleansing atrocities that were encountered under the Nazi regime in Germany²².

Among those partaking in the shielding activities were Serbian politicians, encountered at a rock concert being staged on the Brankov Bridge near the city of Belgrade²³. The town of Novi Sad to the north of Belgrade was also reported to have had VHSs performing similar shielding acts²⁴.

The citizens formed themselves into chain-like formations on these key bridges. Whilst these particular bridges in question ended up not being the target of attacks, other installations such as power lines, a fuel depot not too far from Belgrade, and Yugoslavia's only car factory, were bombed over the same weekend²⁵.

On the 13th of May 1999 during another strike in the Kosovo campaign the NATO forces 'accidentally' killed an estimated 80 civilians in a single bombing²⁶. The raid took place in the village of Korisa and was allegedly focused on a military compound with military objectives in the area²⁷. The NATO forces, however, had allegedly not been aware of the ethnic Albanian refugees that were also in the vicinity. It was reported that NATO officials had subsequently established the refugees were 'invited' into the area where the military objectives were stationed by the Serbian forces, with an aim to use their

²⁰ 'Serb atrocities in Kosovo reported as NATO resumes air strikes' *The Guardian*, 27 March 1999 available at <http://www.theguardian.com/world/1999/mar/27/balkans17> (accessed 2 June 2015).

²¹ Ibid.

²² Ibid.

²³ 'Human chains guard NATO targets' *BBC News* 9 April 1999 available at <http://news.bbc.co.uk/2/hi/europe/314953.stm> (accessed 20 April 2015).

²⁴ Ibid.

²⁵ Ibid.

²⁶ 'Once Again, NATO Admits Accidental Bombing Of Civilians' *The Chicago Tribune* 16 May 1999 available at http://articles.chicagotribune.com/1999-05-16/news/9905160355_1_korisa-serbian-soldiers-and-police-nato-official (accessed 2 June 2015).

²⁷ Ibid.

presence to deter attacks²⁸. An allegation that was quickly denied by the Serbian military leaders²⁹.

The two abovementioned examples, which arose during NATO's Kosovo campaign, are distinguishable from one another. Whereas the first amounts to acts of voluntary human shielding, the second does not. The reports indicate that in the second example the Albanian citizens were 'invited' into the vicinity by the Serbian military who acted with ulterior motives. Thus, it precludes any notion of voluntary human shielding. The second example more correctly constitutes an attempt at using the refugees as proximity shields. An attempt at deterring attacks which unfortunately failed on account of the adversary not being able to effectively discern the legal status of those in the vicinity due to the nature of the strike and the location of the target.

The juxtaposing of these two examples serves to illustrate how it is sometimes difficult to verify the legal status of certain actors present during IAC. This is the rationale behind a presumption favouring a protected status being granted to any actor encountered on the battlefield when it is unclear what exact legal status they have under IHL. Any regulation of the prevalence of VHSs will have to account for the need for objectively verifiable factors indicating that the actor in question is indeed a VHS.

iii. 2011 – Libya: Gaddafi calling on citizens to shield his presidential compound against attack

In an article published by World Bulletin on the 19th of March 2011 it was reported that thousands of Libyans had made their way to the 'fortified' Bab Al-Aziziyah compound of their leader Muammar Gaddafi³⁰. The citizens were coming together with the purpose of shielding their leader from possible

²⁸ Ibid.

²⁹ Ibid.

³⁰ 'Thousands of Libyans packed into Muammar Gaddafi's heavily fortified Tripoli compound on Saturday to form a human shield against possible air strikes by allied forces' *World Bulletin* 20 March 2011 available at <http://www.worldbulletin.net/servisler/haberYazdir/71350/haber> (accessed 20 April 2015).

airstrikes by Allied forces. As in the case of Iraq, these individuals constituted the most vulnerable members of society.

A 10 year old boy named Mahmoud was reportedly on the scene acting as a shield to 'protect' the Libyan leader³¹, whereas another child among the many reported to be on the scene, brandished 'a toy rifle with a flashing barrel'³². A retirement fund employee aged 27 was also recorded being there with her whole family to protect the country and leader, and did so whilst holding her six month old baby in her arms³³. Numerous other women with babies were reportedly also involved in the shielding campaign³⁴.

Whilst most raised their voices in support of the leader, and proclaimed that they would die for their country, it was also believed that some had already lost their lives during a bombing of the Bab Al-Aziziyah complex³⁵. The Libyan leader responded to this by transporting more human shields from 'every part of the civilian population' in an attempt to ward off further attacks. This turned out to be an effective strategy, as it led to the Ministry of Defence abandoning an attack 'after spotting civilians in the vicinity of a facility targeted in a second attack on the compound'³⁶. It was also reported that Muammar Gaddafi had children taken out of schools to act as human shields, and he also relocated certain tanks and heavy equipment to residential areas in order to 'preserve its firepower'³⁷.

³¹ Ibid.

³² 'Libya: Gaddafi's 'voluntary' human shields in good voice' *The Telegraph* 21 March 2011 available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8396464/Libya-Gaddafis-voluntary-human-shields-in-good-voice.html> (accessed 20 April 2015).

³³ 'Thousands of Libyans packed into Muammar Gaddafi's heavily fortified Tripoli compound...' *World Bulletin*.

³⁴ 'Libya: Gaddafi's 'voluntary' human shields in good voice' *The Telegraph*.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

iv. 2014 – Israel vs Palestine: International activists called upon to shield hospitals

The media once again reported instances where foreign nationals voluntarily assumed human shielding roles³⁸. This time the volunteers placed themselves in the Al Shifa Hospital, after a call for help was made at a press conference by an executive director of the hospital asking for activists to occupy the building in an attempt to ward off Israeli air strikes³⁹. The Israeli occupation had targeted hospitals in the region, and have since completely destroyed a hospital⁴⁰. Another hospital has been rendered unusable, whilst at least six others have been severely damaged⁴¹.

Eight foreign activists agreed to stay in the hospital and ‘constantly move between wards and departments to provide maximum protection’⁴² on a shift basis⁴³. The activists were from the United States, the United Kingdom, New Zealand, Australia, England, Spain, Sweden and Venezuela⁴⁴. No reason was provided for the attacks experienced at the hospital, and it was stated that ‘there are no weapons or Hamas members in the hospital’ as the hospital was exclusively attending to the needs of patients undergoing rehabilitative procedures⁴⁵.

The use of VHSs to enhance the already protected status of civilians and civilian objectives have no impact on the outcome of the conflict in question. Destruction of civilian property and the killing of civilians is superfluous and therefore unlawful. The legal status of a VHS would, accordingly, be influenced by the status of the objective they are shielding. VHSs shielding a civilian or civilian

³⁸ American among volunteer human shields at Gaza hospital *McClatchy DC* 13 July 2014 available at <http://www.mcclatchydc.com/2014/07/13/233190/american-among-volunteer-human-shields-at-gaza-hospital.html> (accessed 20 April 2015).

³⁹ *Ibid.*

⁴⁰ ‘Netanyahu targets Gaza hospitals: Internationals volunteer as human Shields to protect Shifa Hospital from Israeli attacks’ *Global Research News* 25 July 2014 available at <http://www.globalresearch.ca/netanyahu-targets-gaza-hospitals-internationals-volunteer-as-human-shields-to-protect-shifa-hospital-from-israeli-attacks/5393301> (accessed 20 April 2015).

⁴¹ *Ibid.*

⁴² ‘Netanyahu targets Gaza hospitals’ *Global Research News*.

⁴³ ‘American among volunteer human shields at Gaza hospital’ *McClatchy DC*.

⁴⁴ ‘Netanyahu targets Gaza hospitals’ *Global Research News*.

⁴⁵ ‘American among volunteer human shields at Gaza hospital’ *McClatchy DC*.

objective would not cause any controversy: it is merely a reinforcement of an otherwise already protected status afforded to the shielded party or objective. However, a problem arises the moment a VHS shields a legitimate military objective. The legitimate military objective is immune from attack for as long as the number of VHSs in its vicinity is substantial to bring into question the morality of the attack. Therefore, it is notable that, depending on the legal status of the object being shielded, certain forms of voluntary human shielding are lawful, whilst others are unlawful.

(d) Inferences regarding the use of voluntary human shields as gathered from the case studies

The single most crucial inference to be drawn from the above cases is that the use of a VHS is not a novel practice, and unlikely to fall into disuse. Thus, it raises the question as to why, considering the debate surrounding these actors, something more deliberate has not been done to effectively regulate the prevalence of VHS in a manner that comports to the objectives of IHL. It is also fairly easy to make the argument that the use of VHSs will continue for as long as the status quo remains ambivalent. In asymmetric warfare, where the one party's military prowess is significantly larger and stronger in terms of numbers and weaponry, the use of VHSs is a simple, yet effective ploy through which the weaker party can keep the adversary at bay.

An analysis of the above case studies will reveal certain similarities that serve to indicate the fundamental characteristics of a VHS. Once we can formulate a clearer idea of what a VHS is, what purpose the VHS serves, and where we might likely encounter VHSs, an appreciation can be had of what the appropriate legal regulation of the VHS will necessarily have to entail.

The case studies revealed the following:

1. In each and every instance the human shields were used by a party expecting an imminent attack, one which they are not able

to successfully defend using their own armed forces. This strengthens the argument that voluntary human shielding will almost certainly occur in conflicts characterised by asymmetric warfare, where there are:

... tactics employed by states and non-state groups who strive to strike weak points in the social, economic, and political structures of military superior nations or forces in an effort to avoid direct confrontation with these stronger forces. Asymmetric warfare encompasses “unorthodox, indirect, surprising, [unlawful] or even ‘unthinkable’ methods” of challenging the military dominance of other nations⁴⁶.

Enemy forces are not afraid to deploy VHSs in an effort to secure an advantage over their far-superior adversaries⁴⁷. Such tactics pose a dilemma to the opposing commanders who are to make a tough decision: ‘refrain from attacking (or attack under extremely restrictive rules of engagement) certain targets, therefore risking degraded military effectiveness, or attack the targets effectively and risk collateral damage’⁴⁸.

2. In most of the cases, individuals assumed the protective shielding positions on the strength of their own volition, that is, their presence in front of a potential target is based upon their decision or desire to be there, and they were free to remove themselves from the vicinity whenever they wanted. It is, thus, distinguishable from instances of involuntary human shielding, where a party to an armed conflict uses force to place and keep an individual in front of a potential target.

⁴⁶ Ezzo & Guiora ‘A critical decision in the battlefield’ 20-21 who cites Lambakis S, Kiras J & Kolet K ‘Understanding —Asymmetric Threats to the United States’ *National Institute for Public Policy* (2002).

⁴⁷ Ibid 14.

⁴⁸ Ibid.

3. The VHSs were all placing themselves at risk in the belief that they were performing a necessary good, whether it be supporting their leader from 'unwarranted aggression', or coming to the aid of humanity in general. Both instances can be seen as causes that will likely have individuals more readily assume the risk of death or injury.
4. It is also discernible that there was a grave risk to the lives of the VHSs. This raises the need for some form of regulation to ensure these shields are comprehensively informed and appreciative of the risks involved. It is debatable whether the VHSs in question are aware of, or indeed appreciate the very real risk they are undertaking. This is especially so in the instances where children were found assuming shielding positions.
5. Probably of greatest concern is the fact that in all these instances women and children were seen performing shielding functions. Children, in most domestic legal systems, are generally considered unable to make decisions that are life-threatening without a parent or guardian's assistance. Considering that an attacking party will theoretically be less inclined to target a site surrounded by children it makes their presence highly valuable to those wishing to employ human shielding tactics. Children are also soft targets and easier to persuade to take up a shielding position. Accordingly, any regulation of VHSs will have to provide an adequate disincentive to those allowing VHS to occupy sites, and those guardians taking their children with them when they act as VHSs.

Generally, an appreciation must be had for the fact that VHSs as a group of actors under IHL have a specific goal of preventing, or at least delaying, potential attacks. They have been very successful in deterring planned attacks which is possibly why we are witnessing that the VHSs are also becoming

increasingly organised and resourceful. Reports of organisations being established with the very purpose of recruiting and deploying more VHSs is a cause for concern, given the legal grey area which they inhabit. Not only does this mean that more people could be placed at risk and increased tensions arise between the States involved, but the exploitive tactics that motivate their activities runs contrary to the objectives of IHL.

The prevalence of VHSs is not only a troublesome issue in international law, but of late certain states, such as the US for example, have debated whether or not the actions of their citizens jetting off to support enemy states through voluntary human shielding amounts to treason⁴⁹. The influx of foreign nationals desirous of serving as VHSs also raises the question of who owes these individuals a duty of protection, and whether their actions invoke state responsibility. Additionally, the ability of foreigners to travel to a war zone with the intention of affecting its outcome stands in direct contrast to the IHL objective of removing protected persons from the battlefield. Just where will IHL draw the line between the fundamental rights of individuals and the need to fulfil its purpose of effectively regulating IAC? The practice of voluntary human shielding strides the fine margins in IHL and asks questions that IHL has not been answering effectively. Ultimately, an internationally acceptable and respected regulation is required to ensure states uniformly approach the practice of voluntary human shielding, and see to it that any contravention of the agreed protocols is met with the necessary and suitable sanction. Of course, if change is not effected then the status quo will continue and it is necessary to cogitate whether these actions and outcomes are in line with the purpose and goals IHL seeks to achieve.

Notwithstanding the deductions made from the respective cases where VHSs were encountered, it is still argued by certain experts that the current LOIAC are in fact adequate to deal with their presence. The strength of the argument rests on the observation that the mere fact that international conventions do not expressly deal with the actor in question does not necessarily mean the current

⁴⁹ 'Senator wants human shields punished' *Fox News* 5 March 2003 available at <http://www.foxnews.com/story/2003/03/05/senator-wants-human-shields-punished.html> (accessed 22 July 2015).

laws cannot be interpreted in such a way so as effectively regulate their presence⁵⁰. As such, it remains necessary to consider the laws at present and proceed on such foundation.

(e) Conclusion

Having uncovered the general characteristics of VHSs, the effect they have on the outcome of IAC and how frequently they are encountered, an analysis of the current international legal framework's regulation of the actor will be useful to evaluate arguments suggesting that the current laws are indeed adequate to regulate VHS in IAC.

⁵⁰ Schmitt M 'Human Shields in International humanitarian Law' (2009) *Columbia Journal of Transnational Law* 316.

CHAPTER III

THE PROBLEMS WITH THE CURRENT INTERNATIONAL HUMANITARIAN LAW REGULATION OF VOLUNTARY HUMAN SHIELDS

As illustrated by the previous chapter on the instances where VHSs were encountered in IHL, the presence of VHSs is not a new phenomenon in IAC. Accordingly, ample time has passed within which to assess the characteristics of VHSs, their role in armed conflict and whether IHL, in light of the findings, adequately, if at all, deals with the VHSs prevalence. This chapter will commence with a study of the basic principles of IHL to garner an appreciation for the underlying values that inform the LOIAC. Without understanding the fundamental purpose of the legal framework, no assessment of the adequacy of the rules, or lack thereof, pertaining to VHSs, can be made. Thereafter, an evaluation of the current IHL prohibition on involuntary human shielding will follow and illustrate how, despite arguments to the contrary, the current prohibition does not extend to VHSs. Without an express regulation of VHSs, it follows that the general rules will apply to VHSs. An evaluation of the current primary legal status of the VHS in IHL will follow and set out the VHS's protections during IAC. It will illustrate that the VHS will be considered a civilian under IHL. Considering the extensive set of protections afforded to those with civilian status, it is easy to comprehend exactly just how effective the VHS can be in immunising a potential target from attack. Thereafter, it will be proved how the VHS does not satisfy the direct participation in hostilities test (hereafter DPH), and how it further entrenches the notion that the current laws do not adequately regulate the presence of VHSs. Then, an analysis will follow of how the proportionality test will be applied where the victim is a VHS. It will illustrate how the application of the proportionality test further incentivises the use of VHSs. Finally, the chapter will conclude with an illustration of how the abovementioned issues gives rise to an argument that the current IHL regulation of VHSs tips the humanity-necessity balance too much in favour of humanitarian considerations. Thereby demonstrating the need for a reform in

IHL's regulation of VHSs. Proposals for such reform will then be discussed in the next chapter.

(a) The basic principles of international humanitarian law

In order to interpret the rules of IHL contained in the numerous conventions and protocols, consideration must be given to the principles that underlie the IHL framework. It is easier to ascertain what the law provides when you know what it aims to do, and accordingly, the purpose of IHL should always be kept in mind⁵¹. The principal goal of the architects of the IHL framework was to reduce the harsh effects of war. To this end they developed certain fundamental principles. The principles serve as a lens for the appropriate interpretation of IHL and will enable us to distil if, and how, the current IHL regulates VHSs in IAC⁵². What follows is an analysis of the fundamental principles of particular relevance to the subject matter: the principle of military necessity, humanitarian considerations and the distinction between combatants and civilians⁵³.

i. Military necessity

Winning the war is a 'legitimate consideration' for states involved in IAC, notwithstanding the advent of IHL and the consequent limitations imposed on the methods and means of warfare. States are permitted, within the bounds of the LOIAC, to engage their military forces with an aim to defeat the enemy. The 1868 St Petersburg Declaration states that 'the only legitimate object which States could endeavour to accomplish during war is to weaken the military force of the enemy'⁵⁴. Therefore, the single, primary objective of any state party to an

⁵¹ Richemond-Barak D 'Nonstate Actors in Armed Conflicts: Issues of Distinction and Reciprocity' available at <https://www.idc.ac.il/publications/files/513.docx> (accessed 19 August 2015).

⁵² Ibid.

⁵³ 'Basic principles of International Humanitarian Law' *International Humanitarian Law Resource Centre* 30 October 2013 available at <https://www.diakonia.se/en/ihl/the-law/international-humanitarian-law-1/introduction-to-ihl/principles-of-international-law/> (accessed 1 April 2015).

⁵⁴ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868 available at <https://www.icrc.org/applic/ihl/ihl.nsf/52d68d14de6160e0c12563da005fdb1b/dbe0afb2065e0d>

armed conflict is to weaken the military force of the enemy. This is to be realised through means and methods that fall within the limits prescribed by IHL.

As a result, commanding officers are limited to do only that which is necessary to overcome the enemy. Accordingly, attacks that are limited to, and made pursuant to this purpose, will be lawful and justifiable⁵⁵. In the appropriate circumstance military necessity can be raised as a justification and have any one, or more, of the following consequences: firstly, it could serve to negate the operations of a principal rule of IHL where military necessity is expressly mentioned as an exception, and permit a violation of the principal rule to the extent required in the circumstances; secondly, It could serve to negate wrongfulness when an otherwise unlawful act has been committed; finally, it could serve to reduce, or totally exclude, the blameworthiness of an offender who has committed an otherwise unlawful act⁵⁶.

Dinstein provides a realistic view of armed conflict when he states that '[w]ar is not a chess game' and 'entails human losses'⁵⁷. It requires that certain harmful and destructive acts be conducted and therefore 'humanitarian considerations cannot be the sole legal arbiters'⁵⁸. In other words, the regulation of any aspect of armed conflict must not be too idealistic, or make the observance of its rules unrealistic. Generally, IHL demands strict adherence and the injuring or killing of a protected person, or the destruction of protected objects will be met with serious repercussions. However, albeit in very limited circumstances, IHL does permit certain 'adverse and even terrible consequences'⁵⁹ to protected persons and objects. These limited exceptions occur where the violation of an IHL norm is justified by considerations of military necessity. Ultimately, IHL strives to have rational soldiers engaging in warfare where every act is 'executed professionally and with the optimal resource mobilisation, and directed towards a clearly

[7ec125641e0031f38c?OpenDocument](#) (accessed 19 August 2015) [Hereafter *The St. Petersburg Declaration*].

⁵⁵ Hampson F 'Military Necessity' Crimes of War Project available at <http://www.crimesofwar.org/a-z-guide/military-necessity/> (accessed 1 April 2015).

⁵⁶ Hayashi N 'Requirements of military necessity in international humanitarian law and international criminal law' (2010) *Boston University International Law Journal* Vol. 28 39; 49-50.

⁵⁷ Dinstein Y *The conduct of hostilities under the law of international armed conflict* (2004) 1 ed (Cambridge University Press: Cambridge) 18.

⁵⁸ *Ibid.*

⁵⁹ Hampson 'Military Necessity' Crimes of War Project.

defined, strategically sound and reasonably attainable military goal'⁶⁰. Thus, in order for a belligerent to be relatively certain that he is acting within the bounds of military necessity, it is prudent that he or she obtain all the relevant information possible in the circumstances and conduct himself or herself accordingly⁶¹. Commanding officers are given leeway to take into consideration the practicalities that confront them in the midst of a military combat situation.

The nature of IAC and how this affects the decision making of combatants are factors considered by judicial officers when having to adjudicate on matters concerning provisions containing within them the exceptional military necessity clause. The judicial officer would assess the substance of these provisions and apply them to the circumstances with an aim to establish whether the exception is applicable, and whether it permits the violation of the principal rule⁶². It is noteworthy that a belligerent cannot invoke military necessity where the purpose behind the measure embarked upon was itself prohibited under IHL⁶³. In appropriate cases military necessity can be used as a justification by a state to 'apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money'⁶⁴. Or, as Hayashi puts it: 'military necessity exempts a measure from certain specific rules of international humanitarian law prescribing contrary action to the extent that the measure is required for the attainment of a military purpose and otherwise in conformity with that law'⁶⁵. This is subject to the laws of war which necessarily means: firstly, a belligerent state may act in accordance with the dictates of military necessity provided it falls within the perimeters of the law of IAC; secondly, certain acts expressly prohibited by the laws of IAC contain a singular exception relative to military necessity⁶⁶; lastly, if an act is prohibited

⁶⁰ Hayashi 'Requirements of military necessity' 43. Hayashi makes exemplary the conduct of a Prussian commander who was known for his high moral standards during armed conflict.

⁶¹ Ibid 63.

⁶² Ibid 42.

⁶³ Ibid 87.

⁶⁴ *United States v List* (The Hostage Case), Case No. 7 (16 February 1948) 1230-1319, 1253 available at

http://www.worldcourts.com/ildc/eng/decisions/1948.02.19_United_States_v_List1.pdf

(accessed 19 August 2015).

⁶⁵ Hayashi 'Requirements of military necessity' 59.

⁶⁶ Example being article 23(g) of the Hague Regulations of 1899/1907 by which it is forbidden: To destroy or seize the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war. Military necessity is also relevant to certain actions which

and no exception is attached to it, then it must be inferred that the framers have already considered military necessity and thought it well not to constitute it as a valid justification for violating the norm⁶⁷. Allowing it to apply generally across all of IHL would 'risk making the law unduly volatile and subservient to the exigencies of war'⁶⁸.

Now that a backdrop to the application of the exceptional military necessity clause have been established, a synopsis of the requirements for the successful invocation of the principle can be set out. According to Hayashi⁶⁹, in order to invoke exceptional military necessity there are four requirements that need to be satisfied in the circumstances⁷⁰, namely:

1. The action in the circumstances was undertaken for a military purpose⁷¹;
and
2. The action was essential to the achievement of the said military purpose⁷². This means that:
 - 2.1 The action was vital to the achievement of the military purpose⁷³;
 - 2.2 That, of those actions that were reasonably available in the circumstances, the action in question was the least harmful⁷⁴; and

are 'presumed unlawful' unless and until they can be justified by 'imperative military necessity'. The rules therefore allow for a deviation from the norm, making otherwise unlawful acts lawful based on the action in question being pursued in the name of military necessity, and only to the extent mandated by military necessity. Once it can be said that the deviation is no longer a military necessity then the rule reverts back to its principal form. If there is no actual military necessity requiring the commission of a certain act then the exception contained in the norm becomes inoperative but that is not to be taken as declaring the conduct unlawful without more. Due to the fact that these actions are presumed unlawful the burden of proof to successfully raise the exception of military necessity in these circumstances is significantly higher than under the ordinary circumstances.

⁶⁷ In such circumstances it is not possible to rely on military necessity as a justification for deviating from the norm. Otherwise the whole fabric of LOIAC would unravel. Unqualified norms of LOIAC must be obeyed in an unqualified manner even if military necessity militates in another direction.

⁶⁸ Hayashi 'Requirements of military necessity' 55-56. Hayashi also includes a list of cases which are support for this view.

⁶⁹ Ibid 62.

⁷⁰ Should any one of these requirements not be met then the measure taken was an unnecessary military action.

⁷¹ Hayashi 'Requirements of military necessity' 62.

⁷² Ibid.

⁷³ Ibid 69.

⁷⁴ Ibid 69, 74. On 74 Hayashi states that in principle military necessity becomes inadmissible as an exception if there is any one other course of action that would have been less injurious.

- 2.3 That the harm caused by the action in question is not disproportionate to the military advantage it would achieve⁷⁵; and
3. The military purpose used to justify the action in question must in itself be in line with the tenets of IHL⁷⁶; and
4. The action in question must itself be permitted under IHL⁷⁷.

As seen from the proposed criteria for establishing whether a military force has acted under the tenets of military necessity, there is always consideration given to military objectives of states in order to ensure that a balance is maintained between military necessity and humanitarian considerations. The regulations cannot be unrealistic and overly onerous on the militants as this could lead to violations being more frequent than actual observance - resulting in a complete failure of the system⁷⁸. On the other hand, if the laws are too scant in their protection of civilians and civilian objectives, then IHL would fail to achieve its purpose. If the balance was tipped more to the side of military necessity then we may find it hard to track the connection between the hostile act and the goal of overcoming the enemy⁷⁹. Accordingly, IHL needs to change with the times, addressing issues on both sides of the humanity-necessity balance, in order to maintain an effective equilibrium⁸⁰.

In the event that a commanding officer orders an attack on a legitimate military objective, with resultant civilian casualties or damage to civilian property, the principle of proportionality is used to determine whether the attack is lawful. The military advantage gained is balanced against the harm caused to protected persons or property, and if the advantage outweighs the harm then it is deemed

⁷⁵ Ibid 69.

⁷⁶ Ibid 62.

⁷⁷ Ibid.

⁷⁸ Reeves S & Thurner J 'Are we reaching a tipping point? How contemporary challenges are affecting the military necessity – humanity balance' (2013) *Harvard National Security Journal* 2. Available at http://harvardnsj.org/wp-content/uploads/2013/06/HNSJ-Necessity-Humanity-Balance_PDF-format1.pdf (Accessed 19 August 2015).

⁷⁹ *United States v. List* (The Hostage Case) 1230-1319, 1253-54. See also Schmitt M 'Military necessity and humanity in International Humanitarian Law: Preserving the delicate balance' (2010) 50 *Virginia Journal of International Law* 797.

⁸⁰ Schmitt 'Military necessity and humanity in International Humanitarian Law' 796.

'justified' or 'necessary'⁸¹. The larger the military advantage, the larger the collateral damage that would be justifiable, and vice versa. The International Court of Justice (hereafter ICJ) in the *Advisory Opinion on the Threat of Use of Nuclear Weapons* left open the question as to whether a State might be able to justify its use of nuclear weapons where the 'very survival of the State was under serious threat'⁸².

It has become state practice for various subjective considerations to be taken into account when determining whether a commanding officer acted in a situation where the attack in question was 'absolutely necessary'⁸³. This is due to the nature of the battlefield and the combatant's 'imperfect knowledge of where a failure to take action might lead'⁸⁴. A certain amount of discretion needs to be afforded to commanding officers regarding their judgements exercised in the heat of battle⁸⁵. Whilst the principle of military necessity imposes substantial limitations on armed forces who want to act within the bounds of the law, it also allows them to raise military necessity as a justification where it was required to win the battle⁸⁶. This conforms to the objective of 'alleviating as much as possible the calamities of war'⁸⁷ under IHL by maintaining the balance between military necessity and humanitarian considerations.

Could military necessity be used to justify harm or injury to civilians and voluntary human shields for that matter? Considering the protections afforded to civilians under IHL, an attack would not be justifiable unless the requirements of military necessity and proportionality are satisfied. A civilian is neutral and a military force stands to gain nothing from a direct attack on such person. However, where a civilian happens to be in the vicinity of a legitimate military target then his incidental death or injury might be excusable in terms of the principle of proportionality, or where applicable, an invocation of the principle of military necessity.

⁸¹ Hampson 'Military Necessity' Crimes of War Project.

⁸² *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports (1996) 226 International Court of Justice 8 July 1996 263.

⁸³ Hampson 'Military Necessity' Crimes of War Project.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *The St. Petersburg Declaration.*

ii. Humanitarian considerations

IHL's purpose of protecting 'persons who are not or no longer participating in hostilities'⁸⁸ accords well with an old latin adage that reads *dum inter homines sumus, colamus humanitatem*⁸⁹. It means 'as long as we are among humans, let us be humane'⁹⁰. To this end IHL places limits on the 'right of parties to an armed conflict to choose methods and means of war'⁹¹. Ideally, what is sought, is the reduction of 'human suffering without undermining the effectiveness of military operations'⁹². This is a realistic compromise considering the nature of IAC. The imperative for humanitarian considerations during armed conflict came about in the last century, as statesmen recognised that there is a need 'to alleviate suffering and save lives, and to treat humanely and respectfully each individual'⁹³ during conflict. The goal, ultimately, is to minimise death and destruction, and prevent the large scale atrocities that were encountered during the two world wars.

Humanitarian considerations are intended to guide belligerents along the straightest path to achieve their military objectives, whilst endeavouring to exact the least amount of injury or death to civilians and destruction to civilian property. It also recognises that certain individuals are not to be harmed, except in very limited circumstances. IHL marries both military necessity with humanitarian considerations in order to curtail the destructive nature of armed conflict. To a certain degree 'the necessities of war ought to yield to the requirements of humanity'⁹⁴ in order to enable IHL to achieve its primary goal. Various international tribunals have been tasked with finding a realistic balance between the competing interests of belligerent parties and those of the innocent

⁸⁸ 'IHL and Red Cross' available at <http://www.redcross.org.hk/rcmovement/ihl.html> (accessed 21 August 2015).

⁸⁹ This phrase is credited to Seneca a major philosophical figure of the Roman Imperial Period. For more information on Seneca see: <http://plato.stanford.edu/entries/seneca/> (accessed 5 May 2015).

⁹⁰ Ibid.

⁹¹ 'International Humanitarian Law' *The International Justice Resource Centre* available at <http://www.ijrcenter.org/international-humanitarian-law/> (accessed 14 April 2015).

⁹² Dinstein *The conduct of hostilities under the law of international armed conflict* 17.

⁹³ 'International Humanitarian Law' *The International Humanitarian Law Resource Centre*.

⁹⁴ *The St. Petersburg Declaration*.

civilian population⁹⁵. Considering the ever changing methods of warfare, this balancing process is and ought to be an on-going one. Once again it is important to stress that under IHL neither military necessity nor humanitarian considerations are paramount on their own. Instead, a balance is to be maintained. If humanitarian considerations were paramount then state military actions would be 'unrealistically restricted by burdensome regulations diminishing the likelihood of compliance'⁹⁶. IHL is not attempting the impossible by campaigning for a complete eradication of the destructive and deadly effects of war, but looks to realistically curtail it to the greatest extent reasonable⁹⁷.

It follows that the objects of legitimate attack are restricted to efforts aimed at weakening the enemy's military. Under IHL there is no allowance for barbaric means and methods of war where the consequences of attacks are not properly considered. Combatants may not fire indiscriminately or use weapons that do⁹⁸, and civilians and civilian objects are also protected⁹⁹ and may not be targeted directly¹⁰⁰. Military actions must be planned, calculated missions that are guided by the laws of IAC. Any contravention of these norms will result in convictions for war crimes.

iii. The principle of distinction

The principle of distinction enables belligerents to assess who may lawfully participate directly in hostilities, and consequently what or who, constitutes a legitimate target during armed conflict. To this end IHL distinguishes between combatants and civilians to reduce harm being caused to non-participants and the unnecessary destruction of property. The laws of IAC assigns different legal obligations and entitlements to each group respectively. One might consider combatants and their aspirations, as informants of military necessity, whereas civilians are the inspiration for humanitarian considerations. IHL seeks to

⁹⁵ Ibid.

⁹⁶ Reeves & Thurner 'Are we reaching a tipping point?' 2.

⁹⁷ Dinstein *The conduct of hostilities under the law of international armed conflict* 17.

⁹⁸ AP I Article 51(4).

⁹⁹ AP I Article 51(1).

¹⁰⁰ AP I Article 51(2).

negotiate a compromise between these two categories and their diverse interests.

Combatants are entitled to participate directly in hostilities and, if their hostile acts were performed within the bounds permitted by IHL, combatants will be immune from any civil or criminal liability for their acts committed during an armed conflict. Combatants will constitute legitimate targets for the duration of the armed conflict and for this reason they are required to actively distinguish themselves from the civilian population by wearing uniforms and fixed emblems¹⁰¹. A failure of a combatant to distinguish himself or herself as such is considered a grave violation of IHL¹⁰² and constitutes a prosecutable war crime¹⁰³.

By contrast, civilians are not permitted to participate directly in hostilities, save for instances of self-defence, and would otherwise be criminally and civilly liable for participation in the hostilities. Civilians are afforded significant protections under IHL and may not be targeted directly by any of the parties to the armed conflict¹⁰⁴. The principle of distinction 'explicitly prohibits making civilians as such the object of attack or undertaking acts or threats of violence, the primary purpose of which is to spread terror among the civilian population'¹⁰⁵. Civilians are to be actively considered and their presence taken into the equation when military operations are conducted in order to ensure as far as possible that they are not subjected to any harm¹⁰⁶. Civilian objects are also protected against direct attacks to prevent unnecessary damage to civilian property and the resultant civilian suffering. The ICRC provides the following in terms of what constitutes civilian objects:

State practice considers civilian areas, towns, cities, villages, residential areas, dwellings, buildings and houses and schools, civilian means of transportation, hospitals, medical establishments and medical units, historic monuments,

¹⁰¹ AP I Article 44(3).

¹⁰² AP I Article 85(3).

¹⁰³ The Rome Statute of the International Criminal Court July 17, 1998, 2187 UNTS 90 (entered into force July 1, 2002 pursuant to the Rome Statute art. 126) at articles 8 (2)(b)(i)-(ii); (2)(b)(iv); (2)(e)(i)-(ii); (2)(e)(iv), [hereafter The ICC Statute].

¹⁰⁴ AP I Article 51(2).

¹⁰⁵ Spieker H 'Civilian Immunity' *The Crimes of War Project* available at <http://www.crimesofwar.org/a-z-guide/civilian-immunity/> (accessed 5 May 2015).

¹⁰⁶ Protection afforded to the general civilian population in terms of AP I article 51(1).

places of worship and cultural property, and the natural environment as prima facie civilian objects, provided, in the final analysis, they have not become military objectives. Alleged attacks against such objects have generally been condemned¹⁰⁷.

If it is found that protected objects are being used for military purposes then these objects become legitimate targets¹⁰⁸. By the same means civilians lose their protection against direct attack once they start to participate directly in hostilities¹⁰⁹. Civilians who participate directly in hostilities are considered legitimate targets for the duration of their direct participation¹¹⁰. This aligns with the purpose of IHL to curb the harm caused to non-participants and those rendered *hors de combat*¹¹¹ during periods of armed conflict. At all levels of IHL it is stressed that civilians are to be protected to the greatest extent possible, taking into account the nature of warfare in modern civilisation that has 'moved from the front to populated urban environments'¹¹².

Although humanitarian considerations were not expressly mentioned in the Hague Regulations¹¹³, it subsequently has been codified in articles 48¹¹⁴, 51(2)¹¹⁵ and 52(2)¹¹⁶ of Additional Protocol I (hereafter AP I). Article 51 and 52

¹⁰⁷ 'Customary IHL Rule 9: Definition of Civilian objects' ICRC https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter2_rule9 (Accessed 21 August 2015).

¹⁰⁸ Rubinstein A & Roznai Y 'Human shields in modern armed conflicts: The need for a proportionate proportionality' (2011) 22:1 *Stanford Law & Policy Review* 93 100.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ In terms of Customary IHL Rule 47: Attacks against Persons *Hors de Combat* it is stated that 'Attacking persons who are recognized as *hors de combat* is prohibited. A person *hors de combat* is: (a) anyone who is in the power of an adverse party; (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or (c) anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape. See 'Customary IHL Rule 47: Attacks against *Persons Hors de Combat*' ICRC available at https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule47 (accessed 13 May 2015).

¹¹² Rubinstein & Roznai 'Human shields in modern armed conflicts' 94.

¹¹³ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Article 25: prohibiting "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended", is based on this principle.

¹¹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. [Hereafter AP I] article 48 provides: "[T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants.

¹¹⁵ AP I Article 51(2) states that: 'The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.'

¹¹⁶ AP I Article 52(2) states that: 'Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature,

of AP I are deemed to be so fundamental to IHL that it 'cannot be the subject of any reservation whatsoever', as this would have the effect of undermining the very purpose of IHL¹¹⁷. The Statute of the International Criminal Court (ICC) also provides that 'intentionally directing attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities'¹¹⁸, constitutes a war crime under the court's jurisdiction. Other international conventions, such as the Protocol to the Convention on Certain Conventional Weapons¹¹⁹, the Convention on Cluster Munitions¹²⁰, and the Ottawa Convention¹²¹ also contain prohibitions against targeting civilians directly¹²².

The principle of distinction has subsequently been incorporated into the military manuals of states¹²³. Remarkably, not only in the manuals of those states who were party to AP I, at the time, but also those who were not¹²⁴. The domestic legislation of numerous states also makes it a criminal offence to attack civilians

location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.'

¹¹⁷ 'Customary IHL Rule 1: The Principle of Distinction between Civilians and Combatants' *ICRC* available at https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 (accessed 21 August 2015). According to the principle of distinction the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.

¹¹⁸ ICC Statute Article 8(2)(b)(i) available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/RomeStatutEng.pdf> (accessed 21 August 2015).

¹¹⁹ United Nations, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (As Amended on 21 December 2001), 10 October 1980, 1342 UNTS 137 available at <http://disarmament.un.org/treaties/t/ccwc> (accessed 5 May 2015). [hereafter CCW] See article 2(3) of Protocol II to the CCW; article 3(2); article 3(7) of AP II to the CCW; article 2(1) of Protocol III to the CCW.

¹²⁰ In terms of the preamble of the 2008 Convention on Cluster Munitions, States came to their agreement to prohibit the use and development of cluster munitions on the basis of the basic principles of IHL, more specifically 'the rule ... that the parties to a conflict shall at all times distinguish between the civilian population and combatants'. See United Nations Convention on Cluster Munitions 30 May 2008 47713 UNTS 39 available at https://www.icrc.org/eng/assets/files/other/icrc_002_0961.pdf (accessed 18 October 2015).

¹²¹ According to the preamble of the 1997 Ottawa Convention on Anti-Personnel Mines, States Parties came to an agreement by once again focusing on the basic principles of IHL, including "the principle that a distinction must be made between civilians and combatants." See United Nations, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18 September 1999 available at <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=D4526D1EB0F4AF1241256585003DD6A1> (accessed 18 October 2015).

¹²² See 'Customary IHL Rule 1: The Principle of Distinction between Civilians and Combatants' *ICRC* available at https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 (accessed 21 August 2015).

¹²³ *Ibid.*

¹²⁴ *Ibid.*

directly¹²⁵. The principle of distinction is a fundamental theoretical underpinning of IHL, and accordingly there are numerous cases that have underlined the importance of the principle. In *Kassem*¹²⁶ the Israeli Military Court recognised the immunity from direct attack, afforded to civilians, as one of the fundamental rules of IHL¹²⁷. The principle has notably also been successfully invoked by parties to AP I against non-party states¹²⁸. In the *Nuclear Weapons case*¹²⁹ the ICJ in its advisory opinion remarked that the principle of distinction is not only a ‘cardinal’¹³⁰ principle of IHL, but also one of the ‘intransgressible principles of international customary law’¹³¹.

It is therefore clear that this principle is part of customary international law, and certainly fundamental to the goals underlying IHL. Ideally, combatants would wage war on battlefields that are removed from civilians and civilian objectives. However, in reality the battlefields are hardly ever far away from the civilian population. In fact in recent IAC the presence of civilians and civilian objects is becoming more of the norm. Consequently, we do not find an absolute prohibition against civilian casualties, and instead IHL employs the principle of proportionality to balance military necessity and humanitarian considerations. When the proportionality test is applied the following limits are taken into consideration: time, geographic location, choice of target(s) and means of attack¹³². The principle of proportionality is violated in instances where the harm caused was in excess of the military advantage gained and constitutes a war crime¹³³. The LOIAC therefore aims to have belligerents pursue their objective of weakening the military force of the enemy in a manner that ensures, as far as possible, the least amount of harm to civilians and civilian objects.

¹²⁵ Ibid footnote 11.

¹²⁶ Israel, *Military Prosecutor v. Omar Mahmud Kassem and others*, Military Court sitting in Ramallah 13 April 1969 available at <https://www.icrc.org/casebook/doc/case-study/israel-prosecutor-kassem-case-study.htm> (accessed 18 October 2015).

¹²⁷ Ibid.

¹²⁸ See ‘Customary IHL Rule 1: The Principle of Distinction between Civilians and Combatants’ ICRC available at https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 (accessed 21 August 2015).

¹²⁹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996).

¹³⁰ Ibid 78-79.

¹³¹ Ibid.

¹³² Rubinstein & Roznai ‘Human shields in modern armed conflicts’ 100.

¹³³ ICC Statute Article 8(2)(b)(iv).

Parties to an armed conflict are required to conduct their military operations in the most humane way possible, and when faced with two alternatives to choose the one which would inflict the least harm to civilians and/or civilian objects, as well as those rendered *hors de combat*. The principle of distinction being the essential factor with which to assess who, or what, is a legitimate target under the LOIAC.

(b) The prohibition against involuntary human shielding

i. The applicable provisions

The IHL prohibition on the use of ‘human shields’ is well documented in treaty law and has crystallised into customary international law by virtue of state practice¹³⁴. Geneva Convention (hereafter GC) III¹³⁵ provides under article 23, that:

No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations¹³⁶.

GC IV¹³⁷ article 28 provides:

The presence of a protected person may not be used to render certain points or areas immune from military operations¹³⁸.

AP I provides under article 12(4):

Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict

¹³⁴ ‘Customary IHL Practice Relating to Rule 97: Human Shields’ available at https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule97 (accessed 5 May 2015).

¹³⁵ ICRC, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135 [hereafter GC III] available at <https://www.icrc.org/ihl/INTRO/375?OpenDocument> (accessed 21 August 2015).

¹³⁶ Ibid article 23.

¹³⁷ ICRC, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287 [hereafter GC IV] available at <https://www.icrc.org/ihl/INTRO/380> (accessed 21 August 2015).

¹³⁸ Ibid article 28.

shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety¹³⁹.

Furthermore, AP I provides under article 51(7), that:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations¹⁴⁰.

The wording of article 51(7) of AP I is said to go to the 'heart of the prohibition by covering both the forcible movement of civilians to shields military objectives from attack as well as more subtle practices'¹⁴¹. It applies to instances where civilians are placed within the vicinity of a military objective as well as instances where military objectives are placed amidst the civilian population¹⁴². Whilst the prohibition provides protection for all protected persons under IHL (civilians and those *hors de combat*) and seemingly covers a wide variety of situations¹⁴³ it is submitted that the prohibition does not extend as far as voluntary acts of human shielding.

Involuntary human shielding is clearly reprehensible¹⁴⁴. Even a just cause might fail to make it permissible to kill an innocent civilian¹⁴⁵. An armed force's use of IHSs is an intentional risking of innocent lives in order to obtain a military advantage¹⁴⁶. It is an act that morally is not dissimilar to the armed force, itself, intentionally killing the said IHSs¹⁴⁷. Accordingly, if it is impermissible for an

¹³⁹ AP I Article 12(4).

¹⁴⁰ AP I Article 51(7).

¹⁴¹ Queguiner J 'Precautions under the law governing the conduct of hostilities' (2006) 88 *International Review of the Red Cross* 793 812.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Haque A 'Human Shields' in Frowe H & Lazar S (eds) *The Oxford Handbook of the Ethics of War* (2015) (forthcoming) 1, 3 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602577 (accessed 17 October 2015).

¹⁴⁵ Ibid 5.

¹⁴⁶ Ibid 7.

¹⁴⁷ Ibid.

opposing force to attack a shielded objective, then it follows that there should be a concerted attempt at prohibiting such shielding practices¹⁴⁸.

Conversely, voluntary human shielding poses a completely different moral matrix. One might argue that the voluntary nature of the actor's conduct makes them 'morally liable' for the harm they incur as it is of their own doing¹⁴⁹. Such approach would, however, denounce their inclusion in the prohibition as there would be a problem with treating two dissimilar actors, similarly. According to this approach, VHSs would be seen as direct participants and their harm would not be factored into the proportionality assessment. However, this would be contrary to the international perception of protected status they are deemed to possess. Else, how would their presence immunise an objective from attack? It is conceded that VHSs are, in relation to IHSs, morally more liable to be killed or put differently, 'easier to justify killing'¹⁵⁰. VHSs have the ability to choose whether or not to shield and accordingly retain the ability to avoid situations in which they could be harmed¹⁵¹. This does not, however, justify disregarding their basic rights¹⁵².

These arguments do not serve to advocate that the practice of voluntary human shielding should not be prohibited. Rather, it is used to illustrate that there are fundamental differences worthy of consideration in the formulation of such prohibition. This would be necessary to guide combatants in their decision making and ensure that innocent civilians are given the greatest protection possible. In light of these abovementioned considerations it is submitted that the current prohibition does not include the practice of voluntary human shielding.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid 16.

¹⁵⁰ Ibid 17.

¹⁵¹ Ibid.

¹⁵² Ibid 19. Haque submits that although the VHSs compromise their rights by their voluntary actions it cannot justify a complete disregard thereof even in the situations where the VHSs are serving as shields for unjust combatants.

ii. Arguments as to why the article 51(7) of AP I prohibition does not include voluntary human shields

(aa) 'Human shields' as understood through article 51(7) of AP I does not include human shields who voluntarily position themselves in front of military objectives

As already illustrated the VHS is one of a few categories of human shields. It is markedly different from the other classes. Although the exact legal definition of a VHS is not provided under IHL it is suggested by the ICRC that the definition of a 'human shield' can be ascertained inferentially through an interpretation of the Geneva Conventions and the Additional Protocols:

[T]he use of the presence or movements of protected persons or civilians to render certain points, areas or (military forces) immune from military operations¹⁵³.

Condé provides a more nuanced definition:

The intentional use of a party to a conflict of one or more human beings, usually civilians, or captured members of the adversary's forces... placed between the adversary and themselves in a way meant to deter an attack against the forces using the human shields, for fear of killing or harming the unarmed shields. The shields are in effect hostages used for strategic purposes¹⁵⁴.

Thus, a 'human shield' is: a protected person, whose presence or movements, is used to render immune from adverse military operations, certain points, areas or military personnel. Such definition comports with commonly known civilian hostages used as shields and proximity shields whose movements are used to shield military objectives. In both instances the shields are forced to act as shields and performing the shielding function either with or without knowledge of the fact that they are being *used* as shields. It is however not relevant whether

¹⁵³ 'Customary IHL Practice Relating to Rule 97: Human Shields' available at https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule97 (accessed 5 May 2015).

¹⁵⁴ Condé H A *Handbook of International Human Rights Terminology* (2004) University of Nebraska Press 114.

or not the protected person is aware of the fact that they are being used as a human shield. The intention element relative to a violation of the prohibition against human shielding instead relates to the belligerent, and whether or not he or she intended to use the protected person to shield a legitimate military objective. Schmitt illustrates the position as follows:

A classic example is a military retreat down a road along which civilians are fleeing. The presence of civilians in no way renders the retreat unlawful: mere collocation does not trigger the norm. However, it would be unlawful for the retreating troops purposefully to intermingle with civilians to stave off attack¹⁵⁵.

Accordingly, the state of the commander's mind when he or she directs forces ultimately determines the lawfulness of an operation¹⁵⁶. If the commander not only knew of the civilians being present, but directed his or her troops to use such presence to forestall attacks from the enemy then the operation would amount to a violation of the prohibition against human shielding.

Does this then automatically render the subjective intention of the civilian actor a non-issue when considering a violation of the prohibition against human shielding? It is submitted that although the determination of a violation will turn on the subjective intention of the belligerent, the fact that a civilian voluntarily assumed a shielding position will pose a serious question: how would an international tribunal conclusively find that there existed an intention on the part of the belligerent to use the presence of a civilian to ward off an attack when the shield had reportedly acted in protest to the war? To complicate the matter further, what if the shield continued to maintain his or her position despite the attempts of the shielded party to have him or her vacate the area? Thus, even if one were to accept the argument that the use of a protected person's 'presence'¹⁵⁷ is broad enough to accommodate VHSs, such prohibition would be merely theoretical. State practice has not provided any conclusive stance with regard to whether or not VHSs are indeed included under the prohibition

¹⁵⁵ Schmitt M 'Human Shields in International Humanitarian Law' *Essays on law and war on the fault lines* (2012) (TMC Asser Press: The Hague) Part IV Chapter 11 547 555.

¹⁵⁶ Ibid.

¹⁵⁷ GC III Article 23. In the context of those *hors de combat* the use of the words "be sent to" and "detained" are indicative of forced human shielding. However, "presence be used" under article 51(7) is once again open to interpretation.

against human shielding¹⁵⁸. This despite their being no ‘formal obstacles’ against such inclusion¹⁵⁹.

It is possible for a protected person to station himself or herself before a legitimate military objective with the purpose of exploiting his or her protections to deter attacks on the said objective as a form of protest against the war. Would it in such circumstances amount to a violation of article 51(7) of AP I? Obviously not, as there would be no intention on the part of the shielded party even though in reality the VHS’s presence in front of the shield would be beneficial to its cause. This lacuna then has the effect of casting doubt on most assessments conducted before an attack is launched where there are civilians positioned in front of a target. Are the civilians used as shields? Are the shields there because they were forcibly placed there or did they position themselves voluntarily? If they are acting voluntarily do they do so in support of the shielded party or in protest against the war?

In essence, VHSs have caused many attacking forces to suspend or cancel lawful, planned attacks on legitimate military objectives, effectively immunising the target through an exploitation of the protections afforded by IHL and the attendant media coverage. It is submitted that this is due to the fact that there is no prohibition against voluntary human shielding: a belligerent cannot be held accountable for those who wilfully and defiantly place themselves in front of a military objective.

(bb) Inclusion and interpretation of the word ‘use’ in the article 51(7) of AP I prohibition

As mentioned, the key element of the treaty provisions relating to the practice of human shielding is *mens rea*¹⁶⁰. Such an analysis looks at whether a party to

¹⁵⁸ Pedrazzi M ‘Using human shields as a war crime’ in Pocar F, Pedrazzi M & Frulli M (eds) *War crimes and conduct of hostilities: Challenges to adjudication and investigation* (2013) Part II Chapter 6 98 104.

¹⁵⁹ Ibid.

¹⁶⁰ Rubinstein & Roznai ‘Human shields in modern armed conflicts’101.

the armed conflict subjectively intended to use the presence of a protected person as a human shield with the purpose of protecting a military objective from attack¹⁶¹. Some experts consider the word 'movement' in article 51(7) of AP I as an indication that it also covers instances of voluntary human shielding¹⁶². However, this view would run counter to the actual wording of the provision which 'implies that the civilian population or persons concerned have acted under duress or, at minimum, without knowledge of the way in which they are being manipulated to shield a military objective'¹⁶³. The phrase 'shall not be used' is indicative of the drafters' intention for the prohibition to relate to instances where armed forces seek to 'use' the presence of civilians to shield military objectives¹⁶⁴. It is submitted that this is the extent of the article 51(7) of AP I prohibition: it condemns the use - through subtle or express coercion - of protected persons as human shields to ward off attacks against legitimate military objectives, irrespective of whether the protected person is aware of such use.

There are two types of intentions that relate to the 'use' of protected persons, namely: the intention to deliberately use a protected person as a human shield; and secondly the intention to use a protected person as a human shield when engaged in combat in urban areas¹⁶⁵. An example of the former would be the case of involuntary human shields who are taken hostage and placed near an objective in order to shield it against attacks (express coercion). In this instance the protected persons would be aware of the fact that they are being used as human shields. An example of the latter would be where the combat is conducted in heavily populated areas and the combatants use the presence of the civilians as proximity shields to deter attacks (subtle coercion). In this instance the protected persons would not be aware of the fact that they are being used as human shields.

¹⁶¹ Ibid.

¹⁶² Lyall R 'Voluntary human shields Direct participation in hostilities and the International humanitarian law obligation of states' (2008) 9 *Melbourne Journal of International Law* 3.

¹⁶³ Queguiner 'Precautions under the law governing the conduct of hostilities' 815.

¹⁶⁴ Ibid 3-4.

¹⁶⁵ Rubinstein A & Roznai Y 'Human shields in modern armed conflicts' 102.

In contrast, VHSs are not 'used' by the defending armed forces as one would find under cases of involuntary human shielding. There is a definite air of volition and freedom of choice and movement that one would not find applicable to cases involving IHSs. The VHS had the freedom to consider whether he or she wants to place himself or herself in harm's way. Furthermore, should he or she decide to take up the shielding position, he or she retains the ability to cease such shielding activity at any moment and immediately vacate the area.

It is also imperative to acknowledge that the LOIAC is aimed at regulating military operations in order to minimise its harmful effects on persons and property unrelated to the armed conflict. Accordingly, the prohibitions and precautions are placed on the shoulders of armed forces. Thus, it supports the view that the word 'use' serves as an indication of the prohibition only extending to involuntary human shielding as voluntary human shielding fundamentally concerns a decision made by the protected person and not a commander. To reiterate: it is not so much the volition of the shield that is problematic but the difficulty it raises with regard to the intention of the shielded party¹⁶⁶. The initial decision of a protected person to take up a shielding position is in itself not prohibited under IHL. Whereas the moment the shielded party intends to use such protected civilian's presence to gain an advantage is prohibited. The prohibition under article 51(7) of AP I is complimented by an obligation under article 58 of AP I that requires both the shielded and attacking party to remove civilians from the vicinity of a military objective¹⁶⁷. In the case of VHSs this would be the more likely yet similarly controversial legal ground upon which to found a case against a state who has benefitted from the presence of VHSs.

(cc) Inclusion and interpretation of the phrase 'direct the movement' in the article 51(7) of AP I prohibition

¹⁶⁶ Schmitt 'Human Shields in International Humanitarian Law' *Essays on law and war on the fault lines* 555.

¹⁶⁷ AP I Article 58.

Whilst, it is indisputable that the forcible use of civilians as hostages and the use of the civilian movements to shield military objectives is prohibited, the same cannot be said with regard to VHSs as 'shall not direct the movements' instils an air of involuntariness. The Netherlands *Military Manual* (2005) provides that 'the civilian population or individual civilians *may not be guided in a specific direction in an attempt to shield military objectives from attacks*'¹⁶⁸. It is, thus, difficult to consider exactly how this provision would apply to VHSs who volunteered their presence. At best a very tenuous basis exists for asserting their actions to be 'directed' or 'guided in a specific direction'. Admittedly, only in situations where it is clear that VHSs were given guidance by the shielded party as to where to shield, could one perhaps argue that such conduct is covered under article 51(7) of AP I. However, it must be appreciated that such conduct will hardly ever be obvious considering the legal consequences that might ensue. Moreover, at all times the VHS has the ultimate say in whether he or she shields, for how long he or she shields, and what he or she shields. Only if the phrase 'direct the movement' is interpreted very broadly would it be capable of arguing that VHSs are regulated under article 51(7) of AP I. It is, however, unclear as to how to interpret the phrase, and accordingly it poses a definite problem in the effort to regulate VHSs.

(dd) National legislation (formulated on the basis of international law) does not account for situations involving voluntary human shields

National legislation enacted to recognise the international law prohibition against human shielding is a further reflection of the fact that the prohibition does not cover VHSs. The domestic laws of states reinforce the IHL position that the use of human shields is prohibited, a violation thereof constituting both

¹⁶⁸ Netherlands. Koninklijke Landmacht. Militair Juridische Dienst. Voorschrift No. 27-412. *Humanitair Oorlogsrecht: Handleiding* (2005) s.1047 available at https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule97 (accessed 16 October 2015).

a war crime and punishable offence¹⁶⁹. Many states made ‘utilizing the presence of a civilian or other protected person to render certain points, areas, or military forces immune from military operations’¹⁷⁰ (adopting the wording of article 8(2)(xxiii) of the *ICC Statute*) an offence, whilst Australia and the US went a little further by providing elements that need to be satisfied in order for a combatant to be held guilty for a violation of the prohibition¹⁷¹. The Australian provision reads as follows:

War crime – using protected persons as shields

(1) A person (the perpetrator) commits an offence if:

(a) the perpetrator uses the presence of one or more civilians, prisoners of war, military, medical or religious personnel or persons who are hors de combat; and

(b) the perpetrator intends the perpetrator’s conduct to render a military objective immune from attack or to shield, favour or impede military operations; and

¹⁶⁹ See Azerbaijan ‘Criminal Code of the Azerbaijan Republic’ (2000) article 115.2 available at <http://www.legislationline.org/documents/section/criminal-codes> (accessed 18 October 2015); Bangladesh ‘The International Crimes (Tribunals) Act’ (No XIX of 1973) s.3(2)(e) available at <http://www.legislationline.org/documents/section/criminal-codes> (accessed 18 October 2015); Croatia ‘Criminal Code’ (No 110 of 1997) (as amended 2006) article 158(1) available at <http://www.legislationline.org/documents/section/criminal-codes> (accessed 18 October 2015); Finland ‘Criminal Code’ (39 of 1889) (as amended in 2008) s.5(1)(13) available at <http://www.legislationline.org/documents/section/criminal-codes> (accessed 18 October 2015); Georgia ‘Criminal Code’ (1999) Article 413(b) available at <http://www.legislationline.org/documents/section/criminal-codes> (accessed 18 October 2015); New Zealand ‘International Crimes and International Criminal Court Act’ (No 26 of 2000) s.11(2) available at <http://www.legislation.govt.nz/act/public/2000/0026/latest/DLM63091.html> (accessed 18 October 2015).

¹⁷⁰ See ‘Customary IHL Practice Relating to Rule 97: Human Shields’ available at https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule97 (accessed 5 May 2015). The article refers to the following, amongst other, legislative provisions enacted by various states: Burundi ‘Law on Genocide, Crimes against Humanity and War Crimes’ (2003) article 4(B)(v); Iraq ‘Law of the Supreme Iraqi Criminal Tribunal’ (2005) article 13(2)(W); Netherlands ‘International Crimes and ICC Act’ (2000) s.11(2); South Africa ‘ICC Act’ (2002) Schedule 1 Part 3 s(b)(xxiii).

¹⁷¹ See ‘Customary IHL Practice Relating to Rule 97: Human Shields’ available at https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule97 (accessed 5 May 2015).

(c) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict¹⁷².

The examples of the IHL provisions and that of the ICC Statute have been closely followed by states and furthers the argument that VHSs were not included in this prohibition. The words 'use', 'utilizing' and 'directing' from the three major provisions relating to the prevalence of human shields are all indicative of an involuntariness on the part of the shield.

iii. Conclusion

VHSs are not expressly nor indirectly prohibited under the current IHL regime. Even if one were to assume that they are it would not provide much assistance in alleviating the present controversy surrounding the actor's prevalence in IAC. Accordingly, at worst the actor is not regulated at all, and at best it is regulated in such an ineffectual way that it might as well not be regulated at all. The argument raised asserting that the VHS's use should be presumed prohibited, as to hold otherwise would countenance efforts to reduce the amount of casualties, is unconvincing. The current international law framework has the effect of making the use of human shields an attractive strategy in IAC.

(c) The uncertainty surrounding the current legal classification of voluntary human shields in international humanitarian law is problematic

i. Introduction

¹⁷² Australia 'Criminal Code Act' (1995) (as amended in 2007) Chapter 8 s.268.65. See 'Customary IHL Practice Relating to Rule 97: Human Shields' available at https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule97 (accessed 5 May 2015).

As mentioned above, IHL regulates the activities of actors present during IAC's by classifying each according to their role in terms of the principle of distinction. From a person's IHL classification we can determine their legal status together with the rights and obligations which flow from such status. This primary status determines how they are to be treated should they fall into the hands of the enemy forces. It is trite in IHL that no person can be without a classification or legal status during armed conflict.

In the unique case of the VHS, the classification process has given rise to much debate as a VHS does not fall squarely into any of the mentioned categories. In essence, we find an actor who has characteristics that span across more than one category under IHL, and this is problematic. It is submitted that the current default classification of VHS does not fully account for the influence they have on the outcome of armed conflicts and, accordingly, fails to effectively regulate the actions of the VHS.

To follow is an outline of the broad categories of actors defined in IHL which one could reasonable expect to find in an IAC. The characteristics of other categories of actors under IHL will be compared to that of a VHS, in order to ascertain in which category the VHS fits best. Once the most suitable category is found, the legal consequences of such a classification will be briefly set out, and used to indicate why such classification of VHSs might be problematic.

(aa) Voluntary human shields as combatants

The legitimising of killing during periods of armed conflict requires that there be certain persons who are lawfully entitled to cause the death of others in certain limited instances. Under IHL that person is known as the combatant and he or she has a right to participate directly in armed conflict during hostilities, which is essentially a license to kill¹⁷³. Combatants enjoy combatant immunity which

¹⁷³ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) Geneva 8 June 1977 article 43(2). Article 43 was adopted by consensus. CDDH Official Records Vol VI CDDH/SR 39 25 May 1977 111.

means that they will not be prosecuted for any lawful participation in hostilities¹⁷⁴. This immunity is effective despite the fact that the conduct of the combatant would have been considered a serious crime under peaceful circumstances¹⁷⁵. The nature of armed conflict makes it acceptable for the combatant to commit these acts that would be considered criminal under ordinary domestic law, and rests on the proviso that the combatant adheres to the laws and customs of war.

A combatant's privilege to engage in lawful combat comes at a price. He or she loses their own immunity from attack, and is thus subjected to the effects of war for the duration of the hostilities. Accordingly, one might observe that those who are allowed to target others become a lawful target themselves. The ICTY Appeals Chamber noted that 'members of the armed forces resting in their homes in the area of conflict... remain combatants'¹⁷⁶ notwithstanding the fact that they are not actively participating in combat or brandishing a weapon¹⁷⁷.

Combatants are, however, not left without any protection. They are afforded Prisoner of War (hereafter POW) status should they become *hors de combat*, surrender, be captured or otherwise fall into enemy hands¹⁷⁸. If a combatant has violated the LOIAC this does not deprive such combatant of his POW protection in the event of capture or surrender¹⁷⁹, but it may expose him to military court martial and prosecution for violating IHL. Only in the instances where the combatant has failed to carry his weapons openly during each military operation in order to distinguish him or her from the general civilian population, might such combatant forfeit his or her secondary POW status¹⁸⁰. Nonetheless,

¹⁷⁴ Vark R 'The Status and Protection of Unlawful Combatants' *From the selected works of Rene Vark* 192 available at

http://works.bepress.com/cgi/viewcontent.cgi?article=1025&context=rene_vark (accessed 11 June 2015).

¹⁷⁵ Ibid.

¹⁷⁶ *Kordic and Cerkez case* ICTY Judgment on Appeal 17 December 2004. Available at https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule3 (Accessed 4 June 2015).

¹⁷⁷ Ibid.

¹⁷⁸ *Constitutional Case No. C-291/07* Colombia Constitutional Court Judgment of 25 April 2007; 80-81. Available at https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule3 (Accessed 4 June 2015).

¹⁷⁹ Vark 'The Status and Protection of Unlawful Combatants' 192.

¹⁸⁰ Ibid Vark points to AP I article 44 (2)-(4) in footnote 11. The article provides that 'combatants forfeit their right to be prisoners of war if they fail to carry their arms openly during each military

if a combatant has been found to have violated the duty to distinguish himself or herself, he or she is still afforded protection, albeit to a lesser extent under article 44(4) of AP I¹⁸¹.

Article 43(2) of the 1977 AP I provides that:

Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities¹⁸².

Thus, individuals (with the sole exception of the religious or medical personnel who accompany armed forces) who are members of 'organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates'¹⁸³, are members of armed forces as defined by international law. There are two possible ways in which one could ascertain whether or not a person is indeed a combatant. Firstly, if the person in question was a member of a traditional armed force (an army of a state) then there would be no question as to their compliance with the requirements set out in GC III article 4A(2), because they are presumed to meet the requirements in terms of customary law¹⁸⁴. Secondly, an alternative means through which a person can acquire combatant status is if they were a member of a volunteer corps, militia or organised resistance movement¹⁸⁵. In these instances, certain requirements will need to be satisfied in order to prove that the person in question is in fact a member of the armed forces of a state party to armed conflict. The

engagement and at such time as they are visible to the adversary while they are engaged in a military deployment preceding the launching of an attack in which they are to participate'.

¹⁸¹ AP I Article 44(4) provides: 'A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed'.

¹⁸² AP I article 43(2).

¹⁸³ AP I article 43(1).

¹⁸⁴ Bosch S 'Voluntary human shields: status-less in the crosshairs?' (2007) *XL Comparative and International Law Journal of Southern Africa* 322 327.

¹⁸⁵ GC III article 4A (2).

requirements, initially set down in the Hague Regulations and now contained in GC III and AP I, include: 'a) that [the individual in question be] commanded by a person responsible for his subordinates; [wear] a fixed distinctive sign recognizable at a distance; c) [carry] arms openly; d) [conduct] their operations in accordance with the laws and customs of war'¹⁸⁶.

The requirements for combatant status, as mentioned above, are echoed in the Military Manuals of several States. Cote d'Ivoire's *Teaching Manual* of 2007 provides that combatants are the following individuals: 'members of armed forces even if they profess allegiance to a non-recognized government; members of rebel movements; members of militias, members of armed resistance movements and members of the armed forces of a third country put at the disposal of a country in conflict'¹⁸⁷. It further states that certain signs will allow a party to classify another as a combatant, these include: the 'wearing of a uniform; carrying of a weapon openly; the presence of an identifiable leader commanding the troops; participation in an attack or in a deployment in preparation of a military operation and the wearing of a fixed distinctive emblem recognisable at a distance'¹⁸⁸. The US *Manual for Military Commissions* of 2007 has similar provisions¹⁸⁹.

Thus, in summary, a combatant is a person who is allowed to lawfully target and attack the opposition forces during hostilities, and at the same time constitutes a legitimate target to the enemy forces for the duration of the hostilities. A person becomes a combatant through membership in the armed forces, as defined broadly under IHL, provided they fulfil the above mentioned requirements which essentially relate to the need for combatants to distinguish themselves from the general civilian population.

¹⁸⁶ GC III article 4(A) (2) (a)-(d).

¹⁸⁷ Cote d'Ivoire. Ministère de la Défense. Forces Armées Nationales. *Droit de la guerre Manuel d'instruction Livre 1: Instruction de base* (2007) 17.

¹⁸⁸ Ibid.

¹⁸⁹ United States. *Manual for Military Commissions* (2007) (published in implementation of the Military Commissions Act of 2006 1C USC) Part II Rule 103(24) ss 948a et seq 11-14 available at https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule3 (accessed 4 June 2015).

A VHS is a passive actor that does not carry arms and consequently does not attack any party to the armed conflict. They also do not wear uniforms or any distinctive emblems so as to distinguish themselves. Furthermore, and most significantly, VHSs are not members of the armed forces and cannot be considered as having combatant status.

Accordingly, the characteristics of a VHS is not suited to combatant status.

(bb) Voluntary human shields as the *levee en masse*

During World War II a special kind of national defence first said to be used by Napoleon centuries ago when enemy forces entered French territory, attracted the attention of the international community¹⁹⁰. This form of defence is known as the *levee en masse*, which occurs when citizens spontaneously rise up in defence of their own nation¹⁹¹. They are not perceived as ‘marauders or criminals’¹⁹². A *levee en masse* is triggered by an invading enemy force and should therefore not be confused with a population, or part thereof, rising up against its own government.

Legal regulation of the *levee en masse* can be traced back to the 1863 Lieber Code. However, the term *levee en masse* itself only appeared in the 1874 Brussels Declaration. Currently, article 2 of the 1907 Hague Regulations, phrased similar to its predecessor in the 1899 Hague Regulations, provides that¹⁹³:

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with

¹⁹⁰ Nabulsi K ‘Levee en masse’ (2011) Crimes of War Project available at <http://www.crimesofwar.org/a-z-guide/levee-en-masse/> (accessed 9 June 2015).

¹⁹¹ Vark ‘The Status and Protection of Unlawful Combatants’ 192.

¹⁹² Ibid.

¹⁹³ Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 19 October 1907, article 2 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter33_rule106_sectionb (accessed 9 June 2015).

Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war¹⁹⁴.

Accordingly, the *levee en masse* are given combatant status, with its associated privileges and obligations to 'carry arms openly and ... respect the laws and customs of war'¹⁹⁵. The proviso that they carry arms openly is to allow other combatants to distinguish the *levee en masse* from those who are not participating in the hostilities. Due to their classification as combatants the members of a *levee en masse* 'will enjoy prisoner of war status upon capture' or surrender¹⁹⁶. Clarity regarding the requirements for an actor to be classified as a *levee en masse* can be found in the military manuals of nation states. In Canada's *LOAC Manual* of 1999, for example, it provides:

As a general rule, civilians are considered non-combatants and cannot lawfully engage in hostilities. There is, however, an exception to this rule for inhabitants of a territory that has not been occupied by an enemy. Where they have not had time to form themselves into regular armed units, inhabitants of a non-occupied territory are lawful combatants if:

- a. On the approach of the enemy they spontaneously take up arms to resist the invading forces;
- b. They carry arms openly; and
- c. They respect the LOAC.

The situation is referred to as a *levee en masse*¹⁹⁷.

When the members of the population take up arms and rise up against an invading enemy force, they cease to be considered civilians and are instead

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Article 4(A) (6) ICRC Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) 12 August 1949 75 UNTS 135 available at: <http://www.refworld.org/docid/3ae6b36c8.html> (accessed 14 October 2015). The Convention was adopted by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held at Geneva from 21 April to 12 August 1949. It was signed on 12 August 1949 and entered into force on 21 October 1950 [GC III].

¹⁹⁷ Canada. Office of the Judge Advocate General. *The Law of Armed Conflict at the Operational and Tactical Level* (1999) 3-2 s13.

clothed with combatant status¹⁹⁸. Although members of a *levee en masse* are required to 'carry arms openly and ... respect the laws and customs of war'¹⁹⁹, the *levee en masse*, however, 'are exempt from the obligations of being under the command of a responsible commander and wearing a distinctive sign'²⁰⁰ as normally required for a person to be clothed with combatant status. This exception is predicated upon a spontaneous uprising, so as to preclude any opportunity for organisation into regular armed forces.

The ICTY in the *Orić* case of 2005 commented on the spontaneity requirement with regard to the *levee en masse*, when it ruled that:

The Trial chamber comes to the conclusion that while the situation in Srebrenica may be characterised as a *levee en masse* at the time of the Serb takeover and immediately thereafter in April and early May in 1992, the concept by definition excludes its application to long-term situations. Given the circumstances of the present case, the Trial Chamber does not find the term *levee en masse* to be an appropriate characterisation of the organisational level of the Bosnian Muslim forces at the time and place relevant to the Indictment²⁰¹.

Thus, great emphasis is placed on the spontaneity of the actors who are allegedly partaking in a *levee en masse*. It can be gathered from the reasoning in the *Orić* case that the level of organisation encountered among those who allegedly participated in a *levee en masse* will be a telling factor as to whether or not the actors in a given situation will be considered as lawful combatants under the category of *levee en masse*.

In summary therefore, a *levee en masse* is an actor who, alongside others in unoccupied territory, spontaneously rise and take up arms against an invading

¹⁹⁸ United Kingdom. Ministry of Defence. *The Manual of the Law of Armed Conflict* (2004) (as amended by amendment 3 Ministry of Defence September 2010) s4.2.2.

¹⁹⁹ Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 19 October 1907, Article 2 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter33_rule106_sectionb (accessed 9 June 2015).

²⁰⁰ United Kingdom. The War Office. HMSO. *The Law of War on Land being Part III of the Manual of Military Law* (1958) s.97 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter33_rule106_sectionb (accessed 7 November 2015).

²⁰¹ *Prosecutor v Naser Orić* [*Orić case*] (30 June 2005), ICTY, Judgment, Case No. IT-03-68-T 133, 135-136.

enemy. They are allowed to participate directly in hostilities provided they 'carry their arms openly' for purposes of distinction and 'respect the laws and customs of war'²⁰². By comparison, a VHS is an actor who takes up a voluntary shielding position in front of a building or person, in order to dissuade an attack on the objective. The VHS himself, or herself, does not resort to any use of weapons or weapon-systems. Accordingly, VHSs do not carry arms openly, in fact they do not carry weapons at all. There are certain similarities between the *levee en masse* and the VHS such as neither being under any formal command, nor required to wear any uniform or be formally organised. However, the passive nature of a VHS inevitably precludes a classification along the lines of combatant status, and invariably a VHS does not fall to be classed as a *levee en masse*.

(cc) Voluntary human shields as non-combatants

The armed forces of a state is made up of both combatants, and non-combatants²⁰³, with the distinguishing factor being who has authority to participate directly in hostilities, and who does not²⁰⁴. As we have already discussed above, a combatant is a member of the armed forces expressly authorised to participate directly in hostilities. Amongst the members of the armed forces, we also find non-combatants or those members who are not authorised to directly participate in hostilities except in instances of self-defence²⁰⁵. It is a state's prerogative to establish which members of the armed forces may and may not participate directly in hostilities²⁰⁶. The means through which states exercise this autonomy is through national legislation.

The non-combatants of a state party to armed conflict consists of 'quartermasters, members of the legal services and other non-fighting

²⁰² Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 19 October 1907, article 2.

²⁰³ Article 3 of the Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land.

²⁰⁴ AP I article 43(2).

²⁰⁵ Ibid.

²⁰⁶ Bosch 'Voluntary human shields: status-less in the crosshairs?' 325.

personnel'²⁰⁷. The non-fighting religious and medical personnel enjoy a special status under IHL and are deemed 'attached' to, rather than members of the armed forces²⁰⁸.

A non-combatant is by no means better protected than a combatant purely because he or she is not allowed to engage in hostilities. A non-combatant member of the armed forces is also subjected to the dangerous effects of war²⁰⁹. With the exception of religious and medical personnel, all non-combatants are legitimate military objectives²¹⁰. Additionally, the negative formulation of a civilian under article 50 of AP I, precludes any notion that a non-combatant enjoys civilian protections and treatment. The article in question expresses that a civilian is anyone who is not a member of the armed forces and a non-combatant is clearly a member of the armed forces. Hence, the non-combatants do not enjoy a general protection against the effects of war. Non-combatants, however, do acquire secondary POW status in the event of capture or surrender²¹¹.

The attacking forces need not take special precautions where non-combatant members of the armed forces, with the sole exclusion of military and religious personnel, are in the vicinity of a legitimate military objective²¹². Thus, provided there are no religious or medical personnel in the vicinity, an attack can ensue without the attacking force having to differentiate between combatant and non-combatant members of the opposing armed forces²¹³.

In summary, a non-combatant is a member of the armed forces not authorised to participate directly in hostilities, except in the instance of self-defence. They are essentially members (with the special exclusion of medical and religious personnel) of the armed forces that perform tasks of a non-combative nature.

²⁰⁷ Ipsen K 'Combatants and non-combatants' in Fleck D (ed) *The handbook of humanitarian law in armed conflict* 1 ed (Oxford University Press) (1995) 95.

²⁰⁸ Ibid 101.

²⁰⁹ Ibid 98.

²¹⁰ Ibid 96-97.

²¹¹ Ibid 95.

²¹² Ibid 99.

²¹³ Ibid.

VHSs on the other hand are not members of armed forces as this would essentially preclude them from being able to effectively immunise a target against attack. Thus, although a non-combatant and a VHS both perform their respective functions without resort to use of force, they cannot be classed under the same category due to the membership requirement. It follows that a VHS cannot be considered a non-combatant.

(dd) Voluntary human shields as unlawful belligerents

As mentioned under the basic principles of IHL, the principle of distinction is paramount to the effective regulation of IAC. Thus, for the IHL framework to fulfil its purpose, the principle needs to be honoured in practice. Consequently, any disregard for the principle of distinction is a serious violation of IHL. A person is either categorised as this or that type of actor, but never two different types simultaneously. Once a person is categorised as a certain actor then they are to adhere to the rules governing the conduct of such actor. Any violations of the privileges and obligations afforded to an actor will attract legal ramifications, because it ultimately undermines the protection of civilians and other protected persons²¹⁴.

A person who disregards the principle of distinction, and participates directly in the hostilities is known as an unlawful belligerent. In 2002, the legal status of unlawful belligerents were a cause for great controversy when former US president, George W. Bush, ascribed unlawful belligerent status to members of the Taliban that were being detained at Guantanamo Bay. Reports declared that the detained Taliban members had no rights under IHL due to their blatant disregard for the LOIAC²¹⁵. Although the reports were erroneous, in that a person cannot ever be without minimum legal guarantees and protections, it does put in perspective how critical states can be of those who violate the LOIAC.

²¹⁴ Gill T & Sliedregt E “Guantanamo Bay: A Reflection on the Legal Status and Rights of ‘Unlawful Enemy Combatants’” 1:1 *Utrecht Law Review* (2005) 28 32 available at <http://www.utrechtlawreview.org/index.php/ulr/article/view/2/2> (accessed 24 June 2015).

²¹⁵ Vark ‘The Status and Protection of Unlawful Combatants’ 191.

An unlawful belligerent harms or intends to harm a party to armed conflict in a way that disregards the LOIAC in order to gain a military advantage²¹⁶. Unlawful belligerency can arise in one of two ways: through a belligerent who fails to follow the laws of war (for example, by disguising himself or herself as part of the opposition forces or as a civilian, which amounts to prohibited acts of perfidy²¹⁷), or through a civilian who participates directly in hostilities in circumstances where he or she was not permitted to do so, in other words, for reasons other than self-defence²¹⁸. Such person constitutes 'a legitimate military target, but once captured, an unlawful [belligerent]²¹⁹ is not entitled to secondary POW status'²²⁰.

Dormann argues that although an unlawful belligerent is not entitled to POW status 'it can hardly be maintained that unlawful [belligerents] are not entitled to any protection whatsoever under international humanitarian law'²²¹. He submits that if they fulfil the nationality requirement of GC IV article 4, then they are afforded the protections granted in that Convention²²². Furthermore, he argues that in terms of article 5 of GC IV, the fact that an unlawful belligerent has participated directly in hostilities will possibly provide a reason for derogating from certain rights under the convention²²³. Dormann also points out that article 75 of AP I, which guarantees humane treatment and respect for fundamental rights, in any event applies to all persons who are 'in the hands of a party to armed conflict, irrespective of whether they are covered by GC IV'²²⁴.

²¹⁶ Bosch 'Voluntary human shields: status-less in the crosshairs?' 331.

²¹⁷ AP I article 37.

²¹⁸ Vark 'The Status and Protection of Unlawful Combatants' 193.

²¹⁹ As 'combatant' is a loaded concept indicating legal authority to participate directly in hostilities it would be better to use the phrase 'unlawful belligerent'. Else what we are saying essentially is that we are dealing with an unlawful person authorised to partake directly in hostilities and this might lead to confusion.

²²⁰ Vark 'The Status and Protection of Unlawful Combatants' 193.

²²¹ Dormann K 'The legal situation of unlawful/unprivileged combatants' (2003) 85:849 *International Review of the Red Cross* 45 73.

²²² Ibid.

²²³ Ibid.

²²⁴ Ibid.

Therefore, to summarise briefly, an unlawful belligerent is an actor under IHL who transgresses the law by disregarding the principle of distinction in one of the various ways mentioned above. In other words, these actors are purporting to use the protections afforded by the law in order to gain an unfair advantage. Comparatively, a VHS exploits the protections afforded by IHL in order to gain an advantage, but not with an intention to physically harm the enemy forces. Furthermore, there is no prohibition against voluntary human shielding and, accordingly, VHSs are not in fact violating the law, but exploiting the protections afforded through it. Therefore, a VHS is not an unlawful belligerent.

(ee) Voluntary human shields as persons accompanying the armed forces

There are person who accompany the armed forces, without being actual members of those armed forces, in order to provide necessary services of a non-military nature. These persons work in close proximity to the combatants and due to the fact that they are not actual members of the armed forces they are not required to wear any uniforms. Instead, the armed forces are to authorise their presence during armed conflict by means of an identity card in accordance with Annexure IV of GC III that contains a description of the function to be performed by the accompanying personnel²²⁵. The description of the function needs to dispel any suspicion that the person accompanying the armed forces is involved in any direct participation in hostilities²²⁶.

By definition persons accompanying the armed forces are considered civilians. This is gathered from the fact that these actors are not members of the armed forces, which is a pre-requisite for combatant status. However, unlike most people with civilian status these individuals are clothed with secondary POW status in the event they find themselves in the hands of the enemy²²⁷. This category of actor is one of only a few non-combatant actors (the other being the

²²⁵ Ipsen K 'Combatants and Non-combatants' in Gill T and Fleck D (eds.) *The handbook of International Humanitarian Law* 2 ed (Oxford University Press: Oxford) (2008) 107.

²²⁶ Ibid.

²²⁷ GC III article 4A (4).

merchant navy or the civil aircraft crews) who through GC III obtain POW status upon capture by the enemy²²⁸.

GC III article 4A (4) grants POW status to the persons accompanying the armed forces and mentions certain examples of such actors:

Persons who accompany the armed forces without actually being members thereof, such 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*, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model²²⁹. [Emphasis added]

The list provided under article 4A (4) is not an exhaustive list and is also said to include private contractors who provide 'support functions without military relevance'²³⁰. The only time a person accompanying the armed forces may resort to use of force is in instances of self-defence²³¹. Any private contractors who work independently, or who are engaged in security services to private companies or persons, are not considered persons accompanying the armed forces²³².

Persons accompanying the armed forces run the risk of collateral injury due to their proximity to the conflict. As the actors accompanying the armed forces are considered civilians, and IHL serves to minimise the amount of harm inflicted to the civilian population and civilian objectives, military leaders are required to take precautionary steps before launching an attack on a military objective where these actors are present²³³.

²²⁸ Ipsen 'Combatants and Non-combatants' (2008) 107.

²²⁹ GC III article 4A (4).

²³⁰ Perrin B (ed) *Modern Warfare: Armed groups, private militaries, humanitarian organisations and the law* (University of British Columbia Press) (2012) 186-187.

²³¹ Ibid.

²³² Ibid.

²³³ AP I article 57(2) aimed at keeping harm to civilians at a minimum.

To summarise then, a person accompanying the armed forces is not a member thereof, and accordingly falls to be classified as a civilian. The actor is not allowed to participate directly in hostilities except in self-defence, and its main function is to provide non-military services to the armed forces. Authorisation to work in close proximity to the combatants is granted by way of an identity card to be carried by the accompanying personnel.

Comparatively, the VHS is similar in the sense that a VHS is also not a member of the armed forces, their function is not to physically harm the enemy and both actors perform their functions in close proximity to combatants. However, a person accompanying the armed forces is provided with an ID card and a VHS is not. Thus, a critical requirement to be classified as a person accompanying the armed forces is lacking. Additionally, it is worthy to note that a VHS would not be able to perform its function whilst in possession of such card, as it would oblige the armed force of a state to ensure that the person is protected, and not in any way used as a human shield. Therefore, although the characteristics of a person accompanying the armed forces is the most similar to that of a VHS, it is still not a suitable classification.

(ff) Voluntary human shields as civilians

In order to achieve the goals which underlie the IHL framework, civilians and civilian objects not directly involved in the armed conflict may not be directly targeted²³⁴. As a result, opposing forces are to exercise their discretion and ensure that only combatants and military objects are the subjects of attack. If an attack on a legitimate military target causes collateral damage to civilian property and or civilians, such attack will only be deemed lawful if it satisfies a proportionality test²³⁵. The protections afforded civilians are conditional: for civilians to claim protection from attack they are required to refrain from any direct participation in hostilities.

²³⁴ AP I article 51(2).

²³⁵ Discussed later in chapter 3(f)

Civilians are granted the widest protections²³⁶ available under IHL due to the fact that these individuals are not members of the armed forces or otherwise allowed to participate directly in hostilities. Their lack of membership to an armed force and, consequently, their lack of authorisation to partake in hostilities, means that a civilian is not afforded secondary POW status upon capture. A person clothed with civilian status will face criminal liability for any direct participation in hostilities. However, it is important to note that a civilian does not become a combatant on the basis of direct participation in hostilities. Instead, the actor retains his or her civilian status whilst his or her civilian protections are suspended. The suspension of their civilian immunity from direct targeting is effective for the duration of their direct participation, irrespective of whether the direct participation is 'permanent, intermittent or once-off'²³⁷. The only time a civilian may legitimately resort to the use of force is self-defence, which is defined narrowly to avoid abuse²³⁸.

In order to prevent a situation where a person's presence during armed conflict is unregulated, the definition of a civilian, as provided in article 50 of AP I, is couched in the negative:

1. A 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. In case of doubt whether a person is a civilian that person shall be considered to be a civilian;
2. The civilian population comprises all persons who are civilians;
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character²³⁹.

²³⁶ AP I article 51(3).

²³⁷ Ibid. See also Supreme Court of Israel *Public Committee against Torture in Israel v. Government of Israel* Case No. HCJ 769/02 (13 December 2006).

²³⁸ Bosch S 'Private Military Security Contractors and International Humanitarian Law – A skirmish for recognition in International Armed Conflict' (2007) 16:4 *African Security Review* 19.

²³⁹ AP I article 50.

Article 4A of GC III pertains to POW status and sets out which actors are granted such protection in the event that they fall into enemy hands, whilst article 43 of AP I sets out those actors who qualify as part of the 'armed forces'. Thus, broadly observed a civilian is anyone who is not entitled to directly participate in hostilities. Accordingly, a civilian is not a member of the armed forces; a member of other militias, volunteer corps, organised resistance movements who fulfil the requirements listed in article 4A (2) (a)-(d) of GC III; 'a member of the regular armed forces who profess allegiance to a government or authority not recognised by the Detaining Power'; or a person who partakes in a *levee en masse*²⁴⁰.

The definition of 'civilians', as contained in article 50 of AP I, has crystallised into customary international law by way of widespread State practice²⁴¹. Similarly phrased definitions are observable in the Military Manuals of States. For example, the Ukraine's *IHL Manual* of 2004 states that²⁴²:

A civilian is any person who finds himself/herself in the zone of warfare, is not a member of armed forces and refrains from any act of hostility. In case of doubt whether a person is a civilian that person shall be considered to be a civilian.

The civilian population comprises all persons who are civilians. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character and of its protection under international humanitarian law²⁴³.

The UK *LOAC pamphlet* of 1981 further refines the definition by providing added examples of individuals who are not civilians when it states that 'civilians are all

²⁴⁰ Article 4 of GC III available at <https://www.icrc.org/ihl/WebART/375-590007?OpenDocument> (accessed 7 November 2015).

²⁴¹ ICRC Customary IHL Rule 5: 'Definition of Civilians' available at https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5 (accessed 23 June 2015).

²⁴² Ukraine. Ministry of Defence. *Manual on the Application of IHL Rules* (2004) s.1.2.32.

²⁴³ *Ibid.*

persons other than those defined in paragraphs 1 to 8 above ... combatants; guerrillas; commandos; spies; mercenaries; military non-combatants'²⁴⁴.

In terms of international case law, the *Blaskic* case of 2000 provides that civilians are those 'who are not or no longer members of the armed forces'²⁴⁵. One of the greatest distinguishing factors between civilians and other actors is that civilians are not in uniform and also do not carry arms openly²⁴⁶. The ICTY Trial Chamber in the *Dragomir Milosevic* case of 2007 goes a little further by stating:

The generally accepted practice is that combatants distinguish themselves by wearing uniforms, or, at the least, a distinctive sign, and by carrying their weapons openly. Other factors that may help determine whether a person is a civilian include his or her clothing, activity, age or sex. In cases of doubt whether a person is a civilian, that person shall be considered to be a civilian. As stated in the Commentary on Additional Protocol I, the presumption of civilian status applies to: "[p]ersons who have not committed hostile acts, but whose status seems doubtful because of the circumstances. They are considered to be civilians until further information is available, and should therefore not be attacked".²⁴⁷

Thus, in the event of doubt as to a person's appropriate status under IHL, such person should be presumed a civilian as a precautionary measure. It is submitted that such presumption is also most likely the factor which would give rise to a decision to classify a VHS as a civilian. This, however, is problematic. Whilst it is conceded that a VHS shares similarities with a civilian, in that a VHS does not wear a uniform, is unarmed and not a member of the armed forces, it must be noted that certain crucial, distinctive characteristics of a VHS are

²⁴⁴ United Kingdom. Ministry of Defence. Prepared under the direction of the Chief of the General Staff. D/DAT/13/35/86 Army code 71130. *The law of armed conflict* (1981) (Revised) 10 s9.

²⁴⁵ *Prosecutor v Blaskic* (2000) Case IT-95-14-T [180].

²⁴⁶ *Maktouf case* Court of Bosnia and Herzegovina Judgment (4 April 2006) 10.

²⁴⁷ *Dragomir Milosevic case* ICTY Judgment (12 December 2007) s945-946.

inconsistent with such classification. Even though a VHS acts in a passive manner, they intentionally and substantially affect the outcome of armed conflict. Furthermore, reports seem to indicate that VHS are becoming more organised, which is also not a trait of civilians. If organisations are proliferating with the aim of deploying these VHS to various conflict zones around the world, they are certainly not your typical civilians who happen to be inhabitants of a territory embroiled with armed conflict. Comparatively, a typical civilian finds himself or herself in the cross-fire due to no act of his or her own. A civilian can choose not to flee from a scene of a potential strike. However, if the target is a legitimate military objective the civilian's presence will require calculations to be made by the attacking commander in order to establish the proportionality of the attack and if it yields a positive result, then the attack will proceed. The exigencies of war would have justified the collateral damage. Realistically we cannot expect a war to be free of casualties, but if the battle is allowed to run its course as fast as possible and with the least amount of civilians intentionally placing themselves in front of legitimate military objectives, we shall logically witness a decrease in the number of civilians injured as a result of collateral damage.

The VHS makes a conscious decision to place himself or herself between the targeted object and the enemy's weaponry and effectively place his or her life on the line. There have been reports of VHSs traveling from all corners of the globe to assume shielding positions in conflict zones, and in some instances these civilians also ran the risk of losing their citizenship as a result. The act of shielding is done with a purpose, there is a strong motive or else they would not take the grave risk. As mentioned before, organisations are being formed to bring VHSs together and deploy them where needed. The motive for these actors is inextricably linked to the outcome of the particular armed conflict in question and the VHSs are to some degree, at least *prima facie*, aligning themselves with a particular state party to armed conflict.

If a VHS places himself or herself in front of a civilian objective, which in any event is protected from direct attacks under IHL, in order to bolster the object's protection, it does not cause the same type of concern. This might occur where a museum or heritage site, of no relevance to military operations, is sought to be protected from the effects of the armed conflict. If the enemy armed forces nevertheless proceed with an attack, thereby destroying the building and causing casualties, then obviously such attack would attract condemnation from the international community and legal consequences will ensue for the perpetrators. However, it is unlikely that a commander would chance a media scandal and legal ramifications where his or her forces stand to benefit nothing from such attack. This type of situation is not the point of contention, but serves to illustrate how a VHS's presence before a legitimate military objective obviously affects the outcome of war in a way that contradicts the general notion that civilians are not involved in the war effort to a degree that raises doubt. VHSs conduct themselves in a way that brings into question whether they are innocent bystanders or individuals intent on directing the course of IAC in favour of the party they are shielding.

ii. Conclusion

Although the VHS would inevitably be classed as a civilian, such approach essentially adds fire to the flame. The protections a civilian enjoys is exactly what the VHSs exploit in order to effectively immunise a target from enemy attack. This sort of advantage would not have been obtainable through use of combatants. Whereas, the rules of IHL seeks to have the scene of combat cleared of civilians in order to protect them from harm, it allows VHSs to influence the outcome of the hostilities by taking positions around legitimate military objectives.

The inadequacy of the current regulation of VHSs is further highlighted when we look at the direct participation in hostilities test.

(d) Voluntary human shields do not satisfy the direct participation in hostilities test

i. Introduction

Even from as early as the 18th century there was a clear correlation between the principle of distinction²⁴⁸ and the obligation on protected persons to refrain from direct participation in hostilities²⁴⁹. Protected persons who nonetheless made themselves guilty of participating directly in hostilities would have their protections against direct attack suspended for the duration of their direct participation²⁵⁰. The application of the DPH test is therefore of significance to a combatant as it would indicate whether, in the circumstances of an intended strike, it is necessary to take precautionary measures and apply the proportionality test²⁵¹. Where protected persons are in the vicinity of a potential target, IHL requires that any harm to these protected persons be minimised through precautionary measures²⁵². Moreover, the subsequent attack would only be lawful if the harm caused can be justified by a significant military advantage gained from the attack²⁵³. The DPH test has been included in Common Article 3 of the four 1949 Geneva Conventions (relating to conflict of an non-international nature), and is also currently contained in the various Protocols Additional to the Geneva Conventions²⁵⁴ (relating to conflicts of an

²⁴⁸ AP I article 48.

²⁴⁹ A Spanish general sent his opponent a letter confirming that civilians who directly participate in hostilities without being part of the 'company of which he is wearing the uniform' could be summarily hanged. Thus, clearly indicating a distinct correlation between the principle of distinction and the DPH test. See Jensen E 'Direct Participation in Hostilities: a concept broad enough for today's targeting decisions' in W Banks (ed.) *New Battlefield Old Laws: Critical debates on asymmetric warfare* (2011) Columbia University Press 85 91.

²⁵⁰ Jensen E 'Direct Participation in Hostilities: a concept broad enough for today's targeting decisions' in W Banks (ed.) *New Battlefield Old Laws: Critical debates on asymmetric warfare* (2011) Columbia University Press 85 91.

²⁵¹ Schmitt M 'The interpretive guidance on the notion of direct participation in hostilities: a critical analysis' 1 *Harvard National Security Journal* (2010) 5 13.

²⁵² AP I article 37.

²⁵³ Schmitt 'The interpretive guidance' 13.

²⁵⁴ AP I article 51(3) & AP II article 13(3).

international nature) which stipulate that civilians are protected from attack 'unless and for such time as they take direct part in hostilities'²⁵⁵.

Owing to the impact a determination as to whether a protected person is participating directly in hostilities can have on the individual's protection from attack, it is prudent to consider the test and whether the conduct of the VHS meets the DPH threshold. What follows is an analysis of the history of the DPH test and the consequent *ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities* (hereafter *Interpretive Guidance*). The reasoning of the experts who formulated the test, and the factors that influenced the adoption of the proposed criteria will follow. Thereafter, criticism levelled at the proposed criteria will be evaluated in order to assess the potential for future amendments to the test. Finally, a comparison would be drawn between the outcomes of considering VHSs as direct participants on the one hand, and considering them as not directly participating on the other. This will serve to indicate which approach is most sound in light of the realities of IAC and IHL.

(aa) Assessing direct participation in hostilities prior to the ICRC Interpretive Guidance

Prior to 2009, there was no clear definition as to what constituted DPH. States, international courts and tribunals, as well as academics approached the test on a case-by-case basis. It was a matter of 'exemplification rather than explication'²⁵⁶, as examples of what would and would not constitute DPH were provided, instead of a formula against which to measure all actions. Although, it was easy to think of cases where the conduct would definitely amount to DPH, such as 'attacking enemy combatants or military objectives'²⁵⁷, there remained

²⁵⁵ Allen C 'Direct participation in hostilities from cyberspace' (2013) 54 *Virginia Journal of International Law* 173 177.

²⁵⁶ Schmitt M 'Deconstructing direct participation: the constitutive elements' (2010) 42 *New York University Journal of International Law & Politics* 697 709.

²⁵⁷ Rogers A 'Combatant Status' Crimes of War Project available at <http://www.crimesofwar.org/a-z-guide/combatant-status/> (accessed 21 July 2015).

certain acts that were not so clear. The case-by-case or 'know it when you see it' approach is particularly problematic when faced when a new actor under IHL.

State practice

States adopted an approach of assessing whether or not a protected person can be considered as a direct participant in hostilities on a case-by-case basis. This is useful to the combatant as it gives the combatant freedom to make quick decisions, but without any specific criteria and only examples to turn to, this approach draws heavily on the combatant's subjective considerations. The approach therefore leaves room for abuse by combatants.

In line with the mentioned casuistic approach, the 2004 UK *Manual on the Law of Armed Conflict*²⁵⁸ provided that:

Whether civilians are taking a direct part in hostilities is a question of fact. Civilians manning an anti-aircraft gun or engaging in sabotage of military installations are doing so. Civilians working in military vehicle maintenance depots or munitions factories are not, but they are at risk since military objectives may be attacked whether or not civilians are present²⁵⁹.

In 2006 the Australian Defence Force²⁶⁰ also adopted such approach:

Whether or not a civilian is involved in hostilities is a difficult question, which must be determined by the facts of each individual case. Civilians bearing arms and taking part in military operations are clearly taking part in hostilities; civilians working in a store on a military air base may not necessarily be taking such a direct part²⁶¹.

²⁵⁸ United Kingdom. Ministry of Defence. *The Manual on the Law of Armed Conflict* (2004).

²⁵⁹ Ibid chapter 5.3.3.

²⁶⁰ Australia. Defence Doctrine Publication (ADDP) 06.4. *Law of Armed Conflict* (2006).

²⁶¹ Ibid chapter 5.36.

Similarly, the 2007 US *Commander's Handbook*²⁶² provided examples of what constitutes direct participation. Interestingly to note was how combatants were given factors to consider in order to guide them in their decision-making. It stated:

[DPH includes] taking up arms or otherwise trying to kill, injure or capture enemy personnel or destroy enemy property. Also civilians serving as lookouts or guards, or intelligence agents for military forces may be considered to be directly participating in hostilities. Combatants in the field must make an honest determination as to whether a particular person is or is not taking a direct part in hostilities based on the person's *behavior, location, attire and other information* available at the time.²⁶³ (Own emphasis)

Accordingly, state practice, although predominantly focused on a case-by-case analysis, gradually underwent a change as the need for a universal approach, with clearly defined criteria, became more pressing.

International courts and tribunals

The ICTY judgments also support the view that prior to the *Interpretive Guidance* the DPH test was applied without a criteria to guide decision-making. Instead, as seen in the *Dusko Tadic* case of 1997²⁶⁴, the international courts and tribunals followed a similar approach to state practice:

It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim to ascertain whether, in each individual's circumstance, that person was actively involved in hostilities at the relevant time²⁶⁵.

²⁶² United States. *The Commander's Handbook on the Law of Naval Operations* (2007).

²⁶³ Ibid chapter 8.2.2.

²⁶⁴ *Prosecutor v Dusko Tadic* ICTY Judgment (7 May 1997) IT-94-1-T.

²⁶⁵ Ibid 616.

It is not difficult to see how this method of assessment left much to be desired. Unless the conduct of the protected person in question is known to constitute an example of DPH, or is relatively similar, it would be considerably tough to conclude that a person is a direct participant with much certainty. To further complicate matters it was not only combat related activities that were provided as examples of direct participation. Thus, exactly where the boundaries of direct participation began and ended was unclear. The court in the *Strugar case* points out this particular difficulty:

Conduct amounting to direct or active participation in hostilities is not, however, limited to combat activities as such... Moreover, to hold all activities in support of military operations as amounting to direct participation in hostilities would in practice render the principle of distinction meaningless²⁶⁶.

Exactly where the line delineating direct participation in hostilities, and the general war effort is situated, was one of the major factors that influenced the subsequent adoption of the criteria outlined in the *Interpretive Guidance*.

Academia

Unsurprisingly, academics were also uncertain as to how exactly the DPH test ought to be applied. Dinstein indicated some of the difficulties in applying the DPH test prior to the *Interpretive Guidance*:

... the adjective 'direct' does not shed much light on the extent of participation required. For instance, a driver delivering ammunition to combatants and a person who gathers military intelligence in enemy-controlled territory are commonly acknowledged to be actively taking part in hostilities. There is a disparity between the latter and a civilian who retrieves intelligence data from satellites or listening posts, working in terminals located in his home country. Needless to say, perhaps, a mere contribution to the general war effort (e.g.,

²⁶⁶ *Prosecutor v Strugar* ICTY Appeal Chamber Judgment (17 July 2008) Case No IT-01-42-A 176-179.

by supplying foodstuffs to combatants) is not tantamount to active participation in hostilities²⁶⁷.

A clearly formulated criteria would better guide the combatant to a conclusion that takes cognisance of both military necessity and humanitarian considerations, and in doing so ensure the conduct complies with the precepts of IHL.

(bb) The ICRC Interpretive Guidance on the notion of direct participation in hostilities

The ICRC's DPH Project emerged in the context of a growing uncertainty regarding civilians who were becoming more actively involved in IAC²⁶⁸. Technological advances gave rise to new actors and methods of warfare. Without criteria to assess whether or not they are direct participants or analogous examples to compare them with, their presence posed problems to combatants in their targeting decisions. Initially, the focus was on civilian contractors who were 'unregulated in either law or policy'²⁶⁹. Due to civilian contractors becoming more prevalent and prone to 'repeated incidents of misconduct' attracting much publicity, certain states have not only 'endeavoured to define the legal status of contractors', but also to 'create systems whereby they can be held accountable'²⁷⁰. However, once the experts convened, the attention soon shifted to 'irregular forces' such as ' Hamas, Hezbollah, and the al Qaeda network'²⁷¹.

The experts convened to resolve disputes regarding 'who qualifies as a civilian in the context of direct participation in hostilities', 'what conduct amounts to

²⁶⁷ Dinstein Y *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) (Cambridge University Press: Cambridge) 1st ed 27-28.

²⁶⁸ Schmitt 'The interpretive guidance' 7-11.

²⁶⁹ Ibid 10.

²⁷⁰ Ibid. Schmitt mentions instances of civilian contractors having a 'negotiated status' that states party to a particular armed conflict agree to in order to establish 'jurisdictional prerogatives', and cites an agreement between the US and Iraq as an example.

²⁷¹ Ibid 11.

direct participation' and 'when is a civilian directly participating such that he or she is subject to attack'²⁷².

Who qualifies as a civilian?

The *Interpretive Guidance* commenced by first setting out the definition of a 'civilian' in IAC, in order to determine who may not be subject to direct attack. It noted that:

For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities²⁷³.

A matter of contention that arose regards the *Interpretive Guidance's* suggestion that only those organised armed groups that had ties with a party to the armed conflict would not be considered as civilians²⁷⁴. Schmitt raises the argument that the suggested approach effectively places members of organised armed groups without ties to a party to the armed conflict on the same legal footing as civilians, and 'the *Interpretive Guidance's* solution for avoiding mistaken attacks on civilians by imposing a function criterion for attacks on group members will accomplish little'²⁷⁵. Determining whether or not a member of such armed group has effectively ceased his or her direct participation is a tough task for those on the battlefield making targeting decisions. However, it is submitted that the issue of distinguishing between a civilian and a member of an organised armed group not linked to any armed force party to the conflict will most often be clouded with doubt and attract the application of article 50(1) of AP I in any event. More importantly, to have organised armed groups without a link to any party to the armed conflict considered combatants or 'civilians

²⁷² Ibid 14.

²⁷³ Melzer N 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2009) ICRC (hereafter *Interpretive Guidance*).

²⁷⁴ Schmitt 'The interpretive guidance' 14-24.

²⁷⁵ Ibid 18, 21.

continuously directly participating', as Schmitt suggests, would be haphazardly increasing the boundaries of legitimate warfare²⁷⁶. The better approach would be to consider these actors as civilians and to target them only when they are found to be directly participating. In such case there would be no doubt as to their legal status, and conversely no one would be considered a legitimate target without sufficient certainty. Hence, it is submitted that the *Interpretive Guidance* provides a sound synopsis of actors who qualify as 'civilians' under IHL.

What conduct amounts to *direct* participation?

The mere participation in hostilities does not constitute direct participation which results in a loss of protection from attack. Instead, it is necessary to distinguish 'indirect' from 'direct' participation²⁷⁷. Many acts can be seen to contribute to the hostilities, such as financial support for the war, citizens back home boosting the morale of combatants²⁷⁸, but to hold that all these people will be direct participants will unreasonably extend the bounds of legitimate warfare. The concept of direct participation 'is developed from the prohibition on attacking or mistreating persons taking no active part in the hostilities'²⁷⁹. It serves, therefore, to limit lawful targets to those who are directly involved in the conduct of hostilities.

In 2003, expert meetings were convened to provide clarity on what is meant by 'direct participation in hostilities' under IHL²⁸⁰. Initially, the experts followed a similar approach to that of states, international courts and tribunals, and academia: examples of what clearly is and is not direct participation were analysed. This approach led to certain contentious examples which highlighted the inherent flaws of the instinctive case-by-case or comparative approaches currently employed during decision-making processes²⁸¹. Experts, thereafter,

²⁷⁶ Ibid 24.

²⁷⁷ Ibid 25.

²⁷⁸ Sandoz Y Swinarski C Zimmerman B (eds.) (1987) '*Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*' (Martinus Nijhoff: Leiden) 1945 [Hereafter *AP Commentary*].

²⁷⁹ Ibid Schmitt M 'The interpretive guidance' 24.

²⁸⁰ Schmitt 'Deconstructing direct participation' 709-712.

²⁸¹ Ibid 711.

considered particular factors that combatants would have to contemplate when assessing whether an actor is participating directly. These factors were used as the basis upon which the DPH criteria were formulated. Among these factors were issues of *mens rea*, proximity to the frontlines, extent of military command, and the criticality of the act to the direct application of violence against the enemy²⁸².

Experts utilised the *ICRC Commentary on the Additional Protocols* (hereafter *Commentary*) during the process of formulating the exact criteria that would serve to guide combatants in their decision making. Although these documents were not binding, it did provide a persuasive and reasoned platform on which to build. The point of departure, therefore, was to contemplate the appropriate bounds of legitimate warfare as the DPH criteria would have to ensure that it is neither too narrow nor too broad. It was necessary to approach the matter realistically:

... to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly²⁸³.

Without a proper distinction between direct participation and the general war effort any attempts 'to reaffirm and develop international humanitarian law could become meaningless'²⁸⁴. In reference to article 51(3), the *Commentary* indicated that 'direct participation' constitutes 'acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces'²⁸⁵. It follows, therefore, that a 'hostile' act relates to those acts which are intended to 'cause actual harm to the personnel and equipment of the armed forces'²⁸⁶. Furthermore, the nature of armed conflict necessarily means that there will always be an aggressor and a victim, and for this reason the word 'attacks' constitutes 'acts of violence against the adversary,

²⁸² Ibid.

²⁸³ *AP Commentary* 516.

²⁸⁴ Ibid chapter 1 1945.

²⁸⁵ Ibid 1944.

²⁸⁶ Ibid 1942.

whether in offence or defence'²⁸⁷. The *Commentary*, therefore, pointed to two factors that aid combatants in their attempts to distinguish acts of direct participation from acts merely supporting the general war effort:

First, an act that negatively impacts the enemy's military effort, or in which harm was intended, usually qualifies [as direct participation]. Second, a relatively direct nexus between the action and the resulting harm should exist; in other words, direct participation must be distinguishable from indirect participation²⁸⁸.

These two factors ultimately gave rise to the first two requirements adopted at the expert meetings. Discussions at the expert meetings, however, indicated a need to consider the issue of 'criticality, command and control, and proximity'²⁸⁹. This then led to the third and final element of the *ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* released in May, 2009²⁹⁰.

A protected person only loses his or her protections against direct attack for the duration of his or her direct participation. In terms of the *Interpretive Guidance*, for conduct to constitute direct participation it would need to satisfy all three cumulative elements of the DPH test²⁹¹: the 'threshold of harm; the element of direct causation and a belligerent nexus'²⁹².

Threshold of harm

The 'threshold of harm' element requires that:

²⁸⁷ AP I article 49.

²⁸⁸ Schmitt 'Deconstructing direct participation' 712.

²⁸⁹ Ibid.

²⁹⁰ *Interpretive Guidance*.

²⁹¹ Schmitt 'The interpretive guidance' 27.

²⁹² *Interpretive Guidance* 20.

The act must be likely to adversely affect the military operations or capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack²⁹³.

There are, thus, two distinct types of harm that if inflicted would satisfy the threshold. The first relates to harm of a military nature. The 'quantitative gravity'²⁹⁴ thereof is not important, or stated differently, it does not stipulate a minimum degree of harm that has to be inflicted²⁹⁵. Harm of a military nature can literally be 'any consequence adversely affecting the military operations or military capacity of a party to the conflict'²⁹⁶. Thus, apart from killing or injuring the enemy forces, other acts which are less severe would equally satisfy the threshold. For example:

... the causation of physical or functional damage to military objects, the military operations or military capacity of a party to the conflict can be adversely affected by sabotage and other armed or unarmed activities restricting or disturbing deployments, logistics and communications. Adverse effects may also arise from capturing or otherwise establishing or exercising control over military personnel, objects and territory to the detriment of the adversary. For instance, denying the adversary the military use of certain objects, equipment and territory, guarding captured military personnel of the adversary to prevent them being forcibly liberated (as opposed to exercising authority over them), and clearing mines placed by the adversary would reach the required threshold of harm. Electronic interference with military computer networks could also suffice, whether through computer network attacks (CNA) or computer network exploitation (CNE), as well as wiretapping the adversary's high command or transmitting tactical targeting information for an attack²⁹⁷.

However, it does not avail a combatant to consider a protected person's conduct as being adverse purely because he or she refuses to act in a manner that is

²⁹³ *Interpretive Guidance* 46.

²⁹⁴ *Ibid* 47.

²⁹⁵ Bosch S 'Targeting Decisions Involving Voluntary Human Shields In International Armed Conflicts: In Light Of The Prohibition Against Civilian Direct Participation In Hostilities' (2013) XLVI (3) *Comparative and International Law Journal of Southern Africa* 447 455.

²⁹⁶ *Interpretive Guidance* 47.

²⁹⁷ *Ibid* 48.

beneficial to the military. For example: a protected person refusing to act as an 'informant, scout or lookout' cannot be said to have satisfied the threshold of harm²⁹⁸.

Harm of a military nature is not the only relevant type as acts which 'are likely to inflict death, injury or destruction to protected persons and objects would also satisfy the threshold'²⁹⁹. This is because the killing, injuring and destroying of protected persons and objects is considered direct participation in hostilities, irrespective of whether it is relative to acts intended to cause military harm³⁰⁰. Relying on the *travaux préparatoire* the *Interpretive Guidance* is quick to point out that although the meaning of 'attacks' under AP I article 49 refers to 'against the adversary', it serves to indicate a link to the hostilities between armed forces rather than an intended target³⁰¹. Accordingly, the threshold of harm allows for 'sniper attacks against civilians and the bombardment or shelling of civilian villages or urban residential areas', among other acts which also inflict death, injury or destruction to protected persons and objects, to constitute direct participation in hostilities³⁰². Acts that fall short of killing, injuring or destroying protected persons and objects cannot be "equated with the use of means or methods of 'warfare' or, respectively, of 'injuring the enemy', as would be required for a qualification as hostilities".³⁰³ Accordingly, acts such as 'the building of fences or roadblocks, the interruption of electricity, water, or food supplies, the appropriation of cars and fuel, the manipulation of computer networks, and the arrest or deportation of persons' will not constitute direct participation in hostilities³⁰⁴.

²⁹⁸ Ibid 49.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Ibid. This approach has been followed by the ICTY in its judgments which has held that sniping and bombardment of civilians amount to an 'attack.' (See Schmitt M 'The interpretive guidance on the notion of direct participation in hostilities: a critical analysis' (2010) 1 *Harvard National Security Journal* 5 28).

³⁰² *Interpretive Guidance* 49.

³⁰³ Ibid 50.

³⁰⁴ Ibid. This is so even if the act in question is prohibited under IHL.

In both instances, whether the harm is of a military nature or relative to protected persons and objects, the harm in question need not *actually* materialise³⁰⁵. It need only be 'likely', and accordingly, all that is required is that there be an objective likelihood that the harm will result from the act in question, or stated differently, that the harm is reasonably expected to follow as a consequence of the act in question³⁰⁶. Combatants are, therefore, not required to wait for the adversary to actually inflict harm before considering their conduct to satisfy the threshold of harm.

If the conduct of a civilian accordingly fails to satisfy the *Interpretive Guidance's* threshold of harm requirement, then he or she will not be considered a legitimate target³⁰⁷.

Direct causation

The second of the cumulative criteria proposed by the *Interpretive Guidance* is the 'direct causation' element, which requires that:

... there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part³⁰⁸.

Thus, for an act to meet this requirement there needs to be a sufficiently close connection between the act and the harm likely to occur³⁰⁹. The close connection would serve to distinguish direct participation from acts that form part of the general war effort. The latter being too wide a field to consider as legitimate targets during a war. War sustaining acts and acts which contribute to the general war effort are considered too far removed from the conduct of hostilities and will not meet the direct causation requirement. Examples of conduct that fall under the war sustaining category include:

³⁰⁵ Ibid 47.

³⁰⁶ Ibid.

³⁰⁷ Allen 'Direct participation in hostilities from cyberspace' 179.

³⁰⁸ *Interpretive Guidance* 46.

³⁰⁹ Ibid 52.

... political, economic or media activities supporting the general war effort (e.g. political propaganda, financial transactions, production of agricultural or non-military industrial goods)³¹⁰.

Whereas, conduct contributing to the general war effort would include:

[the] design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations³¹¹.

The *Interpretive Guidance* posits that only acts which are linked to the likely harm in one causal step would constitute direct participation³¹². Thus, the war sustaining efforts and acts contributing to the general war effort, essentially building up or maintaining the combatant's capacity to harm the enemy, is excluded from the concept of direct participation³¹³. These acts at best are considered indirect participation.

It is irrelevant to consider whether an act is indispensable to the causation of harm³¹⁴. The only relevant criteria is to establish whether or not the protected person's conduct in question is sufficiently closely connected to the actual harm inflicted to the enemy. The *Interpretive Guidance* provides the following example to illustrate this point:

...the financing or production of weapons and the provision of food to the armed forces may be indispensable, but not directly causal, to the subsequent infliction of harm. On the other hand, a person serving as one of several lookouts during

³¹⁰ Ibid 51.

³¹¹ Ibid.

³¹² Ibid 53.

³¹³ Ibid.

³¹⁴ Ibid 54.

an ambush would certainly be taking a direct part in hostilities although his contribution may not be indispensable to the causation of harm³¹⁵.

Furthermore, harm caused by an uninterrupted chain of events or acts will not cause all those involved to be considered as having directly caused the harm. The *Interpretive Guidance* explains as follows:

... the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting and detonation of that device, do not cause that harm directly³¹⁶.

In terms of coordinated military operations, the *Interpretive Guidance* takes cognisance of 'the collective nature and complexity of contemporary military operations'³¹⁷. Accordingly, provision is made for instances where harm is caused by a collection of acts in conjunction with one another³¹⁸. The *Interpretive Guidance*, in such instances, would dictate that only those acts within a coordinated operation that formed an integral part of the inflicting of harm would satisfy the direct causation element³¹⁹. Examples of acts that may be considered an integral part to the infliction of harm to the enemy in coordinated operations, include:

... the identification and marking of targets, the analysis and transmission of tactical intelligence to attacking forces, and the instruction and assistance given to troops for the execution of a specific military operation³²⁰.

³¹⁵ Ibid.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Ibid.

³¹⁹ Galvin J 'Direct participation in hostilities: a proposition for U.S. reaction to the ICRC's Interpretive Guidance and Formulation for a Practicable Definition' (2012) *The George Washington University* 40 available at <http://gradworks.umi.com/15/31/1531544.html> (accessed 27 July 2015). Galvin paraphrases from Schmitt 'Deconstructing direct participation: the constitutive elements' (2010) 725, and the *Interpretive Guidance* 52-53.

³²⁰ *Interpretive Guidance* 55.

Thus, whether it is an individual act or a coordinated military operation, only those protected persons whose conduct is sufficiently closely linked to the harm caused to the enemy, will qualify.

Another reality of modern armed conflict, where combatants use ‘delayed (temporally remote) weapons-systems, such as mines, booby traps and timer-controlled devices, as well as ... remote-controlled (geographically remote) missiles, unmanned aircraft and computer network attacks’, is that temporal and geographic proximity is less relevant in a determination of direct causation³²¹. The causal proximity is the crucial determinant and will remain even where there is no temporal or geographic proximity between the protected person’s act and the likely harm it causes the enemy³²².

In the instances where the harm is yet to materialise the *Interpretive Guidance* provides that ‘the element of direct causation must be determined by reference to the harm that can reasonably be expected to directly result from a concrete act or operation’³²³.

Finally, even if the protected person’s conduct has satisfied both the threshold of harm and direct causation elements, it still needs to meet the belligerent nexus requirement to constitute direct participation in hostilities³²⁴.

Belligerent nexus

In terms of the ‘belligerent nexus’ constitutive element:

[T]he act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another³²⁵.

³²¹ Ibid.

³²² Ibid.

³²³ Ibid.

³²⁴ Ibid 58.

³²⁵ Ibid 55.

Therefore, in an effort to ensure that direct participation only involves conduct that constitutes an integral part of the hostilities between states, 'not every act' meeting the threshold of harm 'necessarily amounts to direct participation in hostilities'³²⁶. IHL treaty provisions defining 'hostilities' and 'attacks' leads to the appreciation that

... an act must not only be objectively likely to inflict harm that meets the first two criteria, but it must also be specifically designed to do so in support of a party to an armed conflict and to the detriment of another³²⁷.

Accordingly, this element requires that an action fulfilling the threshold of harm must directly cause the harm 'in support of a party to an armed conflict and to the detriment of another'³²⁸. Acts that are neither aimed at harming a party to armed conflict nor perpetrated in favour of a party to armed conflict, would not amount to direct participation in hostilities³²⁹. Unless such activities fulfil all the requirements in order to constitute a separate armed conflict, it stands to be regulated through law enforcement measures³³⁰.

In assessing whether or not a particular act has a belligerent nexus the focus is on the objective operational purpose of the act³³¹. The subjective or hostile intent of the person perpetrating the act is irrelevant, bar limited exceptions³³² in extreme cases³³³. Therefore, the belligerent nexus requirement is generally not affected by factors such as 'personal distress or preferences, or by the

³²⁶ Ibid 58.

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ Ibid 59.

³³⁰ Ibid.

³³¹ Van der Toorn posits that the objective standard applicable must provide wide latitude of discretion for the decision-maker. (See Van der Toorn D 'Direct participation in hostilities: a legal and practical evaluation of the ICRC Guidance' in *From the selected works of Damien J van der Toorn 2* (2009) 38).

³³² The extreme cases where subjective intent factors into the direct participation in hostilities assessment relate to instances where: 1) the protected person is 'totally unaware of the role they are playing in the hostilities (driver unaware he is transporting a remote-controlled bomb)'; 2) when the protected person is completely deprived of his or her physical freedom (an involuntary human shield coerced into providing cover for belligerents). In these cases it is deemed that the protected persons cannot be considered as having performed an act and are therefore still protected against direct attacks. (See *Interpretive Guidance* 60).

³³³ *Interpretive Guidance* 60.

mental ability or willingness of persons to assume responsibility for their conduct³³⁴. Consequently, those persons forced to engage in hostile acts, and even 'child soldiers', will be considered as direct participants³³⁵. They will lose their protections and constitute legitimate targets to the opposing forces³³⁶.

The practical relevance of the belligerent nexus requirement is highlighted by the fact that, although there are numerous activities that may satisfy the threshold of harm and direct causation elements, some still lack the requisite belligerent nexus³³⁷. Examples are criminal acts committed 'for reasons unrelated to the conflict', for instance; cases where military equipment is stolen for private use³³⁸. Whilst it is clear that the act will cause the threshold of harm, and the act of theft is directly linked to the harm inflicted, it will still not satisfy the belligerent nexus requirement as it is not perpetrated in support of a party to the armed conflict³³⁹. Additional examples that will further illustrate the practical relevance of the belligerent nexus requirement are: 'assaults against military personnel for reasons unrelated to the conflict; theft of military equipment in order to sell it; defence of oneself or others against unlawful violence (even when committed by combatants); exercise of police powers by law enforcement authorities; and civil disturbances unrelated to the conflict'³⁴⁰.

The task of determining whether a belligerent nexus exists in the circumstances can pose practical difficulties. 'Gangsters and pirates' make distinguishing 'hostilities from violent crime unrelated to, or merely facilitated by, the armed conflict' difficult, as they conduct their operations in legally grey areas³⁴¹. The *Interpretive Guidance* posits that determinations should be made, taking into account all information reasonably available to the combatant, and be ultimately based on objectively verifiable factors³⁴². All precautionary measures reasonably available to the combatants must be utilised in order to avoid

³³⁴ Ibid.

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Ibid 60-61.

³⁴⁰ Schmitt 'The interpretive guidance' 34.

³⁴¹ *Interpretive Guidance* 63-64.

³⁴² Ibid.

‘erroneous or arbitrary targeting’³⁴³. Ultimately, the question that needs to be answered is whether, in the circumstances, the conduct of the protected person ‘can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party’³⁴⁴.

(cc) Criticisms of the ICRC’s Interpretive Guidance direct participation in hostilities test

In light of the number of years it took for experts to unitedly address the issue of DPH, one can expect the first attempt to attract a certain amount of criticism. A shift from a ‘know it when you see it’ approach to one of assessment against objective criteria will have its edges that needs refining. Thus, considering that the ICRC’s *Interpretive Guidance* is a persuasive, rather than binding document, it remains important to effectively acknowledge and evaluate critiques. This will have either of two positive outcomes for IHL: if the critique is analysed to be unfounded, it strengthens the reasoning and persuasiveness of the *Interpretive Guidance*. Alternatively, if the critique has weight, the existing formulation of the ICRC can be amended to represent the international consensus. All in all, the benefits of critically evaluating objections to the ICRC’s formulation of what constitutes DPH will aid in finding a formula that states uniformly adopt in practice. To follow is an evaluation of the more prominent objections raised against the constitutive elements and how this may affect the assessment of DPH. The counter-arguments raised by Melzer is added to provide a defence of the ICRC criterion.

Threshold of harm

³⁴³ Ibid. (See also Allen C ‘Direct participation in hostilities from cyberspace’ (2013) 45: Allen posits that a combatant in his decision-making would do well to err only on the side of caution considering that a direct participant loses his or her protection against direct targeting).

³⁴⁴ *Interpretive Guidance* 63-64.

The main critique levelled at the threshold of harm is that the element is ‘under-inclusive and unduly difficult to satisfy’³⁴⁵. Considering the element concerns two distinct targets each would be considered separately. Firstly, we will analyse the criticisms levelled against the requirement that ‘the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict’, and then the requirement that the act must be ‘likely to inflict death, injury or destruction on persons or objects protected against direct attack.’ The objections aimed at the proposed criterion will be evaluated in light of Melzer’s defence.

The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict...

Van der Toorn strikes the first constitutive element at its foundation when he suggests that ‘adversely affect’ does not technically amount to a threshold, but rather a test of causation³⁴⁶. Basically, he argues that the element does not look at the degree of harm suffered, but instead focuses on whether the conduct of the civilian in question is the cause of the said harm. It is submitted, however, that it is not so much the link between the harm and the actor that is of significance under this element. Although there is no minimum degree required, there is clearly a threshold relating to a *likelihood* of harm directing that acts which are *likely to adversely affect the military operations or capacity of the enemy* will be sufficient. Conversely, those which are not likely to have such an ‘adverse affect’ would not meet the required threshold.

Van der Toorn suggests that the supposed threshold set by the current formulation of the ICRC’s DPH test is too low, and means ‘any negative impact, even if relatively inconsequential to the enemy, would qualify’³⁴⁷. As an alternative, Van der Toorn proposes that the element should rather ‘require a

³⁴⁵ Bosch S ‘The international humanitarian law notion of direct participation in hostilities – a review of the ICRC Interpretive Guide and subsequent debate’ (2014) 17:3 *Potchefstroom Electronic Law Journal* 999 1011.

³⁴⁶ Van der Toorn D ‘Direct participation in hostilities: a legal and practical evaluation of the ICRC Guidance’ (2009) 32-33.

³⁴⁷ *Ibid* 33.

significant adverse effect on military operations or capacity of the enemy'³⁴⁸. It is submitted that the DPH test is formulated to include within its intended ambit those acts which only cause harm in conjunction with other acts. If we consider preparatory conduct and civilians who assist the inflicting of harm by supplying weapons directly to combatants, then the likelihood of an adverse effect on the enemy would adequately account for such acts, whilst simultaneously maintaining a distinction between direct participation and the general war effort. If we were to increase the threshold to only those acts which are likely to *significantly* adversely affect the enemy, then those actors who supply weapons and ammunitions directly to an armed force will not satisfy the criteria despite constituting a major military advantage if killed. An outcome which does not comport to the principle of military necessity and the primary objective of a state's armed forces to weaken the military of the enemy. Additionally, exactly what would constitute a *significant* adverse effect would need to be established to sufficiently guide combatants in their targeting decisions. It seemingly implies death, injury and destruction to legitimate military objectives and would raise the question as to why instead of 'likelihood' the threshold is not more along the lines of a 'probability', instead. It is easy to appreciate that greater certainty will inevitably be required of a combatant to assert that a serious degree of harm will likely be caused to the enemy forces. To have a *significant* adverse effect as the requisite threshold will, accordingly, cause greater hesitation on the part of combatants.

Whilst Van der Toorn looked at the nature of the element and the level the threshold is set at, Schmitt objected to limiting the element to instances where harm is caused to the enemy. Schmitt argues that such an approach renders the element under-inclusive³⁴⁹. He basis this contention on the example of Iraqi insurgent forces' development and use of IEDs that weakened the morale of the Coalition forces who had to develop counter-measures at a great cost³⁵⁰. Thus, the harm in question spread wider than just the casualties caused³⁵¹. Schmitt

³⁴⁸ Ibid.

³⁴⁹ Schmitt 'Deconstructing direct participation' 718.

³⁵⁰ Ibid 719.

³⁵¹ Ibid.

views the Iraqi insurgents increasing their capacity through the development and use of IEDs as having the same effect as weakening the Coalition forces³⁵². The appreciation that 'conflict is usually a zero sum game' in Schmitt's opinion indicates the harm-benefit link and, accordingly, the element should not purely focus on causing harm to the enemy³⁵³. Schmitt also further observes that the *Interpretive Guidance* itself widens the ambit of the threshold of harm element in the case of actions against civilians and civilian objects, when it held that the element would be satisfied 'regardless of any military harm to the opposing party to the conflict'³⁵⁴. It, therefore, serves as an example of the ICRC itself acknowledging that limiting the threshold of harm to cases where the enemy is adversely affected would be incongruent for under-inclusiveness³⁵⁵. Schmitt argues that the correct approach would be to hold that both an act harming or benefitting a party to the armed conflict could satisfy the threshold element. He qualifies this approach by noting that an application of the other two cumulative elements would subsequently curtail the ambit of acts to those which should rightly constitute DPH³⁵⁶.

Melzer counters by stating that Schmitt failed to indicate how the *Interpretive Guidance*'s concept of military harm is an overly narrow interpretation of direct participation³⁵⁷. In defence of the *Interpretive Guidance*, Melzer argued that Schmitt's suggested approach of attaching a loss of civilian protection to persons who develop and produce the IEDs is contradictory³⁵⁸. It contradicts not only the distinction between direct participation and the general war effort, but also Schmitt's own recognition that working in the weapons industry is not, in itself, direct participation³⁵⁹.

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ Ibid 720.

³⁵⁵ Ibid.

³⁵⁶ Ibid. Schmitt reasons that the criteria being cumulative would counter arguments that contend the widening of the scope of the threshold of harm element would render it over-inclusive. Instead he argues that the correct approach would be to assess whether the harm or benefit in question is sufficiently closely linked to the resulting harm/benefit in order to conclude that the act was direct participation.

³⁵⁷ Melzer N 'Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 858.

³⁵⁸ Ibid 860.

³⁵⁹ Ibid.

... or alternatively likely to inflict death injury or destruction on persons or objects protected against direct attack.

Whereas Van der Toorn argued that the threshold in relation to acts that adversely affect military operations or capacity of the enemy was too low, he is of the view that requiring 'death, injury or destruction' in relation to acts adversely affecting the civilian population or civilian objects sets the threshold too high³⁶⁰. Instead, he proposes that the formulation of the test with regard to protected persons should likewise 'require *significant* adverse effects to civilians'³⁶¹.

Schmitt, on the other hand, maintains that the *Interpretive Guidance's* limitation of direct participation in the case of civilians and civilian objects as constituting acts which can be described as 'attacks', is not justified³⁶². He is of the view that the better approach would be to include 'any harmful acts directed against protected persons or objects when said acts are either part of the armed conflict's 'war strategy,' as in the case of deportations, or when there is an evident relationship with ongoing hostilities"³⁶³. This resonates with Van der Toorn's view that the threshold regarding civilians and civilian objects is too high. Schmitt proposes that instead of using 'death, injury or destruction' as the threshold, the better standard would be simply to 'distinguish actions [which are harmful to civilians or civilian objects] directly related to the armed conflict from those that are merely criminal in nature"³⁶⁴. Those which are directly related to the armed conflict would satisfy the threshold element, and can through this approach, include acts such as hostage-taking and deportation³⁶⁵.

Melzer defends the proposed threshold of harm element by maintaining that the loss of civilian protection is not to punish criminal conduct or to safeguard the

³⁶⁰ Van der Toorn 'Direct participation in hostilities' (2009) 33.

³⁶¹ Ibid.

³⁶² Schmitt 'Deconstructing direct participation' 724.

³⁶³ Ibid.

³⁶⁴ Schmitt 'The interpretive guidance' 28.

³⁶⁵ Schmitt 'Deconstructing direct participation' 724.

civilian population against all forms of harm³⁶⁶. The rule is intended to enable parties to an armed conflict to react militarily against those directly participating as an enemy in the conflict³⁶⁷. It is why we find the loss of protection premised on harm caused to ‘the enemy’s military operations or capacity, or [the] use [of] means and methods of warfare directly against protected persons or objects³⁶⁸. Schmitt’s proposal for attaching loss of protection to acts forming part of a belligerent’s ‘war strategy’ would disturb the distinction between direct participation and the general war effort³⁶⁹. A belligerent’s ‘war strategy’ can include ‘the totality of a belligerent’s military, political, industrial, agricultural and financial mobilization’³⁷⁰. Thereby, permitting any conduct even remotely related to the armed conflict to satisfy the threshold of harm element, including absurd examples such as economic sanctions, travel restrictions and political propaganda³⁷¹. Moreover, the alternative ‘relationship with ongoing hostilities’ proposed by Schmitt resembles the belligerent nexus requirement and, accordingly, does not constitute an appropriate substitute³⁷².

Direct causation

This element is arguably the most controversial of all those proposed by the *Interpretive Guidance*. In general terms it has been expressed that the *Interpretive Guidance*’s approach may be too narrow and, as a result thereof, exclude vital military operations, that includes ‘operational level planning, general intelligence activities, military logistics, military communications, IED assembly and combat instruction’³⁷³.

Van der Toorn opines that requiring the act in question to be ‘integral to a concrete operation’ causing harm to the enemy is precisely why the element is unjustifiably limited in its scope. He argues that without the armed forces being

³⁶⁶ Melzer ‘Keeping the balance’ 862.

³⁶⁷ Ibid.

³⁶⁸ Ibid.

³⁶⁹ Ibid 861.

³⁷⁰ Ibid.

³⁷¹ Ibid.

³⁷² Ibid 861-862.

³⁷³ Van der Toorn ‘Direct participation in hostilities’ 35.

able to target these excluded actors it 'could make it very difficult for state forces to achieve their military objectives against irregular forces' and consequently 'place such forces at a significant operational advantage'³⁷⁴.

An example Van der Toorn employs to illustrate the argument reads:

...Afghan men sit down in their camp located in a desolate, mountainous region of Afghanistan. It is nearing the end of winter and they are planning to attack foreign troops and Afghan forces in the early spring. They discuss conducting ambushes and IED attacks in the local area, though they do not discuss exactly how, when or where these attacks will occur³⁷⁵.

According to Van der Toorn, acts like the one in the example will not constitute direct participation in terms of the *Interpretive Guidance*, because 'it does not inflict harm, nor is it integral to a specific operation'³⁷⁶. Alternatively, Van der Toorn is of the view that the causal proximity test should be reformulated to 'include operational activities that facilitate and are closely connected with the materialisation of harm'³⁷⁷ as it would 'permit the targeting of the precursor operational activities that make possible the ultimate infliction of harm'³⁷⁸. Additionally, he argues that the proposed reformulation would lift the burden of armed forces having to differentiate integral acts from general military activities³⁷⁹.

Schmitt also finds himself in disagreement with the one causal step standard, which he considers 'overly strict'³⁸⁰ and 'under-inclusive'³⁸¹. He finds it unnecessary for the harm to be caused in one causal step when the requirement already calls for the state's act to constitute an integral part³⁸² of the harm inflicted. Furthermore, the *Interpretive Guidance* fails to explain what exactly the

³⁷⁴ Ibid 35-36.

³⁷⁵ Ibid 36.

³⁷⁶ Ibid.

³⁷⁷ Ibid 37.

³⁷⁸ Ibid.

³⁷⁹ Ibid 37-38.

³⁸⁰ Schmitt 'The interpretive guidance' 29.

³⁸¹ Schmitt 'Deconstructing direct participation' 727.

³⁸² Schmitt 'The interpretive guidance' 29.

one causal step entails or provide any justification for its use³⁸³. In fact, he raises that the *Interpretive Guidance*, itself, points out that an act does not need to be an indispensable part of a coordinated operation causing harm to the enemy. This, according to Schmitt, seems to stand in direct contrast to the one step causal requirement³⁸⁴. Additionally, he argues that this is further supported in that the *Interpretive Guidance* holds that ‘causal proximity and temporal, or even geographical proximity need not coincide’³⁸⁵. Schmitt asserts that the *Interpretive Guidance*, therefore, essentially rejects those acts ‘connected with the resulting harm through an uninterrupted chain of events’³⁸⁶.

The example Schmitt relies on to highlight the weakness of the ‘one causal step’ approach regards the view that the assembler of an IED is comparable to a ‘lookout’ who provides services that are going to be used for a relatively imminent, albeit unknown military operation³⁸⁷. Schmitt posits that one would be hard pressed to conceive of an indirect act which is integral and, therefore, it is possible that an act many steps removed from the eventual harm inflicting act may still be integral. Moreover, those in the midst of battle would be better off having to determine whether an act is integral as opposed to having to apply a juridical direct causation test. Accordingly, it would be more appropriate to apply the ‘integral part’ test in instances of individual, as well as coordinated military operations³⁸⁸. Additionally, Schmitt contends that such application of the ‘integral part’ criterion under the direct causation element would be more readily accepted by states³⁸⁹.

Schmitt then refers to an example the *Interpretive Guidance* provides relating to the assembly and storage of IEDs in a workshop or the smuggling of its components³⁹⁰. Although the *Interpretive Guidance* indicates an appreciation for the fact that such activities may be connected to harm inflicted during

³⁸³ Schmitt ‘Deconstructing direct participation’ 727-728.

³⁸⁴ Ibid 728. Schmitt cites the *Interpretive Guidance* 54.

³⁸⁵ Ibid. Schmitt cites the *Interpretive Guidance* 55.

³⁸⁶ Ibid.

³⁸⁷ Schmitt ‘The interpretive guidance’ 30-31.

³⁸⁸ Schmitt ‘Deconstructing direct participation’ 729.

³⁸⁹ Ibid 730.

³⁹⁰ Ibid 731.

hostilities via ‘an uninterrupted chain of events’, it maintains that such acts do not cause harm directly³⁹¹. Thus, it is distinct from acts of planting and detonating such IEDs. Schmitt is of the view that few states would refrain from attacking those involved in the assembly process purely on the basis that the activities merely cause harm indirectly³⁹². In fact, Schmitt argues it would be absurd to delay an attack in such a situation, as it may be the only means through which the use of the IEDs may be prevented³⁹³. Accordingly, Schmitt reasons that the attack should be considered as justified in the circumstances, because it amounts to an ‘integral part’ of the intended subsequent operations³⁹⁴. The example in question is also distinguishable from a scenario of workers in a munitions factory where the workers are unaware of who the munitions are for, where they will be transported to, and in what operations they would be used. Therefore, the workers in a munitions factory cannot be considered to be directly participating in hostilities³⁹⁵. Whilst one may consider IEDs assembled and stored, as most likely going to be used in a nearby armed conflict, it is not always a certainty. Those performing the assembling and storage activities are not necessarily aware of when, where or possibly by who those devices would be used. It might be performed by a covert weapons manufacturer unrelated to the purchaser of the devices. As a result, a blanket approach to IEDs may lead to deaths that are not justified in terms of the spirit and purport of IHL. Therefore, unless trustworthy intelligence can link the activities to a party involved in the armed conflict, and infer its imminent use in the battle, such individuals should not as a rule be attacked. In such case, the scenario would resemble that of workers in a munitions factory far removed from and not involved in IAC. It is submitted that Schmitt’s approach does not provide an adequate consideration of all the relevant factors, and in light of the seriousness of the proposed conduct, this is problematic.

³⁹¹ *Interpretive Guidance* 54.

³⁹² Schmitt ‘Deconstructing direct participation’ 731.

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

Moreover, Melzer points out a fundamental error in Schmitt's interpretation of exactly what the direct causation test of the *Interpretive Guidance* entails, when he submits that:

... the "one causal step" criterion identifies those *acts and operations* that qualify as "direct" participation in hostilities, whereas the "integral part" criterion identifies those *persons* who will lose their protection because their conduct represents an integral part of such acts or operations³⁹⁶. (Own emphasis)

Thus, the criterion, essentially, remains the same whether the act was an individual or collective operation. Or put differently, the *Interpretive Guidance* differentiates between direct and indirect causation in both individual and collective operations. Schmitt's view of their being a different standard for each, according to Melzer, is a 'near complete misunderstanding' of how the direct causation test applies³⁹⁷.

Significantly, the 'integral part' criterion is formulated on the basis of an appreciation for the fact that, in terms of collective operations, the harm does not need to be directly inflicted by each person in one causal step. It's the operation in its entirety that must inflict harm in such a direct manner. Thus, when one scrutinises the entire collective effort, the *Interpretive Guidance* suggests that only those individuals, who performed acts that were an 'integral part' of such collective operation's harm inflicting efforts, will be considered as having directly participated in hostilities.

Melzer observes that if one were to follow the approach proposed by Schmitt, namely the replacement of the 'one causal step' requirement with that of the 'integral part' requirement, one would then find 'any person whose conduct constitutes an integral part of a hostile act or operation may be regarded as direct participation in hostilities'³⁹⁸. It substantially and haphazardly broadens the field of actors who may legitimately be directly attacked, as Schmitt fails to

³⁹⁶ Melzer 'Keeping the balance' 866.

³⁹⁷ Ibid.

³⁹⁸ Ibid 867.

provide further guidance for identifying such acts or operations³⁹⁹. This places the operational forces in a position where they are unable to effectively discern acts of direct participation from those which are indirect⁴⁰⁰.

Furthermore, Melzer raises concern over an approach that maintains 'any act connected with the resulting harm through a causal link would automatically qualify as direct participation in hostilities'⁴⁰¹. There is no guidance provided by Schmitt as to exactly how close this link needs to be in relation to the ultimate harm. Ideally, there should be a clear criterion provided to aid operational forces to draw a line dividing direct participation from indirect participation. Such relaxation of the direct causation standard 'would invite excessively broad targeting policies prone to error, arbitrariness and abuse'⁴⁰². Additionally, Melzer is of the opinion that it is unlikely that states 'would condone the targeting of all persons who at some point have causally contributed to a hostile act no matter how far removed from the potential materialization of harm'⁴⁰³.

Belligerent nexus

Schmitt raises two concerns with regard to the belligerent nexus requirement. Firstly, it presumes a zero-sum game where harm to one party necessarily means a benefit to the other. Secondly, it suggests that harm is the *sine quo non* of direct participation⁴⁰⁴. Accordingly, the belligerent nexus should be phrased in the alternative, and consider both acts detrimental and beneficial as satisfactory⁴⁰⁵. This, he furthers, would adequately account for instances where a third party engages in an existing IAC and launches attacks against one of the parties without doing so as assistance to its opponent⁴⁰⁶.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid.

⁴⁰¹ Ibid 868.

⁴⁰² Ibid.

⁴⁰³ Ibid.

⁴⁰⁴ Schmitt 'Deconstructing direct participation' 736.

⁴⁰⁵ Schmitt 'The interpretive guidance' 34.

⁴⁰⁶ Ibid.

Melzer is opposed to such disjunctive reading of the belligerent nexus requirement. It will have the effect of permitting the targeting of civilians who conduct activities unrelated to the hostilities⁴⁰⁷. Examples in point are organised criminals and persons involved in civil unrest⁴⁰⁸. The term 'hostilities' relates to 'warfare between parties to an armed conflict'⁴⁰⁹. Hence, it requires that an act simultaneously be detrimental to one party and beneficial to the other⁴¹⁰. This will ensure that the ambit of the test correctly reflects those who can rightly be considered direct participants in hostilities. Furthermore, violence that falls outside this ambit will relate to law enforcement issues⁴¹¹. It constitutes the most sound approach as IHL 'simply does not permit categorising persons as legitimate military targets without identifying them as members of a belligerent's fighting forces or as persons DPH'⁴¹².

(dd) Direct participation in hostilities and voluntary human shields

An analysis of the criticisms levelled at the *Interpretive Guidance* instils the notion that the current formulation is the most appropriate to deal with modern armed conflict. It would serve as an accurate method through which to determine whether the conduct of VHSs amount to direct participation in hostilities. Such determination is vital considering the growing prevalence of VHSs and the uncertainty surrounding their legal status. The uncertainty emanates from a bifurcated approach to VHSs. To follow is an examination of the expert arguments for and against considering VHSs as direct participants.

The experts who consider voluntary human shielding as direct participation in hostilities

⁴⁰⁷ Melzer 'Keeping the balance' 873.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

⁴¹² Ibid 874.

Experts in favour of VHSs being classified as direct participants argue that a failure to do so would otherwise constitute an overly narrow interpretation of the DPH test, and accordingly not align with the purport of IHL⁴¹³. It is proposed that the ambit of the DPH test ought to be widened to accommodate the conduct of VHSs, on the basis of factors such as the voluntariness of their actions and the influence VHSs exert on the course of IAC.

Voluntariness

The voluntariness of the VHS's conduct raises questions as to whether the actor is in fact supporting a party to the armed conflict. As the VHS is actually present and standing in the line of fire, it sets VHSs apart from those who offer mere moral support to the war effort. Whilst it is easy to appreciate that VHSs are not typical civilians, arguing for their conduct to be considered direct participation in hostilities is going to take a lot more convincing.

Schmitt observes, however, that 'a protected person's willingness to serve as a shield can determine the action's legal character'⁴¹⁴. Thus, contrary to the contentions raised by Melzer⁴¹⁵ and De Belle⁴¹⁶, there is, or at least ought to be, a distinction drawn between voluntary and involuntary human shields. This is the only way through which human shielding can effectively be regulated under IHL. Schmitt illustrates the position as follows:

The involuntary-voluntary distinction also drives the attacker's obligations in shielding situations. Voluntary shields qualify as direct participants in hostilities and thus do not factor into proportionality and precautions in attack calculations. Involuntary shields, by contrast, are civilians who enjoy immunity from attack⁴¹⁷.

⁴¹³ Schmitt M 'Human Shields in International humanitarian Law' (2008-2009) 47 *Columbia Israel Yearbook on Human Rights* 17 41 available at <http://www.marshallcenter.org/mcpublicweb/mcdocs/files/college/hshlds-schmitt.pdf> (accessed 15 October 2015).

⁴¹⁴ Ibid 38.

⁴¹⁵ Melzer 'Keeping the balance' 869.

⁴¹⁶ Bouchie De Belle 'Chained to canons or wearing targets on their T-shirts' 906.

⁴¹⁷ Schmitt 'Human shields in international humanitarian law' 58.

It is argued that those who ‘deliberately place themselves close to military objectives with the motive of favouring one side to the conflict by dissuading the other side from attacking that object’⁴¹⁸ are to be considered as direct participants in hostilities. This is due to the fact that it ‘comports well with the balance between military necessity and humanitarian considerations’⁴¹⁹. Experts in favour of VHSs being considered direct participants are of the view that the current approach to VHSs causes the intended equilibrium between humanitarian considerations and military necessity to tip in favour of humanitarian considerations. Moreover, Van der Toorn argues for a belligerent nexus on the basis of VHSs seeking ‘to advance a party’s military aims to the detriment of the enemy’⁴²⁰.

The courts have also indicated that VHSs might be directly participating in hostilities in certain instances. A case in point is that of the *Public Committee Against Torture in Israel* (hereafter PCATI), where the court averred that:

Certainly, if they [the human shields] are doing so because they were forced to do so by terrorists those innocent civilians are not to be seen as taking a direct part in the hostilities. However, if they do so of their own free will, out of support for the terrorist organisation, they should be seen as taking a direct part in the hostilities⁴²¹.

This is a further substantiation for the argument against an approach that fails to consider the subjective intent of the shields in question. Thus, in appropriate cases those civilians who are clearly IHSs would not be direct participants, whereas those who are clearly VHSs would be direct participants. In the instances where the intentions of the shields are unclear from an objective point of view, and no intelligence is forthcoming, the presumption in favour of primary civilian status would apply.

⁴¹⁸ Boothby ‘Direct participation in hostilities’ 159-160.

⁴¹⁹ Schmitt ‘Human shields in international humanitarian law’ 41.

⁴²⁰ Van der Toorn ‘Direct participation in hostilities’ 34.

⁴²¹ *Public Committee against Torture in Israel (PCATI) v The Government of Israel* (2006) HCJ 769/02 36 available at http://www.haguejusticeportal.net/Docs/NLP/Israel/Targetted_Killings_Supreme_Court_13-12-2006.pdf (accessed 15 October 2015).

Dinstein relates his argument in favour of considering VHSs as direct participants to the principle of distinction. He considers the 'deliberate intermingling' of civilians and combatants to be a violation of the principle that constitutes the very 'bulwark against methods of barbarism in modern warfare'⁴²². It is easy to appreciate how an intermingling of this kind would be counter to the spirit and purport of IHL. The protections afforded to civilians with its corresponding duties on armed forces is premised upon an active distinction between the two actors. Only through the principle of distinction is it possible to protect civilians from the effects of war. The presence of VHSs in front of legitimate military objectives, irrespective of the shielded party's intentions, cannot be described as barbaric warfare. Barbaric warfare denotes a certain lawlessness or a complete disregarding of the law. The more appropriate term to use in the current situation would be 'lawfare'⁴²³. The fact that VHSs are so effective in deterring or delaying attacks on legitimate military objectives serves to indicate that states yield to humanitarian considerations as they perceive the VHSs to be afforded legal protection against direct attack. Fundamentally, the conduct of VHSs constitute a deliberate exploitation of the legal protections afforded to civilians, in order for a party, especially in asymmetric conflicts, to gain an unfair advantage. It evinces a lacuna in IHL to the effect that the prevalence of VHSs is not adequately regulated.

Ezzo and Guiora also argue that VHSs should be considered direct participants due to their voluntary and deliberate attempts 'to preserve a valid military objective for use by the enemy'⁴²⁴. The problem with such approach concerns the subsequent need to distinguish VHSs from IHSs:

[M]ilitary authorities cannot afford to debate the issue with a human shield actually on the ground in a combat area, thereby putting troops in even greater harm's way by resulting delay or inaction. Unfortunately, a committed but

⁴²² Dinstein *The conduct of hostilities* 256.

⁴²³ 'Lawfare' can be described as the process of 'using law as a method of war.' See Goldstein B 'Lawfare: The Use of the Law as a Weapon of War' The Lawfare Project available at <http://www.thelawfareproject.org/what-is-lawfare.html> (accessed 18 August 2015).

⁴²⁴ Ezzo & Guiora 'A critical decision in the battlefield' 26.

intractable human shield might have to be taken out quickly by either persuasion at best or by weapons at worst⁴²⁵.

It is felt that considering VHSs as direct participants would help 'streamline' targeting decisions once it has been discovered that the shields are in fact acting voluntarily⁴²⁶. All this would require is the formulation of decision-making guidelines that would assist the belligerents in determining whether or not the shields in question can be considered involuntary shields deserving of protection or voluntary shields considered as direct participants⁴²⁷. The criteria would necessarily need to provide an objective standard to assist the commander in making his targeting decisions. For this reason the objective criteria would need to relate to intelligence information gathered regarding 'a history of enemy tactics, techniques and procedures'⁴²⁸. Furthermore, according to Ezzo and Guiora, the classification of VHSs as direct participants would resonate with criminal law where a person who acts voluntarily 'possesses sufficient free will to be blamed for his or her conduct'⁴²⁹.

As seen from the various opinions provided by experts there is a great focus on the voluntariness of the actor's conduct. None of the above experts would disagree that an IHS is a civilian deserving of all the protections IHL has to offer. However, to hold that the same protections should be afforded to a person who has voluntarily assumed the risk of shielding a legitimate military objective, whether in support of a party or in objection to the war, seems absurd.

The influence exerted by VHSs on the outcome of conflicts

VHSs have the effect of delaying or deterring a potential attack on a military target. Such effect is attributable to an obligation on armed forces to consider civilian casualties. If an attack has the effect of harming civilians to an extent that it is 'excessive' when weighed against the 'concrete and direct military

⁴²⁵ Ibid 27.

⁴²⁶ Ibid.

⁴²⁷ Ibid.

⁴²⁸ Ibid 29.

⁴²⁹ Ibid 27.

advantage anticipated⁴³⁰, such attack would not be justified⁴³¹. Thus, the presence of VHSs around a military objective represents, in simple terms, a defensive barrier, whether one characterises it as a legal as opposed to physical barrier, does not alter the effectiveness of the strategy.

Perhaps a factor that complicates the moral value attaching to VHS's conduct is the resort to shielding tactics in asymmetric warfare. Some would see voluntary human shielding as an orchestrated, dirty, underhanded and cowardly military tactic, intended to play on the moral conscience of the stronger state. Whereas, others might sympathise with the weaker state and its resort to desperate measures. Realistically, the intention of the human shield can either be to aid a particular party to armed conflict or to stall attacks purely out of objection to the war, or conflict in general. Thus, whilst the practical effect of the VHSs conduct remains the same, the reason for the VHS's conscious risk-taking, may vary. Regardless of the shield's intent, the course of the hostilities is altered by their conduct. Dunlap posits the following:

This issue is politically complex, but not - in my view - legally difficult. In attempting to defend an otherwise legitimate target from attack – albeit by creating a psychological conundrum for NATO – the bridge occupiers lost their non-combatant immunity. In essence, they made themselves part of the bridges' defence system. As such, they were subject to attack to the same degree as any other combatant so long as they remained on the spans⁴³².

Dunlap considers the nature of the object being shielded as determinant of the actor's legal status. It is, however, difficult to conceive of an alternative objective to shield that would attract the same kind of attention. Thus, those who shield in opposition to the war, or war in general, and those who shield with the intent of aiding a party to the armed conflict, would necessarily want to shield military objectives. In light of the difficulty, in some instances, of ascertaining the motive

⁴³⁰ AP I article 51(5)(b).

⁴³¹ Ibid.

⁴³² Dunlap C Jr 'Law and military interventions: preserving humanitarian values in 21st century conflicts' 9 (Paper presented at the Humanitarian Challenges in Military Intervention Conference Washington DC USA 29 November 2001) available at <http://people.duke.edu/~pfeaver/dunlap.pdf> (accessed 14 August 2015).

behind the conduct of VHSs in the midst of conflict, a proposed regulation of the prevalence of VHSs would need to address this issue. Parrish shares a similar stance to that of Dunlap, and takes the matter further:

Although they do not carry weapons themselves, when a volunteer places him- or her-self at a target of potential military significance he or she is directly contributing to the perpetration of hostile acts by one party against another party. Voluntary human shields who seek to exploit their presumed civilian status to enhance the survivability of belligerents, their weapons systems, command and control facilities, and infrastructure that directly supports a belligerent state's war effort, have clearly become involved in combat, albeit not in any traditionally recognized way⁴³³.

Consequently, VHSs can be seen as a way through which a party to armed conflict can continue its attacks on the adversary, whilst simultaneously disallowing the adversary to retaliate, through an exploitation of IHL. This of course is an underhanded tactic that needs to be addressed in order to prevent a complete collapse of the IHL framework. If it is allowed to continue we might find states disregarding the LOIAC.

It must be noted that these actors are indeed affecting the conduct of hostilities, albeit in a passive manner. Accordingly, some experts argue that VHSs contribute in a 'direct causal way' and are more effective in deterring attacks on a legitimate military objective than actual members of the armed forces⁴³⁴. Hence, it would seem absurd to view the conduct of VHSs as anything other than direct participation⁴³⁵. If VHSs are not considered to be 'direct participants' excluded from the proportionality equation a sufficient number of them can absolutely immunize a target from attack⁴³⁶.

⁴³³ Parrish R 'The international legal status of voluntary human shields' 9 (Paper presented at the annual meeting of the *International Studies Association* Montreal Canada 17 March 2004) available at http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/7/4/0/5/pages74057/p74057-1.php (accessed 14 August 2014).

⁴³⁴ Schmitt 'Human Shields in International humanitarian Law' 41.

⁴³⁵ Ibid.

⁴³⁶ Ibid 42.

Boothby bases his argument that VHSs are to be considered direct participants on an appreciation for the fact that the shields are preventing ‘an otherwise potentially lawful attack’⁴³⁷. He insists that arguments against considering VHSs as direct participants, on the basis that they accordingly would not count in the proportionality balance, making their conduct self-defeating, should not detract from the ‘intended legal effect’ of the VHSs’ conduct⁴³⁸. It should be noted that this approach does not make mention of what occurs if intelligence gathered by a military commander indicates that the VHSs are not acting in support of a party, but in opposition to the conflict.

Schmitt also maintains that voluntary human shielding is undoubtedly DPH⁴³⁹. Schmitt posits that only by characterising the conduct of VHSs’ as DPH would their presence in the vicinity of a legitimate military objective ‘no longer potentially immunize’ such objective⁴⁴⁰.

Dunlap sketched a clear picture indicating the influence VHSs exert on the course of hostilities when he commented on the prevalence of VHSs in Kosovo as follows:

A more debatable proposition relates to the status of voluntary human shields such as those Serb civilians who deliberately occupied bridges in Belgrade during the Balkan war. They hoped to deter NATO attacks by presenting a vexing quandary for military planners: how to attack the bridges without killing the “noncombatant” protesters⁴⁴¹.

Van der Toorn views VHSs as a ‘ruse of war solely designed to defend a locality from attack’ and should be deemed DPH⁴⁴². He disagrees with the ICRC *Interpretive Guidance*’s contention that unless the VHSs posed a physical as

⁴³⁷ Boothby ‘Direct participation in hostilities’ 159-160.

⁴³⁸ Ibid.

⁴³⁹ Schmitt M ‘Humanitarian law and direct participation in hostilities by private contractors and civilian employees’ (2004) 5 *Chicago Journal of International Law* 51 533.

⁴⁴⁰ Ibid 58.

⁴⁴¹ Dunlap ‘Law and military interventions’ 9.

⁴⁴² Van der Toorn ‘Direct participation in hostilities’ 34.

opposed to legal obstacle to an attack, it would not satisfy the threshold of harm element⁴⁴³. VHSs cause an adversary to 'erroneously' include the potential harm to shields in the proportionality assessment, which has the effect of dissuading the planned attack⁴⁴⁴.

Additionally, Ezzo and Guiora provides a way around the negative media that would certainly accompany the deliberate injury or even death caused to passive civilians:

The enemy cannot be allowed to shape public perception through the use of civilians. If civilians are voluntarily on the battlefield actively engaged in aiding and abetting the enemy, we posit that their civilian status ceases to exist under international law. The enemy's use of unlawful tactics needs to be communicated to the appropriate audiences so that the enemy doesn't benefit from perceived civilian casualties. If the human shields are there voluntarily then they no longer can be classified as civilian casualties. They now become enemy personnel killed in action. This fact and the basis for the cessation of the civilian status have to be appropriately articulated and effectively communicated to the identified target audiences⁴⁴⁵.

There is a considerable amount of factors that would direct that VHSs are not to be treated on the same footing as IHSs. However, to go so far as to allow these shields to be targeted directly would admittedly cast a blind-eye upon the fact that they are passive by nature. Accordingly, their regulation under IHL should similarly pertain to means that seek to peacefully, and without lethal force, remove their presence from before legitimate military objectives.

The test as applied by those arguing in favour of VHSs being considered as direct participants in hostilities

The conduct of a VHS is considered to be a deliberate attempt at preserving a military objective by shielding it from a lawful attack not unlike point air

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

⁴⁴⁵ Ezzo & Guiora 'A critical decision in the battlefield' 30.

defences⁴⁴⁶. This would therefore meet the threshold of harm as it has an adverse effect on the military operations of the enemy.

In terms of the direct causation element, it can be viewed that the harm caused to the military operations of the enemy is as a direct consequence of the shielding activities of the VHS. The actual harm in question is the inability of the enemy to target what is otherwise considered a lawful target. Had it not been for the conduct of the VHSs the enemy would have been able to attack. The actions of the VHSs, similar to point air defences, causes harm in one causal step.

Furthermore, from an objective point of view, the presence of civilians in front of a legitimate military objective constitutes an act perpetrated in favour of the shielded party and to the detriment of the attacking party. It is reasonable to consider that “certain acts of shielding at the behest of a defending state cross the line of being ‘used by’ that state”.⁴⁴⁷ If the VHS accepts such ‘use’ then their acts of preserving a lawful military target can be considered as an act in support of the party they are shielding⁴⁴⁸. Accordingly, there would be an act in favour of one party and to the detriment of another satisfying the belligerent nexus requirement.

The experts who do not consider voluntary human shielding as direct participation in hostilities

The alternative to the above approach is to consider VHSs as not directly participating in hostilities on the basis that their conduct does not meet the ‘requisite qualitative threshold⁴⁴⁹; the VHSs constitute a legal (as opposed to physical) obstacle against attacks; the manner in which states approach VHSs

⁴⁴⁶ Schmitt ‘Humanitarian law and direct participation in hostilities’ 541. A view supported by Ezzo & Guiora (See Ezzo & Guiora ‘A critical decision in the battlefield’ 26).

⁴⁴⁷ Lyall ‘Voluntary human shields’ 13.

⁴⁴⁸ Ibid.

⁴⁴⁹ Schmitt ‘Human Shields in International humanitarian Law’ 40. Schmitt cites Quiguiner ‘Precautions under the law governing the conduct of hostilities’ 815-817.

are indicative of their protected status; and to hold VHSs to be direct participants would constitute an overly broad interpretation of DPH.

Legal vs Physical obstacle

It is suggested that ‘simply causing the attacker moral pause or creating a legal barrier (through operation of the proportionality principle or precautions in attack requirements) are insufficient’⁴⁵⁰. As the VHSs are not considered direct participants they retain their protected civilian status. VHSs neither cause or threaten actual physical harm to the enemy forces, nor physically obstruct their operations⁴⁵¹. A civilian who blocks passage over a bridge will be directly participating considering the actor’s conduct constitutes a physical impediment to the operations of the enemy⁴⁵². Whereas a civilian who shields a bridge from attack is not directly participating, as it poses a legal rather than physical impediment⁴⁵³. The legal impediment emanates from the fact that the civilian in question would cause the attacker to factor in proportionality before commencing the attack in order to ascertain whether, in the circumstances, harm to the civilian(s) would be justified⁴⁵⁴. Melzer suggests that:

[I]n line with the requirements of “threshold of harm” and “direct causation”, the decisive question must be whether the presence of human shields directly adversely affects the enemy’s *capability*, and not merely his *willingness*, to attack and destroy the shielded objective. This may be the case, for example, where the presence of human shields impedes the visibility or accessibility of a legitimate target, but not where it poses an exclusively legal obstacle to an attack⁴⁵⁵.

Therefore, we find that a sufficient amount of VHSs surrounding a military objective might completely immunise the target from attack on the basis that the attacker is unwilling to do so because of the media and political repercussions

⁴⁵⁰ Ibid.

⁴⁵¹ Schmitt ‘Human Shields in International humanitarian Law’ 40-41.

⁴⁵² Schmitt ‘Deconstructing direct participation’ 732.

⁴⁵³ Ibid.

⁴⁵⁴ Schmitt ‘The interpretive guidance’ 31-32.

⁴⁵⁵ Melzer ‘Keeping the balance’ 869.

that will inevitably follow⁴⁵⁶. Schmitt, however, contends that there exists no sense in treating the conduct of the civilian who voluntarily shields any different than that of a civilian whose conduct constitutes a physical impediment⁴⁵⁷. He further argues that VHSs essentially ‘misuse the law’s protective provisions to prevent an otherwise lawful attack’⁴⁵⁸. The argument, however, does not appreciate the fact that there exists a real possibility that the shields in question might be involuntary. Accordingly, determinations regarding direct participation are not to be made lightly, especially considering the media attention shielding actions attract. De Belle posits the following:

The presence of a human shield is only a legal obstacle for the attacker, who hesitates to attack only out of fear of violating international humanitarian law with the attendant political and media impact. It would therefore be overbold to declare an obstacle of that nature to be direct participation in hostilities⁴⁵⁹.

Accordingly, any proposed regulation of VHSs would need to incorporate a means through which to address the ‘legal obstacle versus physical obstacle’ conundrum. The ability of a civilian to pose an operationally unfair legal obstacle to an attack needs to be prohibited considering the impact it has on the course of combat and the heightened danger it causes to the general civilian population.

State practice

Bosch maintains that the legal obstacle VHSs cause is ‘precisely because they are perceived to enjoy civilian immunity from direct attack’⁴⁶⁰. It is noteworthy that the manner in which states approach circumstances involving VHSs indicate an appreciation for their protected status⁴⁶¹. If it were not for such protected status the conduct of VHSs would be futile, and there would be no

⁴⁵⁶ Schmitt ‘Deconstructing direct participation’ 732.

⁴⁵⁷ Ibid 733.

⁴⁵⁸ Schmitt ‘The interpretive guidance’ 32-33.

⁴⁵⁹ Bouchie De Belle ‘Chained to canons or wearing targets on their T-shirts’ 896.

⁴⁶⁰ Bosch ‘Targeting Decisions’ 462.

⁴⁶¹ *Interpretive Guidance* 57. See also Melzer ‘Keeping the balance’ 872.

operational difficulties like those currently encountered⁴⁶². To simply use a relaxed DPH test to incorporate their conduct would be a drastic step in the wrong direction.

Furthermore, the difficulty of ascertaining the subjective intent of VHSs in the midst of war poses a real problem with regard to formulating and applying a blanket approach to shielding actions⁴⁶³. Melzer notes that whilst in some cases the appropriate IHL status to attach to a shield might be obvious:

[a] vast majority of situations involving human shields, however, are likely to fall into a grey-zone full of intricate questions no military commander or soldier should be expected to resolve: How much “free will” is required for an act of human shielding to become “voluntary,” how much coercion or social pressure to make it “involuntary”?⁴⁶⁴

Accordingly, de Belle suggests that the best way to determine whether or not a VHS directly participates is by ‘an appraisal *in concreto* of the way in which the human shield indeed tries to protect the military objective in question’⁴⁶⁵. The same cannot be said of those who restrict passage over a bridge. It is relatively safe to say that civilians who create a physical impediment to military operations can be considered to harm the operations of the enemy forces. Accordingly, their conduct constitutes DPH. However, if it is evident that the civilians are compelled to perform such activities of blocking passage over the bridge then they will not be considered direct participants. Either way, the subjective intent of the civilians attempting to block passage over the bridge is easier to ascertain than cases which involve VHSs. There accordingly exists some merit in distinguishing between the two types of acts perpetrated by civilian actors, those which constitute a physical obstacle and those which constitute a legal obstacle, and having different consequences attached to each.

⁴⁶² Bouchie De Belle ‘Chained to canons or wearing targets on their T-shirts’ 895.

⁴⁶³ Bosch ‘Targeting Decisions’ 463.

⁴⁶⁴ Melzer ‘Keeping the balance’ 871.

⁴⁶⁵ Bouchie De Belle ‘Chained to canons or wearing targets on their T-shirts’ 896.

The need for a narrow interpretation of DPH

The notion of direct participation in hostilities ‘implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place’⁴⁶⁶. In order for acts to be considered ‘direct’ they need to be ‘acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces’⁴⁶⁷. Moreover, ‘hostile acts’ constitutes those ‘which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces’⁴⁶⁸. Thus, considering the passive nature of the VHS’s conduct it would certainly be difficult to conclude that the shielding act, in itself, inflicts harm to the enemy. The Human Rights Watch, therefore, rightly pointed out that VHSs only indirectly participate in hostilities⁴⁶⁹. This is ascertained through an appreciation for the fact that the shielding efforts preserve the firepower of a state employing such tactics, and will aid subsequent attacks made possible via the protection afforded by VHSs⁴⁷⁰. Although it could be said that the VHSs pose a threat to the enemy, because they essentially preserve objectives that themselves pose a threat, such threat is not immediate⁴⁷¹.

It was also indicated that ‘hostilities’ should include ‘preparations for combat and the return from combat’⁴⁷². This additionally cautions against too readily concluding that VHSs are directly participating in hostilities. De Belle argues that:

It would seem important not to take too broad an approach: to interpret it [the direct causal relationship] too loosely would lead to voluntary human shields easily being placed on the same footing as people taking direct part in

⁴⁶⁶ *AP Commentary* 1679.

⁴⁶⁷ *Ibid* 1944.

⁴⁶⁸ *Ibid* 1942.

⁴⁶⁹ ‘International Humanitarian Law Issues in a potential war in Iraq’ *Human Rights Watch* (Human Rights Watch Briefing Paper 20 February 2003); Section I available at <http://www.hrw.org/background/arms/iraq0202003.htm> (accessed 16 August 2015).

⁴⁷⁰ Bouchie De Belle ‘Chained to canons or wearing targets on their T-shirts’ 894.

⁴⁷¹ *Ibid*.

⁴⁷² *AP Commentary* 1943.

hostilities, which would mean, as some experts have pointed out, that they could be attacked during their preparation, namely when moving towards the military objective to be shielded by their presence⁴⁷³.

Factors that further strengthen the argument that VHSs are not direct participants include *inter alia*: there being no military necessity to attack VHSs when they are not shielding an objective; and that there is nothing to gain from targeting the VHS in addition to the military target⁴⁷⁴. Additionally, the *Interpretive Guidance* provides that:

The fact that some civilians voluntarily and deliberately abuse their legal entitlement to protection against direct attack in order to shield military objectives does not, without more, entail the loss of their protection and their liability to direct attack independently of the shielded objective⁴⁷⁵.

Moreover, the *Interpretive Guidance* was quick to point out⁴⁷⁶ that in terms of article 51 (8) of AP I, '[a]ny violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians'⁴⁷⁷. The obligations include taking the precautionary measures as set out in article 57 of AP I as well as considering the proportionality of an intended attack⁴⁷⁸.

The test as applied by those arguing in favour of VHSs not being considered as direct participants in hostilities

It is imperative to point out that the current DPH test will not be satisfied by the conduct of VHSs. In terms of the threshold of harm element it must be conceded that the conduct of VHSs may in some instances 'be likely adversely to effect the military operations' of the enemy⁴⁷⁹. As the presence of VHSs may

⁴⁷³ Bouchie De Belle 'Chained to canons or wearing targets on their T-shirts' 895.

⁴⁷⁴ Ibid.

⁴⁷⁵ *Interpretive Guidance* 57.

⁴⁷⁶ Ibid.

⁴⁷⁷ AP I article 51(8).

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid 46.

'adversely affect the belligerent parties' military planning and capacity', other acts widely considered as DPH can therefore be imputed to the conduct of VHSs⁴⁸⁰. Examples of which include: undermining the functional capacity of military objects, hampering military deployments and engaging in unarmed activities limiting the military capacity of the enemy.⁴⁸¹ It will however be more readily satisfied if the VHSs in question pose a physical, as opposed to legal obstacle, to enemy forces⁴⁸². Thus, it remains a question of fact in all instances as to whether the conduct of VHSs meets the requisite threshold of harm⁴⁸³. In each case, 'the decisive question must be whether the presence of human shields directly adversely affects the enemy's *capability*, and not merely his *willingness*, to attack and destroy the shielded objective'⁴⁸⁴.

A tougher criterion to satisfy is the direct causation element considering the passive nature of the VHS's conduct and that the VHSs pose no immediate threat to enemy armed forces and objectives. It is difficult to establish a link between such shielding activities and harm suffered by the enemy. The harm envisaged by the *Interpretive Guidance* is to be linked to the VHSs conduct in one causal step and, accordingly, it must be conceded that the VHSs' conduct only causes harm indirectly at best⁴⁸⁵. Thus, it is difficult to consider VHSs' conduct as being linked close enough to satisfy the direct causation element.

Furthermore, it must be appreciated that considering the difficulty in establishing any causal link between the conduct of VHSs and harm suffered by armed forces, any attempt at tying the conduct of VHSs to be in favour of one party and to the detriment of another will be even tougher. Especially since such a determination would require objective intelligence to substantiate such an inference. Considering the passive nature of shielding, it would be difficult to ascertain whether or not the acts are committed in favour of the shielded party

⁴⁸⁰ Bosch 'Targeting Decisions' 461.

⁴⁸¹ Ibid.

⁴⁸² Ibid.

⁴⁸³ *Interpretive Guidance* 57.

⁴⁸⁴ Melzer 'Keeping the balance' 869.

⁴⁸⁵ *Interpretive Guidance* 53-54.

(*prima facie* it may seem so) or whether the shields are acting in opposition to the war or for some other cause.

(ee) The position if voluntary human shields were considered direct participants in hostilities

VHSs would lose their immunity from direct attack as their protected status remains only for such time as they refrain from direct participation in hostilities⁴⁸⁶. They would, thus, become legitimate military targets themselves and relieve the enemy of an obligation to apply the principle of distinction⁴⁸⁷. The VHSs do not need to be factored into a proportionality assessment⁴⁸⁸. However, commanders who are about to attack VHSs who constitute direct participants need to consider whether, in the circumstances, there are protected persons in the vicinity and less harmful means to achieve the military objective⁴⁸⁹. If there are protected persons they need to be factored into the proportionality assessment to determine whether the planned attack would be lawful⁴⁹⁰.

Furthermore, as VHSs are unlawfully engaged in direct participation they will not be considered as prisoners of war when captured by the enemy. VHSs would also be held criminally liable for all unlawful acts committed whilst directly participating. Instead, VHSs are given the same protections afforded to unlawful belligerents in terms of Common Article 3 and article 75 of AP I.

(ff) The position if voluntary human shields were not considered direct participants in hostilities

⁴⁸⁶ Lyall 'Voluntary human shields' 12.

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

⁴⁸⁹ *PCATI* 36.

⁴⁹⁰ Ibid.

If VHSs are not considered as direct participants then they will continue to be clothed with the highly protected civilian status under IHL. Combatants are generally obligated to refrain from causing any harm to protected persons and objects⁴⁹¹. This requires that combatants do everything 'feasible' to ensure: that 'attacks are directed at military objectives only'⁴⁹²; 'that civilians and civilian objects are removed from the vicinity of military objectives'⁴⁹³; 'that military objectives are not located within or near densely populated areas'⁴⁹⁴; 'that other necessary precautions to protect civilians are taken'⁴⁹⁵; that efforts have been made to 'avoid or minimise incidental loss of civilian life injury to civilians and damage to civilian objects'⁴⁹⁶. The word 'feasible' sets a relatively high standard, but is not an absolute⁴⁹⁷ and, accordingly, circumstances will dictate what is feasible⁴⁹⁸. It is, thus, clear that there are numerous obligations on combatants intended to ensure that the principle of distinction is upheld and that civilians are protected from the effects of war.

In terms of the party who has VHSs shielding its military objectives, it can be considered that article 58 of AP I reinforces the prohibition against the 'use' of shields as it requires that the party being defended remove the civilians from the vicinity of a potential attack⁴⁹⁹. However, suggestions that an attacking commander has to 'exhaust all lawful means of persuading an enemy commander to withdraw shields' is unfounded and has since been rejected⁵⁰⁰.

The only instance the harming of an innocent civilian may be both morally and legally justified is when the harm is outweighed by an anticipated military

⁴⁹¹ AP I article 57(1).

⁴⁹² AP I article 57(2)(a)(i).

⁴⁹³ AP I article 58(a).

⁴⁹⁴ AP I article 58(b).

⁴⁹⁵ AP I article 58(c).

⁴⁹⁶ Henckaerts J & Doswald Beck L (eds) *Customary International Humanitarian Law – Vol 1: Rules* (2005) (Cambridge University Press: Cambridge) 51.

⁴⁹⁷ 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia' *ICTY Report* (13 June 2003) 29 available at <http://www.un.org/icty/pressreal/nato061300.htm> (accessed 28 August 2015).

⁴⁹⁸ Lyall 'Voluntary human shields' 14.

⁴⁹⁹ Queguiner J 'Precautions under the law governing the conduct of hostilities' 811.

⁵⁰⁰ *Ibid* 815.

advantage in terms of the proportionality assessment⁵⁰¹. Thus, if despite all the precautionary efforts an attack will still cause harm to civilians or civilian objects, such attack needs to satisfy the proportionality assessment in order to be lawful. Accordingly, all reasonable steps to protect the civilian population and civilian objects will at some point yield to the principle of military necessity. However, it is clear that although the prohibition against causing direct harm to civilians is not absolute, the standard is still very high. The attacking commander, in cases where a planned attack might cause harm to civilians in the vicinity, must assess whether the possible injury or death to civilians, or the destruction of civilian property, would be excessive in relation to the anticipated military advantage⁵⁰². If the assessment indicates that the harm would be excessive then the commander is obligated to refrain from attacking in the circumstances⁵⁰³. A failure to do so would constitute a grave violation of IHL⁵⁰⁴.

ii. Conclusion

The *Interpretive Guidance* constitutes the foremost test for DPH and when applied to VHSs it determines that they are not direct participants. Therefore, VHSs retain their protections. Although in terms of the current international laws this is the most appropriate outcome and no feasible alternative has been proposed, it still leaves experts and military commanders unsatisfied. There is a need for a stricter enforcement of the obligations on states to ensure that civilians are removed from the vicinity of a military objective. Alternatively, that military objectives are not placed near or within the civilian population. The deliberate intermingling of civilians and combatants in order to exploit IHL to further an unlawful end should not be taken lightly. Furthermore, combatants are placed in a difficult position as their actions, although sincerely planned according to the tenets of IHL, might still turn out to be unlawful and have dire consequences for innocent civilians. The current regulations make civilians an

⁵⁰¹ Lyall 'Voluntary human shields' 15.

⁵⁰² AP I article 51(5)(b).

⁵⁰³ AP I article 57(2)(a)(iii).

⁵⁰⁴ AP I article 85(3)(b).

attractive means through which a party can preserve its military objectives. The law, itself, ironically provides through its protective measures an avenue for civilians to be drawn into the line of fire.

(e) The current application of the ‘proportionality in attack’ principle to voluntary human shields add to their effective shielding capabilities

i. Introduction

The principle of proportionality is ‘highly contextual’ and multi-dimensional⁵⁰⁵. It requires moral decisions to be made in a very uncertain and unforgiving environment. The right decisions will not always be evident in each case, but the thoroughly developed principles of IHL will help evaluate the choices made in combat to determine whether or not it is in line with the letter and spirit of the LOIAC⁵⁰⁶.

In terms of the *jus in bello*, the principle of proportionality imposes a ‘requirement that [individual] attacks be proportionate to the military value of the target’⁵⁰⁷. If harm caused by a planned attack outweighs the anticipated military advantage, then the principle of proportionality demands that the commander refrains from pursuing the attack, or finds a less destructive means of attaining the objective. For example: if an attack is being planned on a building which houses enemy troops and munitions, and it is estimated that the attack will cause the death of approximately ten to twenty civilians, then it must be determined whether the advantage gained by destroying the military objective outweighs or justifies the amount of potential civilian casualties. If the attack is

⁵⁰⁵ Cook M ‘The Moral Framework of War’ in *The Moral Warrior* (2004) (Part One: Chapter one) (State University of New York Press: Albany) 21 34.

⁵⁰⁶ Ibid 37.

⁵⁰⁷ Ibid 34.

justified or proportional, it will be lawful⁵⁰⁸. If it is unjustified or disproportionate, then it is unlawful and attracts legal consequences⁵⁰⁹.

It is pertinent to remember that whilst IHL prohibits the direct targeting of the civilian population and civilian objects based on the principle of distinction, the drafters have envisaged and provided for instances where 'collateral damage' occurs *incidentally* during an attack against a legitimate military target. 'Collateral damage' is harm caused to civilians and civilian property during attacks on military objectives⁵¹⁰. Such harm usually occurs where military objectives are located in or near densely populated areas⁵¹¹. Accordingly, as Oppenheim explains:

Their [civilian] presence will not render military objectives immune from attack for the mere reason that it is impossible to bombard them without causing injury to the non-combatants. But ... it is of the essence that a just balance be maintained between the military advantage and the injury to non-combatants⁵¹².

Where collateral damage is anticipated in the planning phase of an attack the proportionality principle will be applied. The proportionality principle seeks to maintain an effective balance between the competing interests of militants and the general civilian population. In terms of this balance there is

[s]ome form of interplay between the military and civilian ... implied in it: where distinction severs, proportionality joins. If distinction provides the parts,

⁵⁰⁸ Fischer H 'Principle of Proportionality' Crimes of War Project available at <http://www.crimesofwar.org/a-z-guide/proportionality-principle-of/#sthash.KUH6eoUW.dpuf> (accessed 21 September 2015).

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid.

⁵¹¹ Ibid.

⁵¹² Oppenheim *L International Law: A Treatise, Vol II, Disputes, War and Neutrality* 6th ed, (revised) Lauterpacht H (ed.), (Longmans, Green and Co: London/New York/Toronto) 1944 415 s.214 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

proportionality makes them into a whole. So proportionality is *inter partes* as much as *erga omnes*⁵¹³.

Accordingly, the principle of proportionality permits the infliction of collateral damage in certain limited instances. In this regard it can be seen as an invocation of the doctrine of military necessity. This should, however, not be considered a derogation of the rule against causing harm to civilians and civilian property, but rather a regulation of a separate consequence of war altogether: the legal status of an attack directed against a legitimate target which *incidentally* causes collateral damage⁵¹⁴. Therefore, an assessment of the proportionality of an attack will necessarily be conducted before, during and after an attack in order to ensure that civilians are protected from harm as far as possible. The prohibition against attacks that cause a disproportionate amount of harm to civilians is clearly entrenched in the LOIAC as the Statute of the ICC declares that a violation of the principle constitutes a war crime⁵¹⁵. However, the principle of proportionality can never be used to justify unlimited destruction caused to civilians and civilian property⁵¹⁶. This is due to the IHL prohibition against unnecessary suffering⁵¹⁷. Broadly viewed, the LOIAC requires military commanders to know and implement the rules prohibiting indiscriminate and disproportionate attacks, and orders that certain precautionary steps be taken during both the planning and execution phase of an attack⁵¹⁸. If at any given moment it becomes clear that the purported attack

⁵¹³ Noll G, 'Analogy at War: Proportionality, Equality and the Law of Targeting' (2013), *Netherlands Yearbook of International Law* (Forthcoming), 1-30 5 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167278 (accessed 22 September 2015).

⁵¹⁴ ICRC, Statement at the CDDH, *Official Records*, Vol XIV, CDDH/III/SR.5, 14 March 1974 37 s.11 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁵¹⁵ ICC Statute article 8(2)(b)(iv) available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/RomeStatutEng.pdf> (accessed 15 September 2015).

⁵¹⁶ De Mulinen F *Handbook on the Law of War for Armed Forces* (1987) (ICRC: Geneva) s.389 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁵¹⁷ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p.127, citing *US Air Force Pamphlet 110-31, International Law – The Conduct of Armed Conflict and Air Operations*, US Department of the Air Force, 1976 s.1-3(a) available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015). The principle of humanity as a basis principle of all IHL both compliments and limits the doctrine of military necessity.

⁵¹⁸ Fischer H 'Collateral Damage' Crimes of War Project.

will cause excessive collateral damage the attacker is required to either cancel the launching of the attack or change the plan in such a way that it conforms to the dictates of the law⁵¹⁹. Any failure to adhere to these requirements will result in legal consequences.

It would be prudent to recall the two types of VHSs: those who constitute a physical obstacle to an attacker and those who constitute a legal obstacle to an attacker. The former, as mentioned earlier, would be considered direct participation in hostilities and, accordingly, will not necessitate any proportionality assessments with regard to the participating shields themselves. The latter, constituting a mere legal obstacle, does so primarily because of the invocation of the proportionality principle.

The VHS causing a legal obstacle is one who takes up a shielding position in front of a legitimate military objective, for example: a stationary missile launcher. As an attack on the legitimate objective will foreseeably cause civilian harm it necessitates a contemplation of the proportionality principle. If the proportionality assessment indicates that the harm caused to the civilian(s) is unjustified in the circumstances then the attack is not permitted under IHL. Accordingly, this legal protection is exactly that which the VHSs seek to exploit in order to preserve the targeted military objective. This creates heightened military and political tension and ultimately contradicts the purpose of IHL: to minimise or reduce the harm to civilians and civilian property. The problematic outcome has seen a genesis of views that propose that VHSs are to be discounted during the proportionality assessment. To follow is an examination of both the current approach to VHSs and the proposals for change.

ii. The current approach to the proportionality principle in light of voluntary human shields

⁵¹⁹ Ibid.

(aa) Codification of the proportionality principle

Article 51 of AP I is a codification of the principle of proportionality under IHL⁵²⁰. The article, which provides protection against 'dangers arising from military operations', constitutes additional protections civilians enjoy in all circumstances, provided they themselves refrain from taking a direct part in the conduct of hostilities⁵²¹.

In an effort to give effect to these general protections, subsection (4) provides that 'indiscriminate attacks' are prohibited during IAC⁵²². The subsequent paragraphs (a) to (c) set out what amounts to an indiscriminate attack under international law and relate to acts that are not, or cannot be, directed at a specific military objective⁵²³; and attacks that have effects which cannot be limited to a military objective, consequently striking military and civilian objectives without distinction. It is clear that these provisions have their origin in the principle of distinction which seeks to separate the objectives that are targetable from those that are not. Accordingly, it constitutes a vital directive to military commanders, and aims to limit the harm caused to innocent civilians during armed conflict. Subsection (5) stipulates further examples of acts which amount to an 'indiscriminate' attack. Article 51(5)(a) of AP I pertains to a bombardment of clearly, separate military objectives as though it was a single objective, whilst simultaneously doing harm to the civilians and civilian property in the vicinity. Whereas, article 51(5)(b) of AP I directly relates to the crux of the principle of proportionality, and considers the following to be indiscriminate:

an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would

⁵²⁰ AP I article 51.

⁵²¹ Ibid.

⁵²² AP I article 51(4).

⁵²³ AP I article 51(4)(a) & 51(4)(b).

be excessive in relation to the concrete and direct military advantage anticipated⁵²⁴.

Thus, in terms of article 51(5)(b) of AP I, a proportionate attack would be one in which the military advantage anticipated outweighs the harm caused to the civilian population and or civilian property. A disproportionate attack is one in which the harm caused to the civilian population and or civilian property outweighs the anticipated military advantage. The prohibition against attacks that cause a disproportionate amount of harm to civilians is customary international law⁵²⁵. Moreover, the Statute of the ICC declares that a violation of the principle constitutes a war crime⁵²⁶.

(bb) Precautionary measures that are relevant to the application of the proportionality principle

The principle of proportionality is further encountered under specific precautionary measures which attacking and defending parties are required to observe in terms of article 57 of AP I. Drafters of AP I have included these obligations with an aim of ensuring that the attacks cause minimal harm to the civilian population and civilian property.

Precautions in attack

The duty to take constant care to spare civilians when conducting military operations

⁵²⁴ AP I article 51(5)(b).

⁵²⁵ 'Customary IHL Rule 14: Proportionality in attack' available at https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14 (accessed 15 September 2015).

⁵²⁶ ICC Statute article 8(2)(b)(iv).

Article 57(1) of AP I is a consequence of the principle of distinction⁵²⁷ and applies to ‘military operations’ in general⁵²⁸. Accordingly, ‘any movements, manoeuvres and other activities carried out by the armed forces with a view to combat’⁵²⁹ must be conducted with a constant care to spare civilians⁵³⁰.

The duty to verify that the objective to be attacked is a military objective

The attacking forces are obligated in terms of article 57(2)(a)(i) of AP I to ensure that the objective they are targeting is, in fact, a legitimate military objective⁵³¹. Although it may sound straightforward, it has been said that the identification of a legitimate military target is ‘one of the most difficult problems facing modern armies involved in combat’⁵³². Obviously, the recent tendency of states to engage in armed conflict in or near densely populated urban environments contributes a great deal to the difficulties encountered during targeting decisions.

Commanders are required to be cognisant of not only the nature of the target itself, but also its immediate environment⁵³³. Thus, it is necessary to look beyond just whether or not the objective is military, civilian or dual-use in nature. Even if the objective is military in nature, a considerable number of civilians in the vicinity might render an attack on such target unlawful should the harm inflicted upon civilians and or civilian property outweigh the military advantage

⁵²⁷ Queguiner ‘Precautions under the law governing the conduct of hostilities’ 4.

⁵²⁸ Bouchie De Belle ‘Chained to cannons or wearing targets on their T-shirts’ 903. This is broader than the paragraphs that follow paragraph one, where the scope relates to ‘attacks’.

⁵²⁹ AP I article 51(7).

⁵³⁰ Bouchie De Belle ‘Chained to cannons or wearing targets on their T-shirts’ 903.

⁵³¹ AP I article 57(2)(a)(i).

⁵³² Geiss & Siegrist ‘Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?’ (2011) 93:881 *ICRC* 11-46 36 available at <https://www.icrc.org/eng/assets/files/review/2011/irrc-881-geiss-siegrist.pdf> (accessed 23 September 2015).

⁵³³ Bouchie De Belle ‘Chained to cannons or wearing targets on their T-shirts’ 903-904.

gained from its destruction. It is, accordingly, easy to appreciate the significant impact the presence of VHSs can have on the targeting decisions of states⁵³⁴.

In the uncertain, ever-changing nature of armed conflict, a commander is required to do 'everything feasible to verify the nature of the objective'⁵³⁵. During the drafting of article 57(2)(a)(i) of AP I the term 'feasible' was preferred over 'reasonable' as it better conveyed the idea of having the commander doing 'that which is practicable or practically possible' in any given circumstance⁵³⁶. The standard of doing everything feasible in the circumstances allows for an assessment as to whether the commander has done that which is 'militarily sound' from his or her perspective⁵³⁷. Accordingly, a commander's decision will be evaluated on a case-by-case basis and rely heavily on the prevailing circumstances at the time his or her decision was made⁵³⁸. Therefore, there is both an objective and subjective component to the test⁵³⁹.

In some instances, circumstances allowing, a '48-hour pattern of life' analysis is conducted, whereby a potential target is monitored from the ground and from the air before an airstrike is launched⁵⁴⁰. This is to ensure that the target is military in nature, and that the area surrounding the objective is cleared of civilians⁵⁴¹. It provides greater surety as to whether the consequent strike would be lawful and cause the least amount of harm to civilians and or civilian property⁵⁴². However, difficulties arise where such a prolonged surveillance is not practicable in the circumstances. For example, in the context of 'emerging targets'⁵⁴³. In these cases there is no time for advance planning. These targets

⁵³⁴ Ibid.

⁵³⁵ Ibid 904.

⁵³⁶ Geiss & Siegrist 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?' 36-38.

⁵³⁷ Ibid.

⁵³⁸ Ibid.

⁵³⁹ Ibid.

⁵⁴⁰ Ibid.

⁵⁴¹ Queguiner 'Precautions under the law governing the conduct of hostilities' 5.

⁵⁴² Geiss & Siegrist 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?' 36-38.

⁵⁴³ Queguiner 'Precautions under the law governing the conduct of hostilities' 6-7.

appear suddenly on the battlefield and necessitate quick decision-making⁵⁴⁴. Any complicated procedures of assessment will have to be substituted for an accelerated analysis⁵⁴⁵. Fortunately, the obligation to verify the status of an objective takes the nature of armed conflict into account. What is feasible will always depend on the unique circumstances of every case.

The obligation does not require that the parties involved acquire and use 'sophisticated means of reconnaissance'⁵⁴⁶. Rather, it requires that the 'most effective and reasonably available means be used systematically' to verify the nature of a potential target⁵⁴⁷. A commander is, therefore, guided by these provisions to only attack once he or she is convinced that all available, credible information has been considered, and indeed indicate that the target may be lawfully attacked⁵⁴⁸. A mere suspicion that the target is military in nature is not enough, and an attack launched on account of such information may amount to a violation of the obligation to verify the status of the targeted objective⁵⁴⁹. To make matters more complicated, ruses employed by the enemy may affect the veracity of the information gathered and cause a *bona fide* commander to launch attacks against civilian objectives⁵⁵⁰.

*The obligation to choose means and methods of attack with a view of avoiding and minimising incidental loss of civilian life, injury to civilians and damage to civilian objects*⁵⁵¹

Article 57(2)(a)(ii) of AP I stipulates that when an attack is being planned, those involved shall:

⁵⁴⁴ Ibid.

⁵⁴⁵ Ibid.

⁵⁴⁶ Ibid 5-6.

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid.

⁵⁴⁹ Ibid 6.

⁵⁵⁰ Ibid 7.

⁵⁵¹ AP I article 57(2)(a)(ii).

take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects⁵⁵².

At all times it must be appreciated that the standard regards that which is feasible in the circumstances. Article 57(2)(a)(ii) of AP I does not set an abstract standard removed from the peculiarities and means of the particular parties in question. The purport of the obligation can be illustrated through the following examples:

Timing of an attack:

If human shields are not present in front of a potential target at all times then the target should be attacked during those times the human shields are not in front of the target⁵⁵³.

Means of attack:

An attacker should use weapons that would destroy the military objective whilst exacting the least amount of harm possible to civilians and or civilian property⁵⁵⁴. It does not mean that armed forces are required to acquire precision-guided weapons, but requires instead that they use them 'where it is possible and feasible to do so'⁵⁵⁵.

Method of attack:

An attacker should also consider the method of attack as it can be altered through consideration of this obligation, for example:

⁵⁵² Ibid.

⁵⁵³ Bouchie De Belle 'Chained to cannons or wearing targets on their T-shirts' 904.

⁵⁵⁴ Ibid.

⁵⁵⁵ Ibid.

... during the gulf war in 1991, pilots were advised to attack bridges in urban areas along a longitudinal axis ... so that bombs that missed their targets – because they were dropped too early or too late – would hopefully fall in the river and not on civilian housing⁵⁵⁶.

This requires, once again, that commanders at all times be wary of the means and methods they are using in the circumstances, and whether or not it can be employed in a way that achieves the same result, but with less collateral damage.

Location of attack:

The obligation to choose ‘means and methods with a view of avoiding and minimising incidental loss of civilian life, injury to civilians and damage to civilian objects’, also impacts on the location of an attack as it is appreciated that parties should avoid launching attacks on densely populated areas if it will cause excessive civilian losses⁵⁵⁷.

The obligation to ‘cancel or suspend an attack if it becomes apparent that the objective is not a military one, or is subject to special protection, or that the attack would be disproportionate’⁵⁵⁸

This particular provision is proof of the view that the proportionality assessment is not only an important consideration during the planning of an attack, but also its execution⁵⁵⁹. Thus, if new information comes to light, indicating that the status of an attack has gone from proportionate to disproportionate, such attack should immediately be suspended. For example: ‘if a pilot has received the

⁵⁵⁶ Ibid 9.

⁵⁵⁷ Queguiner ‘Precautions under the law governing the conduct of hostilities’ 8.

⁵⁵⁸ AP I article 57(2)(b).

⁵⁵⁹ Bouchie De Belle ‘Chained to cannons or wearing targets on their T-shirts’ 904.

order to bomb an objective but he realises at the last minute that it is protected by a human shield, he should suspend the attack and refer back to his command⁵⁶⁰. If the attacking force fails to alter their operations, in light of the new information, then such attack and its disproportionate collateral damage will attract legal consequences.

Additionally, this provision instils the notion that the 'standard of conduct [envisaged by the principle of proportionality] applies at all operational levels'⁵⁶¹. The principle does not apply in such a way as to freeze-frame the circumstances on the ground at the moment the commander makes his or her decision, calculating the collateral damage on the basis of the perceived conditions at such time. Instead, it requires those involved in the planning and decision making, as well as those called upon to execute the plans, to contemplate the proportionality of the chosen course of conduct right up to the moment the damage is inflicted. This serves to negate instances where a soldier seeks to avoid responsibility for a disproportionate attack by hiding behind the fact that he or she has been ordered to execute the attack⁵⁶². Soldiers are to use their judgment and not merely rely on the commander's appraisal of the circumstances⁵⁶³. To hold that a soldier is to do as he or she is told in the event that it is clear that the mandated operation would contravene the LOIAC is clearly contrary to the purport of this provision⁵⁶⁴.

Modern technology has advanced to such an extent that even once bombs have been dropped from a plane it can still be guided away from the initial intended target and reduce the damage caused⁵⁶⁵. These advances in the means and methods of warfare are to be taken into consideration when the principle of proportionality is applied. It could help establish whether or not feasible methods

⁵⁶⁰ Ibid 905.

⁵⁶¹ Queguiner 'Precautions under the law governing the conduct of hostilities' 11.

⁵⁶² Ibid 12.

⁵⁶³ Ibid 13.

⁵⁶⁴ Ibid.

⁵⁶⁵ Ibid 12.

of preventing and reducing harm to civilians and civilian objects have been employed in the circumstances.

*The obligation when faced with a choice of two military objectives, to choose the one which may be expected to cause the least danger to civilians*⁵⁶⁶

This obligation requires an attacker to adopt ‘the lesser evil’⁵⁶⁷ when he or has the luxury of choice between two or more military objectives. Considering the fact that there are two or more legitimate military objectives, a lot of subjective freedom is given⁵⁶⁸. Notwithstanding such freedom to choose, the attacking party is to balance the competing values at stake during an attack: the likely military advantage and the harm likely to be caused to civilians and civilian objects. In this instance more than one proportionality assessment would need to be conducted, and the course of action which would be least harmful to civilians is to be chosen. It is perhaps interesting to note that the pivotal consideration is ‘the least danger to civilians’ as opposed to the objective that might secure the greatest military advantage and still remain valid in terms of the proportionality assessment. This would however lead to a situation where, whilst the destruction of A might be more advantageous in terms of the overall campaign, if B would cause least harm to civilians then this provision guides belligerents to conduct their attack against B. This does not seem very practical from a military perspective and the provision seems to relate instead to instances where the same advantage can be gained by the destruction of any one of two or more objectives. To destroy the one which would lead to the least amount of civilian harm in this second instance is better suited to the purport of the provision. De Belle seems to support this view when she suggests that this kind of choice only occurs when the objectives faced are lines of communication, for example: ‘if human shields are positioned on a bridge and the communication line can be broken by attacking another bridge that is not

⁵⁶⁶ AP I article 57(3).

⁵⁶⁷ *AP Commentary* 705.

⁵⁶⁸ Bouchie De Belle ‘Chained to cannons or wearing targets on their T-shirts’ 905.

surrounded by civilians', then the attacker is obligated to attack the latter bridge⁵⁶⁹. Thus, illustrating through this example that the destruction of any of the two would achieve the same military advantage, but clearly the one option would be less injurious to civilians, and in terms of IHL the less harmful means should be pursued.

*The obligation to give effective warning of attacks which could affect the civilian population unless circumstances do not permit*⁵⁷⁰

In modern warfare the line dividing those who are targetable from those who are not is becoming more difficult to see and requires that warnings be given of impending attacks, in order to ensure the best possible protection to the civilian population⁵⁷¹. The warnings are intended to provide an opportunity for civilians to evacuate the vicinity of a military objective being targeted⁵⁷² and the word 'effective' requires that the method used be designed to achieve this purpose. The warning is required in most instances as the provision provides 'unless circumstances do not permit'⁵⁷³. Thus, where a warning has not been given before an attack there needs to be a good reason. The obligation requires that the commanders always be conscious of the duty to avoid or minimise harm to the civilian population and civilian objects. It provides that caution is the rule, and any deviation from it will only be tolerated if it can be justified in the circumstances⁵⁷⁴.

There seems to be consensus that the provision does not require a warning before the launch of every attack, but that circumstances ultimately dictate the

⁵⁶⁹ Ibid 905-906.

⁵⁷⁰ AP I article 57(2)(c).

⁵⁷¹ Geiss & Siegrist 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?' 38-39.

⁵⁷² Ibid.

⁵⁷³ Queguiner 'Precautions under the law governing the conduct of hostilities' 15.

⁵⁷⁴ Ibid.

appropriate course of action⁵⁷⁵. In most cases a general warning at the start of conflict is required with regular warnings that follow periodically⁵⁷⁶. The use of the word 'may' indicates that it is only when it is clear that civilians will possibly be harmed or where there is doubt as to this possibility that the warning is required⁵⁷⁷. Where it is obvious that there will be no harm to civilians or civilian objectives it is not necessary to give an advance warning⁵⁷⁸. In light of modern warfare's tendency to occur in densely populated urban areas one would be challenged to conceive of instances where civilian harm is not a possible consequence of most attacks⁵⁷⁹.

Another factor that is unclear, regarding the standard of conduct expected from commanders, is the required form and specificity of the warning. Once again, there is no other guidance other than the spirit of the obligation being to protect the civilian population and civilian property. Moreover, the nature of every conflict is different and, accordingly, what constituted an effective warning in one instance would not necessarily in another. Hence, there is a need for commanders to assess the possibility of civilian harm and issue a very clear warning so as to have the civilians evacuate the area. There would necessarily have to be some indication as to the target or a rough delineation of where the strike zone would be so as to have civilians steer clear. Additionally, the timing of the warning must also allow for civilians to remove themselves beyond the point of danger and for the attack to occur shortly thereafter to prevent the civilians from returning before the attack has in fact been made⁵⁸⁰. Whereas, if the warning was too late, those who believed they had some time to gather their belongings or search for friends and family known to be in the vicinity, could be caught in the line of fire. The conduct of the attacking party would ultimately be shaped by the following considerations:

⁵⁷⁵ Geiss & Siegrist 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?' 38-39.

⁵⁷⁶ Ibid.

⁵⁷⁷ Ibid.

⁵⁷⁸ Ibid.

⁵⁷⁹ Ibid.

⁵⁸⁰ Bouchie De Belle 'Chained to cannons or wearing targets on their T-shirts' 905.

The level of precision required will depend on the general objective pursued; the attacking party will have to ensure the immunity of the civilian population and civilian property, while also taking into account its own military interests in each strategic context⁵⁸¹.

In the context of voluntary human shielding the 'effective warning' obligation can possibly be very useful to discourage shields from maintaining their positions in front of the targeted military objective:

... a warning before an attack on the objective will let the party using the human shields – thinking that they will forestall an attack – know that the stratagem has not worked, and give it a chance to remove the human shields from the target⁵⁸².

An advance warning, however, does not relieve the attacker of having to comply with the other precautionary measures. It is not open to an attacker to consider 'an entire area as a military objective simply because he recommended that it be evacuated'⁵⁸³. If the VHSs were to not heed the advance warning and remain behind they are still considered civilians clothed with protected status⁵⁸⁴. Thus, VHSs who continue to stand their ground will have to be factored into the proportionality assessment before an attack can lawfully be made against the military objective. This is another problematic area in terms of international law and its regulation of VHSs⁵⁸⁵.

Precautions to be taken by the party subject to an attack

⁵⁸¹ Queguiner 'Precautions under the law governing the conduct of hostilities' 16.

⁵⁸² Bouchie De Belle 'Chained to cannons or wearing targets on their T-shirts' 905.

⁵⁸³ Ibid.

⁵⁸⁴ Ibid.

⁵⁸⁵ See the chapter on 'Proposals for suitable future regulation of voluntary human shields' for an approach that will adequately address and alleviate this problem.

*Article 51(7) of AP I prohibition against involuntary human shielding*⁵⁸⁶

As previously indicated under this chapter the defending party is prohibited from both forcefully placing civilians in strategic locations and using the movements of the civilian population in order to shield military objectives. This would be contrary to the purpose of IHL which seeks to limit the harm caused to civilians and civilian objects. Thus, to reiterate, article 51(7) of AP I provides:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations⁵⁸⁷.

VHSs are not expressly dealt with under IHL. Instead, the general provisions of the LOIAC are applied to the characteristics of the actor in order to establish its legal status. Any inclusion of the actor under the law is as a direct consequence of broadening the interpretations of provisions directly relating to other actors prevalent in the theatre of war. The wording of article 51(7) of AP I is such that a broad interpretation and application is not possible. It only caters for the human shields of an involuntary nature: those who are taken hostage and forcibly positioned and those whose presence or movements are being used as proximity shields. In both instances there is no volition on the part of the shield. IHL does not prohibit the use of VHSs. Obviously, this is an undesirous consequence, but to maintain that article 51(7) of AP I is applicable to VHSs constitutes at best an attempt to cast a drop of water on a rather large fire.

⁵⁸⁶ AP I article 51(7).

⁵⁸⁷ Ibid.

*The obligations imposed by article 58 of AP I*⁵⁸⁸

Notwithstanding the fact that there is no prohibition against voluntary human shielding, there exists another obligation, albeit equally in need of proper enforcement, that would seem to be a way of ensuring VHSs are removed from the vicinity of a military objective. It does, however, depend on the interpretation of the provision and the punishment imposed on those who fail to comply. The more lenient it is the more readily states will suffer the consequences and continue acquiescing to the presence of VHSs in front of their military objectives. Article 58 of AP I provides that each party to the conflict shall to the maximum extent feasible:

- (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
- (b) avoid locating military objectives within or near densely populated areas;
- (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations⁵⁸⁹.

Despite the provision being formulated as a measure to ensure the protection of civilians and civilian objects, certain factors make it inapplicable to VHSs. Even though the provision states 'to the maximum extent feasible' it does, however, not constitute an absolute as one cannot be obligated to do the impossible⁵⁹⁰. In terms of paragraph (a), it requires that parties merely 'endeavour' to remove the civilians under their control. Furthermore, the word 'control' also constitutes a problem in light of the voluntary nature of VHSs.

⁵⁸⁸ AP I article 58.

⁵⁸⁹ Ibid.

⁵⁹⁰ 'Commentary - Precautions against the effects of attacks'.

There is no control that a military force exerts over VHSs. These shields are present on account of their will to be there and are free to vacate the scene whenever they so wish. Perhaps one could argue that where the state called on VHSs to take guard at specifically identified military objectives such control exists. However, would this constitute enough influence on the eventual course of a VHS's conduct so as to argue that the military force exercises control over the shield? Furthermore, how would such control be verifiable apart from very clear-cut cases? The more one considers the entire IHL legal framework, the easier it is to come to the conclusion that the drafters had not included the VHS in its provisions, otherwise there would be some form of tangible and acceptable regulation.

The obligations on the defending parties in terms of article 51(7) and article 58 of AP I are both intended to assess 'whether belligerents have done what is reasonable in the circumstances' to keep harm to civilians to a minimum⁵⁹¹. Although they serve a similar purpose, their standards are different. Article 51(7) of AP I is an absolute prohibition: under no circumstance will the use of involuntary human shields to preserve and further military objectives be justified under IHL⁵⁹². This does, however, require a genuine intention to use these civilians as human shields on the part of the belligerent in order for there to be a violation of article 51(7) of AP I⁵⁹³. By comparison, article 58 of AP I is relative in nature and will always evaluate the conduct of a party in light of the prevailing circumstances⁵⁹⁴. A mere failure to do that which is feasible in the circumstance to remove civilians in the area is enough to constitute a violation⁵⁹⁵. This is true irrespective of whether the belligerent intended to ignore the provision or not. The disparate ways in which IHL moves to deal with violations of the respective provisions may be directly related to the fact that, between the two articles, only a violation of article 51(7) of AP I constitutes a war crime⁵⁹⁶.

⁵⁹¹ Rubinstein & Roznai 'Human shields in modern armed conflicts' 102.

⁵⁹² Ibid.

⁵⁹³ Ibid.

⁵⁹⁴ Ibid.

⁵⁹⁵ Ibid.

⁵⁹⁶ Rubinstein & Roznai 'Human shields in modern armed conflicts' 102.

It would, therefore, be easier to establish a violation of article 58 of AP I as it merely requires proof in the circumstances that a defending party had failed to do that which is feasible to remove civilians from the vicinity. However, proving an intention to have civilians not only positioned in front of specific military objectives, but with a goal of immunising the target from direct attack in order to preserve it for the defending state is difficult in the context of armed conflict. Unless, of course, there was clear evidence that the civilians were forcibly positioned before these military objectives and did not have the freedom to remove themselves from such position.

Proving the necessary intention in the case of VHSs would almost be impossible. Moreover, despite the efforts of a state to remove civilians in front of a military objective the VHSs might still refuse to evacuate the area and, accordingly, negate any wrongdoing by the state in terms of both article 51(7) and article 58 of AP I. Such an appreciation is again indicative of the fact the VHSs were not considered in the drafting of article 51(7) of AP I as the supporting provisions also fail to illustrate any depth of thought invested in the effective regulation of these controversial actors.

(cc) State practice

The principle of proportionality under article 51 of AP I drew some criticism prior to the adoption of the Additional Protocols. It was most notably considered by France as an overly extensive limitation on a state's right to legitimate defence⁵⁹⁷. However, as there were no suitable alternatives available to deal with the issue of minimising collateral damage, it eventually obtained the status of customary international law. Accordingly, since the adoption of the Additional

⁵⁹⁷ 'Customary IHL Rule 14: Proportionality in attack' available at https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14 (accessed 15 September 2015).

Protocols many states have reflected the importance of the principle of proportionality by providing guidelines in military manuals and enacting domestic legislation to the effect that a violation thereof constitutes an offence⁵⁹⁸.

Military Manuals

The military manuals of states are quick to instil an appreciation for the fact that collateral damage, in itself, is not prohibited. It is only when it is established during the planning or launching of an attack that the expected collateral damage would exceed the military advantage anticipated that such attack becomes unlawful⁵⁹⁹. Spain's *LOAC Manual* (1996)⁶⁰⁰ states:

The principle of proportionality seeks to limit the damage caused by military operations. It is based on a recognition of the fact that it is difficult to limit the effects of modern means and methods of warfare exclusively to military objectives and that it is likely that they will cause collateral damage to civilians and civilian objects⁶⁰¹.

Thus, the reality of armed conflict is a factor incorporated into the assessment of the proportionality principle. It is accepted that due to the nature of warfare

⁵⁹⁸ Ibid.

⁵⁹⁹ Australia. Australian Defence Doctrine Publication 06.4. Australian Defence Headquarters. *The Manual on the Law of Armed Conflict* 11 May 2006 s.5.30, s.5.38 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14#top (accessed 17 September 2015); Canada. Office of the Judge Advocate General. *The Law of Armed Conflict at the Operational and Tactical Level* 1999 4-2 4-3 s.17, s.18 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14#top (accessed 17 September 2015); Canada. Office of the Judge Advocate General. *The Law of Armed Conflict at the Operational and Tactical Level* 13 August 2001 s.202.5 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14#top (accessed 17 September 2015).

⁶⁰⁰ Spain. Orientaciones, El Derecho de los Conflictos Armados, Publicacion OR7-004, 2 Tomos, aprobado por el Estado Mayor del Ejercito, Division de Operaciones, 18 March 1996, Vol 1 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14#top (accessed 17 September 2015).

⁶⁰¹ Ibid s.2.5.

there will be collateral damage. This, in itself, is not prohibited. However, the amount of civilian harm must be kept to a minimum. A means through which IHL seeks to achieve this goal of minimal civilian harm is through an application of the proportionality principle which seeks to balance the interests of states and their armed forces with the plight of innocent civilians. Consequently, 'provided that the expected incidental casualties and damage are not excessive in relation to the concrete and direct military advantage anticipated'⁶⁰² incidental harm to civilians will not be prohibited.

The IHL goal of minimising harm caused to the civilian population and civilian objectives emanates from the prohibition against unnecessary suffering⁶⁰³. This is also reflected in the various military manuals of states. For example, the *Military Manual* (2005) of the Netherlands⁶⁰⁴ mentions that IHL places limits upon a military force in order to avoid unnecessary suffering⁶⁰⁵. The *US Air Force Pamphlet* (1976)⁶⁰⁶ states:

Complementing the principle of necessity and implicitly contained within it is the principle of humanity which forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes. This principle of humanity results in a specific prohibition against unnecessary suffering, a requirement of proportionality and a variety of more specific rules examined later. The principle of humanity also confirms the basic immunity of civilian populations and civilians from being objects of attack during armed conflict. This immunity of the civilian population does not preclude unavoidable incidental civilian casualties which may occur during the course of attacks

⁶⁰² Ibid s.2.4.2.

⁶⁰³ AP I article 35(2) provides: 'It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering'.

⁶⁰⁴ Netherlands. Koninklijke Landmacht. Militair Juridische Dienst. Voorschrift No. 27-412. *Humanitair Oorlogsrecht Handleiding* (2005) available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14#top (Accessed 17 September 2015).

⁶⁰⁵ Ibid s.0118.

⁶⁰⁶ United States. US Department of the Air Force. Air Force Pamphlet 110-31 *International Law – The Conduct of Armed Conflict and Air Operations* (1976) available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (Accessed 17 September 2015).

against military objectives, and which are not excessive in relation to the concrete and direct military advantage anticipated⁶⁰⁷.

Thus, through the principle of proportionality it is implied that ‘no more force may be used than is strictly necessary’ in order to obtain a military advantage and defeat the enemy⁶⁰⁸. In Canada’s *LOAC Manual* (2001) the basic principles that inform an application of the proportionality principle is clearly identified:

This concept of humanity results in a specific prohibition against unnecessary suffering, a requirement of proportionality, and a variety of more specific rules. The concept of humanity also confirms the basic immunity of civilian populations and civilians from being objects of attack during armed conflict. This immunity of the civilian population does not preclude unavoidable incidental civilian casualties that may occur during the course of attacks against legitimate targets and that are not excessive in relation to the concrete and direct military advantage anticipated⁶⁰⁹.

It is, thus, easier to comprehend the purpose behind the proportionality principle and exactly what factors are to be balanced. Commanders are given the spirit of the principle and its purpose under IHL. With the fundamental considerations in mind the commanders can attempt to assess a concrete situation before them and make an informed decision. During the assessment commanders are guided to weigh up or balance the factors mentioned above in order to establish the proportionality of an attack. The Australian *LOAC Manual* (2006) requires its commanders to:

⁶⁰⁷ Ibid s.1-s.3(a).

⁶⁰⁸ Ibid Netherlands *Humanitair Oorlogsrecht Handleiding* (2005) 33 s.0229.

⁶⁰⁹ Canada. Office of the Judge Advocate General. *The Law of Armed Conflict at the Operational and Tactical Level* 13 August 2001 s.202.5 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14#top (accessed 17 September 2015).

weigh the military value arising from the success of the operation against the possible harmful effects to protected persons and objects. There must be an acceptable relationship between the legitimate destruction of military targets and the possibility of consequent collateral damage⁶¹⁰.

Canada's *Law of armed conflict at operational and tactical level* (2001) explains further:

There must be a rational balance between the legitimate destructive effect and undesirable collateral effects. As an example, you are not allowed to bomb a refugee camp if its only military significance is that refugees in the camp are knitting socks for soldiers. As a converse example, you are not obliged to hold back an air strike on an ammunition dump simply because a farmer is ploughing a field beside it. Unfortunately, most applications of the principle of proportionality are not quite so clear cut⁶¹¹.

If it is established during a balancing of the various competing interests that the harm would be excessive in relation to the anticipated military advantage states are required to either suspend, cancel or plan their attack in such a way as to make it acceptable in terms of the principle of proportionality. An example is the *UK LOAC Manual* (2004)⁶¹² which states:

An attack is not to be launched, or is to be cancelled, suspended or re-planned, if “the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be

⁶¹⁰ Australia. Australian Defence Force. Australian Defence Doctrine Publication (ADDP) 06.4. *Law of Armed Conflict* (2006) ss 5.1, 5.9, 5.30, 5.38 and 5.61 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14#top (accessed 17 September 2015). See also ss 2.8, 2.10, 4.2, 4.5, 4.46 and 6.26.

⁶¹¹ Canada. *The Law of Armed Conflict at the Operational and Tactical Level* 13 August 2001 s.204.4- s. 204.6.

⁶¹² United Kingdom. Ministry of Defence. *The Manual of the Law of Armed Conflict Ministry of Defence* (1 July 2004) (as amended by amendment 3, September 2010) available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14#top (Accessed 17 September 2015).

excessive in relation to the concrete and direct military advantage anticipated⁶¹³.

This is reflected in most military manuals of states.

National Legislation

States across the globe have adopted various means through which to include the IHL provisions on the proportionality principle into their domestic legal systems. Some have included provisions which merely referred to either the Geneva Conventions and the Additional Protocols⁶¹⁴ or the ICC Statute⁶¹⁵ maintaining that a violation of any of these laws would be actionable within the state's jurisdiction. Australia's Criminal Code Act of 1995 (as amended in 2007) provides an itemised description as to what amounts to a disproportionate attack⁶¹⁶:

268.38 War crime – excessive incidental death, injury or damage

(1) A person (the perpetrator) commits an offence if:

(a) the perpetrator launches an attack; and

⁶¹³ Ibid s. 5.33.

⁶¹⁴ For example: Cook Islands' 'Geneva Conventions and Additional Protocols Act' (2002); s.5(1). The section effectively punishes 'any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach ... of [the 1977 Additional Protocol I]'. See https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015). See also New Zealand's 'Geneva Conventions Act' (1958) as amended in 1987 s.3(1) available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015); and United Kingdom's 'Geneva Conventions Act' (1957) as amended in 1995 s.1(1) available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶¹⁵ For example: Congo's 'Genocide, War Crimes and Crimes against Humanity Act' (1998) article 4. The article defines war crimes with reference to the categories of crimes defined in article 8 of the 1998 ICC Statute. See https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶¹⁶ Australia's 'Criminal Code Act' of 1995 (as amended in 2007) available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

(b) the perpetrator knows that the attack will cause incidental death or injury to civilians; and

(c) the perpetrator knows that the death or injury will be of such an extent as to be excessive in relation to the concrete and direct military advantage anticipated; and

(d) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for life⁶¹⁷.

National Case Law

Germany

In the *Fuel Tankers case* of 2010⁶¹⁸, alleged war crimes and violations of the German laws were being investigated after an airstrike was launched in Afghanistan against fuel tankers of the International Security Assistance Force⁶¹⁹. The airstrike resulted in the death of numerous civilians.

⁶¹⁷ Ibid chapter 8, s.268.38, 327-328. See https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015). See also Belgium's 'Penal Code' of 1867 (as amended on 5 August 2003) chapter III, Title I bis, article 136, s.1(22); Burundi's 'Law on Genocide, Crimes against Humanity and War Crimes' (2003) article 4(B)(d); Finland's Criminal Code of 1889 (as amended in 2008) chapter 11, s.5(1)(8); France's 'Code of Defence' of 2004 (as amended in 2008) article D4122-10; France's 'Penal Code' of 1994 (as amended in 2010) article 461-27 and 461-28; Georgia's 'Criminal Code' (1999) article 413(d); Germany's 'Law Introducing the International Crimes Code' (2002) Article 1, s.11(1)(3); Iraq's 'Law of the Supreme Iraqi Criminal Tribunal' (2005) article 13(2)(D); Mali's 'Penal Code' (2001) article 31(1)(4); Netherlands' 'International Crimes Act' (2003) article 5(2)(c)(ii); Niger's 'Penal Code' of 1961 (as amended in 2003) article 208.3(12); Norway's 'Penal Code' of 1902 (as amended in 2008) s.106(c); Peru's 'Code of Military and Police Justice' (2006) article 95(3); Republic of Korea's 'ICC Act' (2007) article 13(1)(3); Rwanda's 'Law Repressing the Crime of Genocide, Crimes against Humanity and War Crimes' (2003) articles 8-9; Senegal's 'Penal Code' of 1965 (as amended in 2007) article 431-3(b)(3); South Africa's 'ICC Act' (2002) Schedule 1, Part 3, s.(b)(iv); Sweden's 'Penal Code' of 1962 (as amended in 1998) chapter 22, s.6; Uruguay's 'Law on Cooperation with the ICC' (2006) articles 26.2 and 26.3.12. All available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶¹⁸ *Fuel Tankers Case* (16 April 2010) Germany, Federal Court of Justice, Federal Prosecutor General 63-66 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶¹⁹ Ibid.

The German forces were ultimately acquitted of any wrongdoing. It was mentioned that the German International Crimes Code, section 11, requires that the attack in question must have been carried out by military means and the officials had to genuinely anticipate that the attack will cause disproportionate collateral damage⁶²⁰.

As the military attack was launched in either an IAC or non-IAC it satisfies the objective element of section 11 of the German International Crimes Code. The provision conforms to article 49 of AP I which defines an 'attack' as an 'act of violence against the adversary'⁶²¹ and such would require the act to have occurred in the context of an IAC or a non-IAC. In the *Fuel Tankers case* the two bombs that had been dropped in the attack was indeed a violent act perpetrated through military means as envisaged by section 11 of the German International Crimes Code and article 49 of AP I.

However, in order to impute criminal liability on the German officials a further subjective element had to be satisfied. This element required that the accused must not only have 'definitely anticipated that the attack would result in the killing or injury of civilians or the damage of civilian objects', but that it would be so severe as to be disproportionate to the 'overall concrete and direct military advantage anticipated'⁶²². The subjective element required there to be a direct intent on the part of the accused, in other words, the accused 'must want to attack a military objective'⁶²³. Furthermore, the accused must also anticipate disproportionate collateral damage. It was found that the accused did not have such subjective intent as required by law. In the circumstances an accused, Colonel Klein, maintained that he had not anticipated that the bombing would bring about disproportionate collateral damage. In fact, Colonel Klein had

⁶²⁰ Ibid.

⁶²¹ The article applies to both international armed conflict (through the Protocol itself) and non-international armed conflict (through customary international law).

⁶²² *Fuel Tankers Case* 63-66.

⁶²³ Ibid.

'considered that only insurgents were present on the ground'⁶²⁴, and did not at all anticipate any collateral damage, let alone disproportionate collateral damage.

It was also found that Colonel Klein's conduct was lawful under both international and domestic law, notwithstanding the fact that civilians were killed in the airstrike. The German Federal Court elaborated on the nature and extent of the protections afforded to civilians under IHL:

[F]rom a legal perspective the protection of international humanitarian law applies irrespective of whether civilians know about the danger of such an attack or of whether they found themselves at the place of military confrontations out of their free will or under coercion ... Yet, the protection of civilians does not apply in an unlimited way. International humanitarian law ... prohibits ... attacks ... against a military objective if at the time of the order to attack the anticipated civilian damage is out of proportion to the anticipated concrete and direct military advantage. This prohibition of excessiveness is a specific military proportionality clause which cannot be compared to the effects of the prohibition of excess under the law that applies in times of peace. "Out of proportion" is not to be equated with the stricter standard of lack of appropriateness; the killing of uninvolved persons can never be appropriate under human rights law ...⁶²⁵

It was stated that a means through which IHL prohibits the excessive collateral damage is by requiring 'a military advantage of a tactical nature'⁶²⁶. This can include examples such as 'the destruction or weakening of hostile troops or their means of combat, or territorial gain'⁶²⁷. The military advantage need not be long term or ultimately decide the armed conflict. It is appreciable that, if the law were to require that the armed forces refrain from launching attacks that are of no

⁶²⁴ Ibid.

⁶²⁵ Ibid.

⁶²⁶ Ibid.

⁶²⁷ Ibid.

military benefit to them, conforming to the notion that the only legitimate objective a state has in times of war is the weakening of the adversary, such approach would necessarily lead to less civilian harm.

In the *Fuel Tankers* case the direct military advantage was the destruction of the fuel tankers and the killing of the nearby Taliban which included the high-level regional commander⁶²⁸. The anticipated military advantage was the prevention of the use of the fuel by the Taliban and a disruption of the Taliban's command structure⁶²⁹. In the proportionality assessment 'the expectations at the time of the military action based on the facts are decisive'⁶³⁰. It does not matter whether the advantages anticipated at the time of attack are fully realised.

Likewise, the anticipated civilian harm must also be assessed at the time the attack is launched⁶³¹. In the circumstances it was found that factors such as the distance to the nearest civilian settlements, the presence of the Taliban, the darkness of night, and the information gathered through informants, made Colonel Klein's statement that he did not anticipate any civilian harm at all, credible⁶³². It was also held by the German Federal Court that no further reconnaissance or precautionary measures were feasible in the circumstances⁶³³.

It was further expressed that although article 50 of AP I requires that in cases of doubt as to a person's status he or she be deemed a civilian, it does not require *absolute* certainty⁶³⁴. Hence, if the circumstances and information gathered indicate that the targeted individuals are legitimate objectives, even

⁶²⁸ Ibid.

⁶²⁹ Ibid.

⁶³⁰ Ibid.

⁶³¹ Ibid.

⁶³² Ibid.

⁶³³ Ibid.

⁶³⁴ Ibid.

though afterwards it becomes clear that they were in fact civilian, such attack would not be unlawful. Considering the nature of armed conflict some leeway is given to honest mistakes made by military commanders.

Finally, as regards the actual balancing of military advantage and anticipated collateral damage, the German Federal Court emphasised that

The literature consistently points out that general criteria are not available for the assessment of specific proportionality because unlike legal goods, values and interests are juxtaposed which cannot be “balanced” ... Therefore, considering the particular pressure at the moment when the decision had to be taken, *an infringement is only to be assumed in cases of obvious excess* where the commander ignored any considerations of proportionality and refrained from acting “honestly”, “reasonably” and “competently.”⁶³⁵ (Own emphasis)

Accordingly, an attack would only be considered disproportionate if it were obviously excessive. There are no mathematical algorithms with which to determine exactly where the scale starts to tip in favour of either side. It allows commanders a considerable amount of freedom to pursue their military objectives without being unrealistically curtailed by IHL. It also would seem to be a fair bartering of mutual interests, ensuring greater levels of compliance. The German Federal Court provided that ‘the destruction of an entire village with hundreds of civilian inhabitants in order to hit a single enemy fighter’ is an example of a clearly excessive and disproportionate attack⁶³⁶.

It was concluded in the *Fuel Tankers* case that there was no clear disproportionate or excessive harm caused to civilians⁶³⁷.

⁶³⁵ Ibid.

⁶³⁶ Ibid.

⁶³⁷ Ibid.

Israel

The Israeli High Court in the 2006 *PCATI case*⁶³⁸ stated that the principle of proportionality is a general principle and constitutes a human rights concept⁶³⁹. The principle arises in instances where an attack is being launched against combatants or civilians who are directly participating which causes harm to civilian bystanders⁶⁴⁰. IHL requires in such instances that the harm caused to the innocent civilians must be proportionate to the military advantage to be gained from the attack⁶⁴¹. The Israeli High Court provided some examples as to the circumstances that could possibly give rise to collateral damage:

Civilians might be harmed due to their presence inside of a military target, such as civilians working in an army base; civilians might be harmed when they live or work in, or pass by, military targets; at times, due to a mistake, civilians are harmed even if they are far from military targets; at times civilians are forced to serve as “human shields” from attack upon a military target, and they are harmed as a result. In all those situations, and in other similar ones, the rule is that the harm to the innocent civilians must fulfil, inter alia, the requirements of the principle of proportionality⁶⁴².

Thus, whether it is in one of these circumstances or another, if a civilian, not directly participating in hostilities, is harmed during an attack launched in an IAC then the principle of proportionality would apply to assess the lawfulness of the attack⁶⁴³. The Israeli High Court further reiterates that the proportionality principle is currently contained in article 51 of AP I⁶⁴⁴.

⁶³⁸ *PCATI* 41-44.

⁶³⁹ *Ibid.*

⁶⁴⁰ *Ibid.*

⁶⁴¹ *Ibid.*

⁶⁴² *Ibid.*

⁶⁴³ *Ibid.*

⁶⁴⁴ *Ibid.*

Other National Practice

In 2008, Denmark's Ministry of Defence and Ministry of Foreign Affairs reiterated the fundamental purpose of IHL is to 'protect the victims of war as much as possible'⁶⁴⁵. Pursuant to this objective it is found that

[T]here are specific international legal requirements to weapons with regard to ... proportionality between the military advantage of neutralising an active opposing military target and the resulting devastating consequences for the civilian population⁶⁴⁶.

Accordingly, the use of weapons in IAC would in most instances necessitate at least a preponderance of the principle of proportionality in the planning of an attack. The preponderance would regard the fact that 'the armed forces must act with only the degree of force necessary to achieve the specific military objective' and in so doing 'lessen civilian suffering'⁶⁴⁷. During the planning phase of an attack an assessment of the anticipated collateral damage may be influenced by considerations of the safety of the attacking forces⁶⁴⁸. Accordingly, this is a valid factor to include in a proportionality assessment⁶⁴⁹.

⁶⁴⁵ Denmark. Ministry of Defence and Ministry of Foreign Affairs. 'A cost benefit analysis of possible introduction of a national Danish moratorium on all cluster munitions' 1 April 2008 15-16 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁴⁶ Ibid.

⁶⁴⁷ *Report on the Practice of Iraq* (1998), Chapter 5, referring to the press conference of the President, 10 November 1980, *Encyclopaedia of the Iraqi-Iranian War*, Vol. I 318; and 'Statement by the Iraqi President during preliminary discussions with the Committee of Good Offices', 2 March 1984, *Encyclopaedia of the Iraqi-Iranian War*, Vol. III 54 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁴⁸ Israel, Ministry of Foreign Affairs, Background paper, *Responding to Hamas attacks from Gaza: Issues of Proportionality*, December 2008 s.1 and s.3-4 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁴⁹ Ibid.

Israel's Ministry of Foreign Affairs in a report on the Israeli operations in Gaza (also referred to as 'Operation Cast Lead') provided the following statement with regard to the principle of proportionality:

The "elements of crimes" drafted in the Rome Statute of the International Criminal Court implementation process and approved by the Assembly of States Parties to the Rome [1998 ICC] Statute clarifies two key matters as well – that the actionable offence of causing "excessive incidental death, injury or damage" is established only where these matters were "clearly excessive," and that excess and proportion is to be judged "in relation to the concrete and direct overall military advantage anticipated."⁶⁵⁰

Once again, it is observed that state practice deems only those acts which are clearly excessive as disproportionate. This illustrates that a great deal of tolerance is to be expected as an attack would be lawful up until the point where it becomes obvious that the civilian harm outweighs the military advantage. An attack is therefore only categorised into two types of attack: attacks which are clearly disproportionate, and therefore unlawful, and attacks which are lawful. *Prima facie* the balance is already tipped slightly more in favour of the military than that of civilians. To assess the proportionality of an attack is a very complex task:

[The] evaluation of proportionality (or excessive harm to civilians compared to military advantage) requires balancing two very different sets of values and objectives, in a framework in which all choices will affect human life. States have duties to protect the lives of their civilians and soldiers by pursuing proper military objectives, but they must balance this against their duty to minimise incidental loss of civilian lives and civilian property during military operations.

⁶⁵⁰ Israel. Ministry of Foreign Affairs. *The operation in Gaza 27 December 2008 – 18 January 2009: Factual and Legal Aspects* 29 July 2009 s.120-122 and s.128-129 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

That balancing is inherently difficult, and raises significant moral and ethical issues⁶⁵¹.

Israel's Ministry of Foreign Affairs also made mention of the fact that there needs to be a definite intent on the part of the commander to launch an attack that he or she anticipates would cause collateral damage, and that this damage would be disproportionate to the military advantage expected⁶⁵². Otherwise an accused cannot be convicted of a war crime. The report explains further:

[T]he existence of a war crime turns not on the reasonableness of the commander's weighing of military advantage against civilian harm, but on whether he or she *knew that the attack would cause clearly disproportionate harm*, but proceeded intentionally notwithstanding this knowledge⁶⁵³. (Own emphasis)

Therefore, even if a commander could in the circumstances have chosen a different plan of attack which would have resulted in less collateral damage, it would still be justified if it can be proved in the circumstances that the commander launched the attack whilst subjectively thinking it would not amount to excessive harm to civilians⁶⁵⁴. It is stated that '[s]econd-guessing the reasonableness of a commander's decision in a rapidly evolving and complex battlefield situation should not be done lightly'⁶⁵⁵. Instead, the information available to the commander and the value of the military objective to a reasonable military commander must be taken into account⁶⁵⁶.

⁶⁵¹ Ibid.

⁶⁵² Ibid.

⁶⁵³ Ibid.

⁶⁵⁴ Israel *The operation in Gaza 27 December 2008 – 18 January 2009: Factual and Legal Aspects* s.120-122 and s.128-129.

⁶⁵⁵ Ibid.

⁶⁵⁶ Ibid s.421.

The report further stresses that the mere fact that civilian casualties occurred as a result of an attack does not point to wrongfulness on the part of a commander⁶⁵⁷. Only in instances ‘where it was known that [an attack] was likely to cause excessive collateral damage’ can it be said that there exists a *prima facie* violation of the principle of proportionality⁶⁵⁸. If such suspicion of anticipation of excessiveness turns out to be true in the circumstances, then the commander in question might find himself or herself criminally liable and convicted of a war crime⁶⁵⁹.

In a report on the practice of Kuwait it was stated that an obvious violation of the principle of proportionality is present where ‘no military advantage could be expected from the destruction of an object’⁶⁶⁰.

The US Department of Defense stated in a report to congress that ‘balancing [the military advantage and the civilian harm] may be done on a target-by-target basis, as frequently was the case during Operation Desert Storm, but also may be weighed in overall terms against campaign objectives’⁶⁶¹. This then provides an alternative position to the case-by-case analysis.

The way states view and approach the principle of proportionality is also evident from the submissions made to the ICJ when the court was considering the legality of the use of nuclear weapons. Delegates from India submitted a

⁶⁵⁷ Israel. *Position paper by the Military Advocate General on Investigating allegations of Violations of IHL*, submitted to the Public Commission to Examine the Maritime Incident of 31 May 2010 (the Turkel Commission), 19 December 2010, Part B available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁵⁸ Ibid.

⁶⁵⁹ Ibid.

⁶⁶⁰ *Report on the practice of Kuwait* (1997) Chapter 1.5 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁶¹ United States. Department of Defence. ‘Final Report to Congress on the Conduct of the Persian Gulf War’ 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol 31, 1992 622 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

statement that addressed the issue of weapon use in the principle of proportionality context:

The relationship between military advantage and the collateral damage involved also determines the legality of use of a weapon or a method of warfare employed. If the collateral damage is excessive in relation to the military advantage, the attack is forbidden⁶⁶².

Thus, certain weapons that make targeting and limiting harm to legitimate military objectives difficult will themselves constitute unlawful means of warfare considering the excessive collateral damage it would cause⁶⁶³. This view is supported by the state of New Zealand who submitted that '[d]iscrimination between combatants and those who are not directly involved in armed conflict is a fundamental principle of international humanitarian law'⁶⁶⁴.

Whether or not the use of nuclear weapons is absolutely prohibited under IAC is still unresolved. The US for example hold that the legality of the use of nuclear weapons 'depends entirely on the circumstances, including the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians'⁶⁶⁵. Whereas, other states maintain that the

⁶⁶² India. Written statement submitted to the ICJ, *Nuclear Weapons Case* 20 June 1995 3 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁶³ Islamic Republic of Iran. Written statement submitted to the ICJ, *Nuclear Weapons Case* 19 June 1995 2. See also Written statement to the ICJ *Nuclear Weapons (WHO) Case* undated 1-2 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015). The Republic of Iran stated that the 'illegitimacy' of the use of nuclear weapons is apparent when one acknowledges the difficulty in attempting to think of reasons that would justify such destructive means of warfare. In other words an application of the proportionality principle would in most instances regard the use of nuclear weapons as unlawful.

⁶⁶⁴ New Zealand. Written statement submitted to the ICJ, *Nuclear Weapons Case* 20 June 1995 s.71 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁶⁵ United States. Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case* 10 June 1994 27. See also Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995 23 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

use of nuclear weapons is clearly unlawful as it would violate the principle of proportionality⁶⁶⁶.

Dissent

During the Second Reading Speech of the Geneva Conventions Amendment Bill 1990 in the House of Representatives, it was explained that⁶⁶⁷:

[T]he protocols do not require no civilian casualties. That is not in the game at all. The protocols do not say that in any clause. The protocols require the military leadership to assess whether or not civilian losses would be in proportion to the military objectives to be achieved by the attack in question. We all know that it is not always easy to get the right balance in these areas – that is accepted – but I think that it is just about being obtained here. It is certainly being done as well as it can be.⁶⁶⁸

There was, as can be expected, some dissent within the international community with regard to the principle of proportionality and its application under IAC. Perhaps most widely accepted would be the appreciation of the fact that the current IHL does not clearly define the proportionality principle nor does it provide clear criteria for its application⁶⁶⁹. It was also felt that the principle

⁶⁶⁶ See Solomon Islands, Written statement to the ICJ, *Nuclear Weapons case* 19 June 1995 s.3.103. See also Written statement to the ICJ, *Nuclear Weapons (WHO) case* 9 June 1994 s.3.94, where the Solomon Islands stated that “the principles of proportionality and humanity are obviously violated” by the use of nuclear weapons. See also Zimbabwe, Oral pleadings before the ICJ, *Nuclear Weapons Case* 15 November 1995, Verbatim Record, CR 95/35; 27, who considered “the threat or use of nuclear weapons violates the principles of humanitarian law prohibiting the use of weapons or methods of warfare that ... are disproportionate.” All the above are available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁶⁷ Australia. House of Representatives. Attorney-General. ‘Geneva Conventions Amendment Bill’ (1990) Second Reading Speech *Hansard* 12 February 1991 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁶⁸ Ibid.

⁶⁶⁹ *Report on the practice of Botswana* (1998); chapter 1.5 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

unduly diminishes the protections afforded to civilians and places too much subjective discretion on the shoulders of the military commanders⁶⁷⁰. In fact, delegates from Poland went so far as to say that

The rule of proportionality as expressed in the ICRC text would give military commanders the practically unlimited right to decide to launch an attack if they considered that there would be a military advantage. Civilian suffering and military advantage were two values that could not conceivably be compared⁶⁷¹.

Delegates from Romania furthered this view by stating that the principle of proportionality is in effect allowing for some of the civilian population to be sacrificed for a military advantage, and bestows extensive powers to military commanders⁶⁷². Considering that military commanders would tend to attach more weight to a military advantage, the proportionality principle and its subjective standard is open to abuse⁶⁷³.

The then Russian Federation considered the principle of proportionality to be IHL's 'weakest point'⁶⁷⁴. The Russian Federation delegates reasoned as follows:

IHL itself does not clearly enough define the criteria of respecting the balance between the requirements of humanism and military necessity. This issue is not

⁶⁷⁰ German Democratic Republic. 'Statement at the CDDH', *Official Records*, Vol XIV, CDDH/III/SR.7, 16 March 1974 56 s.48 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁷¹ Poland. 'Statement at the CDDH', *Official Records*, Vol XIV, CDDH/III/SR.8, 19 March 1974 61, s.13 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁷² Romania. 'Statement at the CDDH', *Official Records*, Vol XIV, CDDH/III/SR.31, 14 March 1974 305, s.42. See also 'Statement at the CDDH', *Official Records*, Vol XIV, CDDH/III/SR.7, 18 March 1974 57, s.55 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁷³ Ibid.

⁶⁷⁴ Report on the practice of the Russian Federation (1997) chapter 1.5 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

treated in any of the available documents. It remains the exclusive domain of commanders at the helm of military operations⁶⁷⁵.

At the CDDH, Hungary observed that the debate had illustrated a division amongst states with regard to the principle of proportionality⁶⁷⁶. It further posited that an established rule under IHL should be 'reflected in practice' and yield the desired results⁶⁷⁷. The Hungarian delegates were concerned about the increase in civilian casualties and maintained that

[E]ither the rule was not well established and hence not binding; or it existed and could not be applied in armed conflicts; or it existed and was applied, but the results of its application provided the best argument against it⁶⁷⁸.

The proportionality assessment clearly addresses both the principle of military necessity and humanity in that it allows harm to civilians only in those instances where the harm was caused incidentally to the pursuit of a military objective.

(dd) International courts and tribunals

The 2006 *Galić case* judgment on appeal, reminds that fundamental to the purpose of IHL is the obligation on states to spare civilians and civilian objects to the greatest extent possible⁶⁷⁹. This stems from the principle of distinction which is 'cardinal' to the 'fabric of humanitarian law'⁶⁸⁰. These two aforementioned requirements conjunctively constitutes an 'absolute prohibition'

⁶⁷⁵ Ibid.

⁶⁷⁶ Hungary. 'Statement at the CDDH', *Official Records*, Vol XIV, CDDH/III/SR.6, 19 March 1974 68, s.60 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁷⁷ Ibid.

⁶⁷⁸ Ibid.

⁶⁷⁹ ICTY, *Galić case*, Judgment on Appeal, 30 November 2006 s.190 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁸⁰ Ibid.

against the direct targeting of civilians⁶⁸¹. This does not mean that no civilian harm is to be expected⁶⁸², but rather that 'casualties must not be disproportionate to the concrete and direct military advantage anticipated' when planning and executing an attack⁶⁸³. In the *Martić case* of 2007⁶⁸⁴, the ICTY Trial Chamber stated:

The prohibition against targeting the civilian population does not exclude the possibility of legitimate civilian casualties incidental to an attack aimed at military targets. However, such casualties must not be disproportionate to the concrete and direct military advantage anticipated before the attack. In particular, indiscriminate attacks, that is attacks which affect civilians or civilian objects and military objects without distinction, may also be qualified as direct attacks on civilians. In this regard, a direct attack against civilians can be inferred from the indiscriminate character of the weapon used.⁶⁸⁵

Commanders are required to only attack legitimate military objectives where it is clear that it would not cause excessive collateral damage⁶⁸⁶. Thus, in certain instances even attacks on legitimate military objectives may be unlawful. Such unlawfulness would emanate from article 51(5)(b) of AP I⁶⁸⁷.

The obligation on states to guard against the launching of attacks that would cause excessive collateral damage consequently requires commanders to be

⁶⁸¹ Ibid.

⁶⁸² ICTY, *Kordić and Čerkez case*, Judgment on Appeal, 17 December 2004 s.52 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015). The Tribunal posited that the infliction of collateral damage is not unlawful *per se*.

⁶⁸³ Ibid.

⁶⁸⁴ ICTY, *Martić case*, Judgment, 12 June 2007 s.69. See also ICTY, *Kupreškić case*, Judgment 14 January 2000 s.524 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁸⁵ *Martić case* s.69. See also ICTY, *Kupreškić case*, Judgment 14 January 2000; s.524 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁸⁶ *Galić case* s.190-192.

⁶⁸⁷ ICTY, *Martić case*, Review of the Indictment, 8 March 1996 7 s.18 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

conscious of the means and methods used and whether or not there are other less harmful means of obtaining the military advantage in the circumstances. In the *Galić case* of 2003, the ICTY Trial Chamber stated:

The practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible. Once the military character of a target has been ascertained, commanders must consider whether striking this target is “expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.⁶⁸⁸

Thus, the duty to spare civilians must always be the guiding principle when planning an attack⁶⁸⁹. To test whether or not an attack was proportionate ‘it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack’⁶⁹⁰.

In the event that a disproportionate attack is launched, such attack would constitute the *actus reus* of an ‘unlawful attack’⁶⁹¹. The requisite *mens rea* relates to either intention or recklessness⁶⁹² and requires the prosecution to prove ‘that the attack was launched wilfully and in knowledge of circumstances

⁶⁸⁸ *Galić case* s.58.

⁶⁸⁹ *Ibid.*

⁶⁹⁰ *Ibid.*

⁶⁹¹ ‘Final Report to the Prosecutor by the Committee established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia’, ICTY, The Hague, 14 June 2000 s.28 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁶⁹² *Ibid.*

giving rise to the expectation of excessive civilian casualties⁶⁹³. Mere negligence will not suffice⁶⁹⁴.

In appropriate cases attacks may be so disproportionate that it could 'give rise to the inference that civilians were actually the object of attack'⁶⁹⁵. The *Dragomir Milošević case* before the ICTY in 2006 is a case in point:

From on or about 10 August 1994 to on or about 21 November 1995, Dragomir Milošević, as Commander of Bosnian Serb forces comprising or attached to the Sarajevo Romanija Corps and/or forces affiliated with the VRS, conducted a campaign of artillery and mortar and modified air bomb shelling onto civilian areas of Sarajevo and upon its civilian population. The shelling attacks on Sarajevo civilians were deliberate, indiscriminate, and/or excessive and disproportionate to the concrete and direct military advantage anticipated. *In particular ... given the inherent inability of modified airbombs to engage specific targets, their deployment could only have been intended to cause civilian casualties.* The campaign of shelling resulted in over a thousand civilians being killed or injured⁶⁹⁶. (Own emphasis)

Therefore, in the event that a strike is excessively disproportionate it might result in an inference being drawn to the effect that no effort was made to spare civilian lives. Accordingly, the only reasonable conclusion to reach in such case is that the attacker in question deliberately and directly attacked the civilian population. This is cause for added concern by the attacking commander as launching a disproportionate attack is morally less reprehensible than a blatant attack on civilians. The latter would certainly result in a media outcry and a shift in the perceptions of the international community.

⁶⁹³ *Galić case* s.58-60.

⁶⁹⁴ 'Final Report to the Prosecutor by the Committee established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia' *The Hague* 14 June 2000 s.28.

⁶⁹⁵ *Galić case* s.58-60.

⁶⁹⁶ ICTY, *Dragomir Milošević case*, Prosecution's Submission of Amended Indictment Pursuant to Rule 50 and Trial Chamber's Decision, dated 12 December 2006, 18 December 2006 s.24-25 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

iii. Specific operational issues regarding the principle of proportionality

The principle of proportionality does not provide clear-cut guidance as to the appropriate action to be taken in each case. Instead, it necessitates a balancing of competing interests in order to ensure that the outcome of each action is in line with the spirit and purport of IHL⁶⁹⁷. There are inherent difficulties faced when having to make abstract calculations to apply in very real situations⁶⁹⁸. It is not surprising that we find the following questions, raised in the Final Report of 2000 on the NATO bombing campaign against the Federal Republic of Yugoslavia, still being relevant today:

a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants or the damage to civilian objects? b) What do you include or exclude in totalling your sums? [and] c) What is the standard of measurement in time or space?⁶⁹⁹

Military advantage and collateral damage are aspects of military necessity and humanitarian considerations respectively⁷⁰⁰. The way in which to balance these competing interests, and exactly how much weight to attach to either side, will depend on a number of factors, all which serve to illustrate the 'level of humanitarian sensitivity' of the global community at the point in time⁷⁰¹.

⁶⁹⁷ Cannizzaro E 'Conceptualizing proportionality: jus ad bellum and jus in bello in the Lebanese war' (2006) 88 *ICRC* 1-15 8 available at <https://www.icrc.org/eng/resources/documents/article/review/review-864-p779.htm> (accessed 28 September 2015).

⁶⁹⁸ *Ibid.*

⁶⁹⁹ Geiss & Siegrist 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?' 30.

⁷⁰⁰ Cannizzaro 'Conceptualizing proportionality' 11-13.

⁷⁰¹ *Ibid.*

(aa) How to determine whether there is in fact an ‘anticipated military advantage’

We see that in terms of both article 51(5)(b) of AP I and article 8(2)(b)(iv) of the ICC Statute⁷⁰², commanders are required to assess whether there is a ‘concrete and direct military advantage’⁷⁰³ to be gained from an attack. The ICRC Commentary on the 1977 Additional Protocols provides:

The expression “concrete and direct” was intended to show that *the advantage concerned should be substantial and relatively close*, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded⁷⁰⁴. (Own emphasis)

Where there is no ‘bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved’⁷⁰⁵ then the attack would be unlawful. Where such military advantage is expected a further assessment needs to be conducted by commanders: whether or not the anticipated military advantage justifies the expected consequential collateral damage the attack will cause. As mentioned, where the collateral damage is clearly excessive in relation to the military advantage anticipated, the attack would violate the principle of proportionality. As to what exactly the expression ‘concrete and direct overall military advantage’ (as it is phrased in the ICC Statute) pertains to, an explanatory footnote in the ICC Elements of Crimes 2000 directs:

⁷⁰² ICC Statute Article 8 (2) (b) (iv).

⁷⁰³ The ICC Statute has the word ‘overall’ included in the phrase but as shall be illustrated the inclusion has no legal effect.

⁷⁰⁴ *AP Commentary* s.2209.

⁷⁰⁵ Australia ‘Declarations made upon ratification of the 1977 Additional Protocol I’, 21 June 1991 s.4 and see also New Zealand ‘Declarations made upon ratification of the 1977 Additional Protocol I’, 8 February 1988 s.3 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

The expression “concrete and direct overall military advantage” refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack⁷⁰⁶.

Furthermore, the commander must have ‘an honest and reasonable expectation that the attack will make a relevant contribution to the success of the overall operation’⁷⁰⁷. This requires that values be attached to either side of the scale (military advantage and collateral damage) as a ‘reasonable military commander’ would in the circumstances⁷⁰⁸. It is observed that even though there might be some disagreement experienced between ‘reasonable military commanders’ in close cases, reasonable military commanders would tend to agree on those cases in which it can rightly be held that the collateral damage was clearly excessive⁷⁰⁹. The test is in effect aimed at prohibiting ‘[m]anifestly disproportionate collateral damage inflicted in order to achieve operational objectives, because this results in the action essentially being a form of indiscriminate warfare’⁷¹⁰. Considering the fact that there is no ‘set formula’ to ascertain the values to attach and weigh up against each other in the

⁷⁰⁶ ‘Finalised draft text of the Elements of Crimes adopted by the 23rd Meeting of the Preparatory Commission for the International Criminal Court’, UN Doc. PCNICC/2000INF/3/Add.2, Addendum, 6 July 2000, as adopted by the Assembly of States Parties, First Session, 3-10 September 2002, *Official Records of the Assembly of States Parties to the Rome Statute of the ICC*, UN Doc. ICC-ASP/1/3, 25 September 2002, and ICC-ASP/1/3/Corr.1, 31 October 2002 footnote 36 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁷⁰⁷ Canada. Office of the Judge Advocate General. *The Law of Armed Conflict at the Operational and Tactical Level* 13 August 2001 s.415.1 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015). See also Canada, Office of the Judge Advocate General, *The Law of Armed Conflict at the Operational and Tactical Level* (1999) 4-3 s.20-21 and 2-3 s.16; Belgium, *Droit Pénal et Disciplinaire Militaire et Droit de la Guerre, Deuxième Partie, Droit de la Guerre*, Ecole Royale Militaire, par. J, Maes, Chargé de cours, Avocat-général près la Cour Militaire, D/1983/1187/029, (1983), 29; Australia, Australian Defence Doctrine, Australian Defence Headquarters, Publication 06.4, *The Manual of the Law of Armed Conflict* (11 May 2006) s.5.10-5.11.

⁷⁰⁸ ‘Final Report to the Prosecutor by the Committee established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia’, ICTY, The Hague, 14 June 2000 s.50.

⁷⁰⁹ Ibid.

⁷¹⁰ Israel *The operation in Gaza 27 December 2008 – 16 January 2009: Factual and Legal Aspects* s.127.

assessment, whether or not an attack is lawful/ unlawful or proportionate/ disproportionate would always be ‘a question of degree’⁷¹¹.

(bb) The standard of a ‘reasonable military commander’

The values that are attached to either side of the proportionality scale is determined by a commander prior to an attack. Once the attack is launched and the effects are examined, the level of thought that went into the planning of the attack will be evident. In 2009, the Israeli Ministry of Foreign Affairs explained:

[T]he balancing [of military advantage and collateral damage] may not be second-guessed in hindsight, based on new information that has come to light; it is a forward-looking test based on expectations and information at the time the decision was made. This perspective is confirmed by the use of the word “anticipated” within the text of the rule itself, as well as in the explanations provided by numerous States in ratifying [the 1977] Additional Protocol I⁷¹².

However, exactly when a particular attack becomes disproportionate will always be a matter of contention⁷¹³. Accordingly, the proposed standard with which to measure whether an attack was indeed proportionate in IHL is that of the ‘reasonable military commander’.

It is still unclear whether or not IHL evaluates the decisions of a ‘reasonable military commander’ based on a subjective or objective standard⁷¹⁴. The backgrounds, levels of education, and moral values of commanders differ from

⁷¹¹ Israel, *Rules of Warfare on the Battlefield*, Military Advocate-General's Corps Command, IDF School of Military Law, 2nd ed (2006) 27 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

⁷¹² Israel *The operation in Gaza 27 December 2006 – 16 January 2009: Factual and Legal Aspects* s.123 and s.125-127.

⁷¹³ Geiss & Siegrist ‘Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?’ 32-33.

⁷¹⁴ *Ibid.*

one to the other. Moreover, very rarely would military commanders and human rights lawyers 'assign the same relative values to military advantage⁷¹⁵' and collateral damage in a given situation. These complexities relative to the value judgment to be made by a commander in the heat of battle give rise to certain legal grey areas where it cannot be established with certainty that an attack can be considered disproportionate and therefore unlawful⁷¹⁶. Accordingly, Geiss & Siegrist are of the view that:

IHL must provide for fluctuating circumstances and the myriad uncertainties that are prevalent in an armed conflict, and it must – in order to be realistic – leave a margin of discretion to soldiers operating on the ground. However, the actual margin of discretion and the standard relevant for the evaluation of individual decision-making are to be distinguished. An objectified decision-making standard – the standard of the 'reasonable military commander' – does not curtail a soldier's margin of discretion in the assessment of situational realities but simply forestalls arbitrariness in the exercise of this discretion⁷¹⁷.

Cannizzaro observes that the objective-subjective dilemma requires one to ask: 'Should [a military] operation be accomplished according to the best practice available, or rather according to the best practice available to the state or to the individual commander who directs the action?'⁷¹⁸. The former would inform an objective standard and the latter a subjective standard. Cannizzaro advocates for an objective standard as it is felt that the subjective capabilities of a state should not detract from its duty to protect innocent civilians⁷¹⁹. It would mean that the level of protection afforded to civilians are varied and dependent on the differing military capacities of states⁷²⁰. This view is supported by the Canadian *LOAC Manual* of 2001:

⁷¹⁵ Boothby W *The law of Targeting* (Oxford University Press: Oxford) (2012) 180.

⁷¹⁶ Ibid.

⁷¹⁷ Ibid 33-34.

⁷¹⁸ Cannizzaro 'Conceptualizing proportionality' 9-11.

⁷¹⁹ Ibid.

⁷²⁰ Ibid.

The test for determining whether the required standard of care has been met is an objective one: Did the commander, planner or staff officer do what a reasonable person would have done in the circumstances?⁷²¹

On the other hand, the ICTY has endorsed the view that ‘the choice of strategy to be followed *remains entirely at the discretion of the acting state*, and that the proportionality of the action must be assessed strictly in regard to individual military actions’⁷²².

(cc) Target by target vs Overall campaign

Whether or not to assess the proportionality of military action on a target-by-target basis or against the overall campaign is unclear. One view asserts that as the proportionality principle applies under the *jus in bello* it follows that ‘it cannot logically be measured by reference to the ultimate goals of a military mission’⁷²³. This is due to the fact that an assessment of proportionality entails a balancing of competing interests where none on their own can claim absolute priority⁷²⁴. As a result, the principle stands to be applied to each military action⁷²⁵. However, the bulk of international law seems to indicate the contrary. In 1991 the US Department of the Army stated⁷²⁶:

The concept of “incidental loss of life excessive in relation to the military advantage anticipated” generally is measured against an overall campaign. While it is difficult to weigh the possibility of collateral civilian casualties on a

⁷²¹ Canada *The Law of Armed Conflict at the Operational and Tactical Levels* 13 August 2001 s.418.3.

⁷²² Cannizzaro ‘Conceptualizing 9-11.’

⁷²³ Ibid 8.

⁷²⁴ Ibid.

⁷²⁵ Ibid.

⁷²⁶ United States, Letter from the Department of the Army to the Legal Adviser of the US Army Forces deployed in the Gulf region, 11 January 1991 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

target-by-target basis, minimization of collateral civilian casualties is a continuing responsibility at all levels of the targeting process⁷²⁷.

This seems logical as campaigns are embarked upon in order to achieve certain military gains or advantages. If individual attacks were analysed the ultimate military objective would be weighed against attacks that form small parts of the greater campaign. Accordingly, such approach would tend to justify civilian casualties in each instance. The Côte d'Ivoire *Teaching Manual* of 2007 provides:

The military advantage at the moment of attack is the advantage anticipated from the operation or from the military campaign of which the attack is a part, considered as a whole, and not only from isolated or particular parts of that campaign or that operation.

There is a concrete and direct military advantage if the commander reasonably and honestly anticipates that the attack contributes to the success of the operation as a whole⁷²⁸.

The Military Manuals of states also support this view. The Canadian *LOAC Manual* of 2001 mentions with regard to targeting:

⁷²⁷ Ibid.

⁷²⁸ Côte d'Ivoire, *Droit de la Guerre, Manuel d'instruction, Livre IV: Instruction du chef de section et du commandant de compagnie, Manuel de l'élève*, Ministère de la Défense, Forces Armées, Nationales, November 2007 27 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015). See also Germany, *Humanitarian Law in Armed Conflicts – Manual*, DSK VV207320057, edited by The Federal Ministry of Defences of the Federal Republic of Germany, VR II, 3 August 1992, English translation of ZDv 15/2, *Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch*, August 1992, s.444; United Kingdom, *The Manual on the Law of Armed Conflict*, Ministry of Defence, 1 July 2004, s.5.33.5; United States, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP. 5-2.1/COMDTPUB P5300.7, issued by the Department of the Navy Office of the Chief of Naval Operations and Headquarters, US Marine Corps and Department of Transportation, US Coast Guard, October 1995, (formerly NWP 9 (Rev.A)/FMFM 1-10, October 1989, s.6.1.2.1; United States, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7, issued by the Department of the Navy Office of the Chief of Naval Operations and Headquarters, US Marine Corps. and Department of Homeland Security, US Coast Guard, July 2007, s.8.2.

The military advantage at the time of the attack is that advantage anticipated from the military campaign or operation of which the attack is part, *considered as a whole, and not only from isolated or particular parts of that campaign or operation*⁷²⁹. (Own emphasis)

As regards the subtle differences in wording between article 51(5)(b) of AP and article 8(2)(b)(iv) of the ICC Statute, the ICRC directed:

The addition of the words “clearly” and “overall” in [the] provision relating to proportionality in attacks must be understood as not changing existing law. The word “overall” could give the impression that an extra unspecified element has been added to a formulation that was carefully negotiated during the 1974–1977 Diplomatic Conference that led to [Additional Protocol I] and this formulation is generally recognized as reflecting customary law. The intention of this additional word appears to be to indicate that a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself. As this meaning is included in the existing wording of the 1977 Additional Protocol I, the inclusion of the word “overall” is redundant⁷³⁰.

Accordingly, these two provision are to be interpreted as meaning the exact same thing, with article 51(5)(b) of AP I providing the correct reflection of the international consensus and article 8(2)(b)(iv) of the ICC Statute constituting an enforcement of the provision.

⁷²⁹ Canada, *The Law of Armed Conflict at the Operational and Tactical Level*, Office of the Judge Advocate General, 13 August 2001; s.415.1. See also Canada *The Law of Armed Conflict at the Operational and Tactical Level*, Office of the Judge Advocate General, 1999, 4-3 s.20-21 and 2-3 s.16; Belgium, *Droit Pénal et Disciplinaire Militaire et Droit de la Guerre, Deuxième Partie, Droit de la Guerre*, Ecole Royale Militaire, par. J, Maes, Chargé de cours, Avocat-général près la Cour Militaire, D/1983/1187/029, 1983, 29; Australia, *The Manual of the Law of Armed Conflict*, Australian Defence Doctrine, Publication 06.4, Australian Defence Headquarters, 11 May 2006, s.5.10-5.11. All the above available at https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule97 (accessed 16 October 2015).

⁷³⁰ ICRC, ‘Statement at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court’, 8 July 1998, *UN Doc. A/CONF.183/INF/10*, 13 July 1998 1, s.2 available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (accessed 17 September 2015).

(dd) What information is required in order to judge the proportionality of an attack?

In general, military commanders are required to assess the proportionality of an attack by having regard to the circumstances and information before them. The information before the commander required to decide whether or not to attack, would need to be 'related to the military necessity necessary to justify an attack, and ... the elements which are available to him, related to the possible loss of human life and damage to civilian objects'⁷³¹. The Canadian *LOAC Manual of 2001* provides the following with regard to targeting decisions:

Commanders, planners and staff officers are required to take all "feasible" steps to verify that potential targets are legitimate targets. However, such decisions will be based on the "circumstances ruling at the time". Consideration must be paid to the honest judgement of responsible commanders, based on the information reasonably available to them at the relevant time, taking fully into account the urgent and difficult circumstances under which such judgements are usually made⁷³².

It is therefore discernible that a great deal of discretion is afforded to military commanders and, accordingly, a lot of responsibility. The 2005 *Military Manual of the Netherlands* states:

The circumstances of the time are decisive to whether an object constitutes a military objective. The definition leaves the necessary discretion to the commanding officer. The Dutch Government, in ratifying AP I [1977 Additional

⁷³¹ Belgium, *Droit Pénal et Disciplinaire Militaire et Droit de la Guerre, Deuxième Partie, Droit de la Guerre*, Ecole Royale Militaire, par. J, Maes, Chargé de cours, Avocat-général près la Cour Militaire, D/1983/1187/029, 1983 29.

⁷³² Canada, *The Law of Armed Conflict at the Operational and Tactical Levels* 13 August 2001 s.418.2.

Protocol I], has declared in this connection that military commanders who are responsible for carrying out attacks must base their decisions on their evaluation of the information available to them at the time⁷³³.

Ultimately, the test of proportionality under IHL comes down to the following inquiry as set out in the *Galić case* of 2003:

In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack⁷³⁴.

A similar inquiry was used by the Israeli Ministry of Foreign Affairs in its 2008/2009 report on 'Operation Cast Lead':

[T]he core question, in assessing a commander's decision to attack, will be (a) whether he or she made the determination on the basis of the best information available, given the circumstances, and (b) whether a reasonable commander could have reached a similar conclusion⁷³⁵.

The information should ultimately aid the military commander in assessing, firstly, whether or not there are civilians that might be harmed the intended attack. If the information points to civilians being harmed by the attack, then the commander must obtain information that would allow him or her to attach the relative values on either side of the proportionality scale in order to determine whether the attack is justifiable or not. This balancing act would require the commander to assess in the circumstances whether or not the collateral damage is clearly excessive. If the information gathered from credible sources

⁷³³ Netherlands *Humaintair Oorlogsrecht: Handleiding* (2005) s.0511 and s.0543.

⁷³⁴ *Galić case* s.58.

⁷³⁵ Israel *The operation in Gaza 27 December 2008 – 18 January 2009: Factual and Legal Aspects* s.125.

reasonably points to the conclusion that the attack would be proportionate, and that in the event of greater and unexpected collateral damage it cannot be argued that the commander had any wilful desire to cause such harm, then the information would most likely ensure that the subsequent attack would be justified.

(ee) Influence of asymmetric warfare

The principle of proportionality can only be an effective measure to minimise harm to innocent civilians if it is applied to a situation where the states party to the armed conflict has honoured the principle of distinction. Thus, the tendency of states, especially weaker states in asymmetric warfare, to ‘evade the classical battlefield by shifting the hostilities from one location to another – often in proximity to civilians’ has a significant impact on a proportionality assessment⁷³⁶. The deliberate co-mingling of combatant and civilian objectives make it extremely difficult for commanders to discern what is targetable from that which is not targetable⁷³⁷. Moreover, IHL does not adhere to the principle of reciprocity and accordingly one party’s unlawful military operations does not relieve the other from having to fulfil its obligations.

Accordingly, the strategies resorted to by weaker states in asymmetric warfare, effectively ‘bringing hostilities into the proximity of urban and civilian surroundings’, means there exists a greater threat of harm being caused to innocent civilians⁷³⁸. It similarly places soldiers on the ground at a greater risk ‘as they cannot always discern the difference between those who are participating in hostilities and those who are not’⁷³⁹. Geiss & Siegrist comment

⁷³⁶ Geiss & Siegrist ‘Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?’ 12.

⁷³⁷ Ibid.

⁷³⁸ Ibid 19.

⁷³⁹ Ibid.

on the difficulties faced with regard to asymmetric warfare and the application of the proportionality principle:

Time and again international fora have expressed concern that civilians continue to bear the brunt of modern armed conflicts. Less attention, however, has been devoted to the various 'follow up' questions that blurred lines of distinction raise when it comes to the identification of legitimate military objectives, the application of the proportionality principle, and the precautionary measures prescribed by virtue of Article 57 of Additional Protocol I and customary law. Asymmetric conflicts, it seems, bring to the fore a number of long-standing questions and ambiguities pertaining to the humanitarian rules regarding the conduct of hostilities⁷⁴⁰.

Asymmetric warfare, thus, has the effect of accentuating the grey areas within the international legal framework, making it even harder to assess the proportionality of an attack. This is appreciable when considering how VHSs are especially used as a means through which to preserve the military objectives of the inferior state in an asymmetric war. The weaker state seeks out grey areas in the law behind which to hide. Accordingly, this would need to be factored into the equation when determining whether or not an attack is proportionate.

(ff) Risk minimisation for one's own forces

As mentioned above, in situations where the opposing force's combatants co-mingle with the civilian population it becomes particularly dangerous. Not only are the civilians in danger because of their proximity, but combatants on the ground will find it difficult to distinguish their enemies from the civilian population⁷⁴¹. Accordingly, it is observed that a state's desire to 'minimize risks for its own forces as much as possible', is 'a relevant factor when conducting a

⁷⁴⁰ Ibid.

⁷⁴¹ Ibid 34.

proportionality assessment⁷⁴². This factor has especially been used to justify the use of aerial power when ground forces were available and adequate⁷⁴³. It is considerably harder to ensure that aerial attacks are harming civilians, but it spares the lives of many combatants who would easily have been killed due to an inability to timeously detect enemies amidst the civilian population.

Military Manuals of states posit that the concept of ‘military necessity’ regards that which is required to “defeat the enemy with the ‘least expenditure of time, means or personnel’ or a ‘minimum expenditure of life and resources’”.⁷⁴⁴ This is deemed to be in keeping with the realities of modern IAC⁷⁴⁵. Although the safeguarding of one’s own forces is a legitimate consideration, it cannot categorically override the duty to protect innocent civilians⁷⁴⁶. In each instance there needs to be a balancing of the fundamental interests (military and humanitarian) that give rise to a decision to attack or refrain from attacking in the circumstances⁷⁴⁷. Geiss & Siegrist distinguishes between the general security of one’s forces and the security of one’s forces in light of a particular attack⁷⁴⁸. It seems that if the decision to protect one’s forces occurs after the initial engagement, as a result of the enemy’s retaliation, such protection would be considered a valid military advantage to weigh against the possible civilian casualties⁷⁴⁹.

If the decision to protect one’s forces occurred prior to engaging the enemy, as a strategic choice to commence an attack in a particular manner, this would also be considered a military advantage and affect the proportionality assessment⁷⁵⁰. The advantage in this case would not arise out of such attack *per se*, but instead the decision to attack in a very advantageous manner. It is

⁷⁴² Ibid.

⁷⁴³ Ibid.

⁷⁴⁴ Ibid.

⁷⁴⁵ Ibid.

⁷⁴⁶ Ibid 34-35.

⁷⁴⁷ Ibid.

⁷⁴⁸ Ibid.

⁷⁴⁹ Ibid.

⁷⁵⁰ Ibid.

appreciable that such approach would mean a much higher military advantage can be attributed to such an attack and in turn justify greater civilian casualties⁷⁵¹. However, such approach poses a problem as it could tend to tip the proportionality scale in favour of military considerations from the outset⁷⁵². The purpose and edicts of IHL must at all times be applied in conjunction so as to ensure the proper application of the principles to IAC. Although the military advantage in both instances of general and specific protection of one's forces may legitimately be considered during the proportionality assessment, it must always be conducive to the efforts to contain the harsh effects of war. Thus, at any point it becomes apparent in the planning phase of an attack that excessive civilian casualties would be caused, the commander is to either cancel the attack or consider alternative measures to achieve the military objective. The protection of one's own forces will in no way justify a patently disproportionate aerial attack "on the basis of arguing that it is 'safer' [for your own forces] and therefore of a higher military advantage than hypothetical alternative forms of attack".⁷⁵³

The purpose of IHL is to protect the civilian population, whilst the parties to the conflict engage in their efforts to cause the submission of the other. To argue that the protections of the civilian population should be trumped by the safety of the belligerents would seem an absurd proposition. It is instead submitted that in the event of considerable risk to one's own forces, a state is to rather withdraw its troops until such time it is both safe for the military and the civilian population. The alternative of having innocent civilians bearing the consequences would be a step in the wrong direction for IHL.

iv. Voluntary human shields and the current proportionality assessment

⁷⁵¹ Ibid.

⁷⁵² Ibid.

⁷⁵³ Ibid.

The application of the current proportionality principle will be explained by using the following example: State A is planning an attack on State B. State B is inferior to its adversary and wishes to preserve its primary weapons. Accordingly, State B publicly announces that it will soon be attacked and those who love their country are to take up a shielding position in front of these military objectives to ward off an attack. State A upon complying with the precautionary procedures are aware of the presence of fifty civilians in front of the intended target. As the civilians are not held at gunpoint or chained to the military objective they cannot assign any other status to the shields other than that of voluntary or consider their status as unclear. Either way, they are considered as civilians.

Bosch in the context of VHSs explains the dynamics of protected civilian status and the principle of proportionality:

Consequently, working from the premise that VHSs are to be categorised as civilians, and are not found to be participating directly in hostilities, then harm to a VHS could only be condoned where a concrete and direct military advantage would result from an attack, and the harm caused to the VHSs represent acceptable collateral damage. As civilians, albeit inconveniencing the opposition, the VHSs retain their immunity from direct attack and may not be entirely discounted in applying the proportionality principle⁷⁵⁴.

She then refers to examples of state practice that serve to indicate a practice of assigning such protected status to VHSs during international armed conflict. It was mentioned that those involved in the Serbian and Iraqi conflicts took VHSs into account when applying the proportionality assessment⁷⁵⁵. Similar practice has also reportedly been resorted to by the US in their targeting decisions⁷⁵⁶.

⁷⁵⁴ Bosch S 'Voluntary human shields in international armed conflict' (2013) *CILSA* 447 467.

⁷⁵⁵ *Ibid.*

⁷⁵⁶ *Ibid.*

De Belle provides insight as to what effect the deliberate mingling of civilians with military objectives has on an armed force's targeting decisions. She explains that the presence of VHSs in the vicinity of a legitimate military objective does not cause a legitimate military objective to cease being a military objective. It only means that an application of the LOIAC in the circumstances surrounding a planned attack directs that the effects thereof would not justify the advantage to be gained. A commander must assess:

whether or not he can attack such a military objective, ... [and] must reason as in the case of any other legitimate military objective an attack on which runs the risk of causing collateral damage to civilians who, in this case, are the human shields protecting the target. An attack will be possible if and only if the potential damage to civilians is not excessive in relation to the concrete and direct military advantage anticipated⁷⁵⁷.

Accordingly, VHSs are not as a rule neutralising a military objective⁷⁵⁸. It is only when there are too many who might be harmed, making it excessive in relation to the military advantage anticipated, that IHL prohibits an attack through the principle of proportionality in such instance. Therefore, it is not the destruction of the objective *per se* that is unlawful, but the incidental harm an attack thereupon would cause. It is still open to the armed force to launch an attack on the military objective through methods and means that would limit the harm to an amount that is justified in relation to the anticipated military advantage.

De Belle further asserts that, whilst it is perhaps appreciable that a voluntary shield and an involuntary shield might not have similar moral values attaching to their levels of protection, 'an approach based on the human shield's

⁷⁵⁷ Bouchie De Belle 'Chained to cannons or wearing targets on their T-shirts' 899-900.

⁷⁵⁸ *Ibid* 900.

willingness or otherwise would ... run the risk of dangerously eroding civilian protection⁷⁵⁹. This she asserts on the following premise:

[t]here would be a real risk of this approach being abused by the attacker who could be tempted to classify all civilians close to a military objective he is targeting as voluntary human shields if as a result he could make his proportionality appraisal on a more flexible basis⁷⁶⁰.

Any application of the proportionality principle which essentially pivots on the voluntariness of the shield's conduct might be an affront to both the principle of inalienable rights under article 8 of the Fourth Geneva Convention, and the norm that makes targeting civilians unlawful unless and for such time as they are taking a direct part in the hostilities⁷⁶¹. To treat differently certain individuals within the category of civilians would not only be complicating real-time targeting decisions on the ground, but suggest that the life of a particular civilian is of less importance. Considering the fact that the proportionality principle in itself is already a relaxation of the protections afforded to civilians, further erosion thereof would indicate a definite preference being given to military considerations. This would make the civilian protections almost non-existent and the principle of proportionality redundant. Currently, the proportionality rule 'creates an incentive for the use of human shields since a party can - in order to compensate for its military disadvantage, or, alternatively, to enhance its military capacity - effectively immunize a military objective from an attack by placing enough civilians at risk'⁷⁶².

If in the example provided State A launches an attack on the objective shielded by VHSs through an aerial bombardment this would cause excessive collateral damage. State A would also not be able to justify their unlawful acts by arguing State B had violated the LOIAC. The protections afforded to the civilian

⁷⁵⁹ Ibid 902.

⁷⁶⁰ Ibid.

⁷⁶¹ Ibid.

⁷⁶² Rubinstein & Roznai 'Human shields in modern armed conflicts' 120.

population do not cease to apply the moment a party decides to violate IHL. The obligation that most likely would be argued as not having been complied with is the duty on the shielded party to do that which is feasible to remove those civilians under their control from the vicinity of a military objective. Whether or not one might be able to successfully argue that these civilians are under the shielded state's control is debatable. Moreover, the VHSs in question are those who constitute a legal obstacle and not a physical impediment to an attack. They are civilians and are included in the proportionality assessment. Therefore, the CNN effect would also solicit a global outrage and change the international community's perceptions of the violating state.

The factors mentioned above are the very reason why law abiding states withhold an attack in such instances, notwithstanding the wilful exploitation of a lacuna under IHL. States would then re-assess, and either cancel the attack or alter their methods and means of attack so as to ensure compliance with the proportionality principle. Notably, such outcome gives the shielded party an unfair operational advantage. It would allow a weak state to launch an attack whilst hiding behind VHSs each time in order to deter a retaliation from a superior state. The tactic clearly does not conform to the spirit of IHL.

v. Proposals for an alternative application of the proportionality principle to voluntary human shields

The outcome reached through applying the current proportionality approach to the case of VHSs is undeniably problematic. This has sparked various experts to formulate an alternative approach to discourage the practice. The arguments against an inclusion of VHSs in the proportionality assessment are premised on the fact that the shields are essentially preserving a legitimate military objective through exploitation of the edicts of IHL⁷⁶³. Experts maintain that shielding is prohibited under article 51(7) of AP I, and because the seemingly⁷⁶⁴ unlawful

⁷⁶³ Parks W 'Air war and the Law of war' (1990) 32 *Air Force Law Review* 147 162.

⁷⁶⁴ It is maintained that the act of voluntary human shielding is not unlawful.

shields are trying to prevent a lawful attack, the armed forces and not the shields are to be given the support of the LOIAC⁷⁶⁵. It is felt that although an attacking party is not relieved of its duties under IHL purely because of the perceived unlawful acts of the enemy, they ought likewise not to be 'obligated to assume any additional responsibility as a result of the illegal acts of the defender'⁷⁶⁶. As it stands, the current approach incentivises the use of VHSs and this requires a re-think of the principle of proportionality in the context⁷⁶⁷.

Dinstein argues for a discounted value to be attached to VHSs on the basis that they deliberately place themselves in jeopardy⁷⁶⁸. He acknowledges the general protections afforded to civilians, but is of the view that where human shields (voluntary or involuntary) are used, greater casualties are to be expected and this needs to be taken into consideration:

[T]he principle of proportionality remains prevalent. However, even if that is the case [that great effort must be made to spare civilians], the actual test of excessive injury to civilians must be relaxed. That is to say, the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that – if an attempt is made to shield military objectives with civilians – civilian casualties will be higher⁷⁶⁹.

Dinstein basis such assertion on the fact that 'a belligerent State is not vested by the LOIAC with the power to block an otherwise legitimate attack against combatants (or military objectives) by deliberately placing civilians in harm's way'⁷⁷⁰. Major General A.P.V Rogers holds a similar view, and considers that tribunals who are tasked with adjudicating on proportionality are

⁷⁶⁵ Parks 'Air war and the Law of war' 162.

⁷⁶⁶ Ibid.

⁷⁶⁷ Ibid.

⁷⁶⁸ Bosch 'Voluntary human shields in international armed conflict' 467.

⁷⁶⁹ Dinstein *The conduct of hostilities under the law of International Armed Conflict* 131.

⁷⁷⁰ Ibid.

... entitled to take all the circumstances into account and attach such weight as it considers proper to such matters as the defender's ... deliberate use of civilians or civilian objects as a cover for military operations ... or use of hostages or involuntary 'human shields.' It is submitted that the proportionality approach by tribunals should help redress the balance which otherwise would be tilted in favour of the unscrupulous⁷⁷¹.

Once again, the view indicates support for the notion that an attacking force should be allowed a greater number of civilian casualties where human shields are involved (as opposed to instances they are not). This approach might be pragmatic in a military sense, but needs to be viewed against a concerning inference that ultimately it is the human shield (irrespective of his or her volition) who is punished in an attack, and not the defending state. Schmitt provides that

By compensating for the military advantage a party using human shields gains through its violation of the law, the approach recalibrates the military necessity-humanitarian considerations balance. Yet, *it is flawed in that it makes no commensurate correction in humanitarian considerations for factors such as the increased jeopardy in which the tactic places civilians, especially vulnerable protected persons*⁷⁷². (Emphasis added)

Schmitt concedes it would be 'illogical' to consider any discounted value attaching to those who are forced to act as human shields, but then proposes an approach that seeks to accommodate both full protection and a discounted value⁷⁷³. He posits:

A modified tack would count involuntary shields fully as civilians in the proportionality analysis. However, in the face of uncertain proportionality, an attacker would be entitled to launch the strike. Such an approach preserves the

⁷⁷¹ Rogers *A Law on the Battlefield* (2004) Juris Publishing 129.

⁷⁷² Schmitt 'Human Shields in International Humanitarian Law' 53.

⁷⁷³ *Ibid* 54.

rule of proportionality in its entirety, while rebalancing the disequilibrium in the military necessity-humanitarian considerations dichotomy. It constitutes a methodology for resolving uncertainty, not a devaluation of civilians or the protections to which they are entitled⁷⁷⁴.

The very dangerous approach Schmitt advocates, tends to force a post-attack appraisal of the proper application of the proportionality principle. Should it come to light that the shields in question were in fact IHSs it would be too late to apply protective measures. Instead, it seems the approach would constitute a justification exercise whereby commanders would be allowed to attack in uncertain situations and make up their argument in defence of their actions as they go.

Moreover, Bosch argues that if we are to accept that VHSs are 'entitled to a lesser degree of protection against attack' it would increase the burden on the shoulders of military commanders⁷⁷⁵. The commanders would have to establish whether or not the presence of a civilian was intended to shield a military objective and if so whether the civilian's actions were voluntary⁷⁷⁶. This added burden to the already unenviable task of commanders is seemingly an inaccurate reflection of IHL⁷⁷⁷.

GC IV article 8, which provides that protected persons 'may never renounce the rights secured to them'⁷⁷⁸ under the Convention, supports the view that VHSs are to be given the benefit of full civilian protections during a proportionality assessment. De Belle opines that 'although a distinction based on willingness could have some relevance in a criminal case, it has no place in the conduct of hostilities as it cannot be applied on the ground'⁷⁷⁹. Additionally, Melzer is of the

⁷⁷⁴ Ibid.

⁷⁷⁵ Bosch 'Voluntary human shields in international armed conflict' 468.

⁷⁷⁶ Ibid.

⁷⁷⁷ Ibid.

⁷⁷⁸ Article 8 of Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

⁷⁷⁹ Bouchie De Belle 'Chained to cannons or wearing targets on their T-shirts' 903.

view that the proportionality principle, as it stands, is flexible enough to account for the presence of VHSs⁷⁸⁰.

An appreciation must be had for the fact that civilians are the ones who are either compelled or lured into shielding⁷⁸¹. Thus, whilst the military objective in question constitutes a legitimate target, the same cannot be said of protected persons within the immediate vicinity of the said objective. This is true whether the civilian has been compelled to shield or voluntarily assumed such a position. The former on the basis of the express prohibition under the LOIAC, and the latter on the basis of the general principles of IHL that considers the volunteer as not directly participating in hostilities and therefore enjoys protected civilian status.

Applying the alternative approach to the example states above: if the 50 VHSs were discounted to value only as much as 10 civilians, then provided the military advantage is substantial, such attack would be lawful. The possible result of this is that we might see states calling on even greater numbers of shields in order to still ensure an attack is prohibited in terms of the proportionality principle. This would further complicate targeting decisions. Even more complicated would be to get states to uniformly agree on the numerical discount and method of calculation. However, notwithstanding a discounted value attached to VHSs, there might still be cases where the shields still constitute a legal impediment to an attack. If that is the case, it must be appreciated that the alternative approach still does little to effectively regulate the presence of VHSs and their ability to exploit their protections for wrongful ends.

Instead of finding new ways to justify the collateral damage that ensues after an attack on a legitimate military objective shielded by protected persons, the focus should rather be on why the practice, of getting the defender to hesitate in

⁷⁸⁰ Melzer N *Targeted killings in international law* (Oxford University Press: Oxford) (2008) 346.

⁷⁸¹ Ibid.

attacking such legitimate target by using human shields, in itself, seemingly does not attract much retribution. An approach needs to be formulated that does more than just prevent the killing of innocent civilians. There are many measures employed by IHL to achieve this which in the circumstances are not achieving its purpose. There needs to be an effective regulation of the presence of both unique sets of human shields. The advantage a shielded state obtains is problematic, and as Parks notes:

Any law of war rule that offers the potential for a military advantage for the defender over the attacker, or *vice-versa*, is a rule doomed to failure. It would not only increase the risk to the innocent civilian but in all likelihood would jeopardize the credibility of the law of war itself⁷⁸².

IHL as it stands prohibits the use of IHSs, that is, those who are taken hostage and those who are used as proximity shields. However, where VHSs are concerned, it is only those who constitute a physical impediment that are considered direct participants and therefore liable to attack. Those who constitute a legal impediment are not regulated under IHL. The precautionary measures require those under the control of the state to be removed from the vicinity and such element of control does not exist between states and VHSs. Thus, states who acquiesce to the presence of VHSs in front of their legitimate military objectives are not punished at all. The effect of the current approach is adequately summed up as follows:

Since the current application of the proportionality requirement shifts the responsibility from the shielding party to the impeding one, it increases - and perhaps legitimizes - the danger to civilians during hostilities, rather than reducing it⁷⁸³.

⁷⁸² Parks 'Air war and the Law of war' 154.

⁷⁸³ Rubinstein & Roznai 'Human shields in modern armed conflicts' 120.

Moreover, any approach which merely serves to discount the values attaching to these civilians will not, in itself, deter the defending state, but ultimately merely justify an attacking state who in the face of VHSs decides to attack anyway.

vi. Conclusion

The proportionality principle is both broad and flexible enough to include the VHSs, and is therefore not the crux of the problem: it is the lack of regulations pertaining to the presence of VHSs that are lacking. It renders the proportionality principle ineffectual at discouraging the use of VHSs. Any attempts at decreasing the values attaching to VHSs would ultimately only be endangering more civilians at the cost of military expediency. Instead, the focus should rather be on the development of an express regulation of VHSs and their presence during IAC.

(f) The current lack of express international humanitarian law regulation of voluntary human shields creates a disequilibrium in the humanity-necessity balance

i. Introduction

Considering the need for IHL to enforce realistic limitations on IAC to engender compliance, the protections granted to a VHS does not suit its operational purpose from a legal perspective. Although these default civilian protections are without a doubt the reason why this actor is so influential, the protections associated with their default civilian status cannot summarily be withdrawn from these actors or even reduced. An increased value placed on military necessity would not necessarily counter the current problems faced with regard to VHSs. Ultimately, any proposed alterations to various aspects of IHL (such as the

ambit of DPH test and the proportionality assessment) does little to rectify the current imbalance. Only a concerted effort to regulate the actual presence of VHSs would recalibrate the humanity-necessity balance. As it stands, the ability of the VHS to immunise an otherwise legitimate military objective, through an exploitation of their protected status, tilts the humanity-necessity scale too far in favour of humanitarian considerations.

ii. International humanitarian law and the humanity-necessity balance

The 1899 and 1907 Hague Regulations noted that '[t]he right of belligerents to adopt means of injuring the enemy is not unlimited'⁷⁸⁴. Thus, all the rules of IHL are in fact an expression of the international community's efforts to find the appropriate compromise between military necessity and humanitarian considerations. States have the power to enact, amend and reject international laws and, accordingly, the body of international law represents the standard of conduct states have agreed to uphold⁷⁸⁵. States are responsible for ensuring that the laws at all times remain infused with an equilibrium between matters of military necessity and humanitarian considerations⁷⁸⁶. Too much emphasis on military necessity has the consequence of bringing about the 'horrendous atrocities' encountered during WWII⁷⁸⁷. Whereas, if too much emphasis was placed on humanitarian considerations, it would unrealistically burden armed forces to the point where compliance becomes unlikely⁷⁸⁸.

The international laws subsequently incorporated into the domestic legislation and military manuals of states indicate the balancing of the two main objectives of states namely; furthering the interests of the state and the protection of its

⁷⁸⁴ Schmitt 'Military necessity and humanity in International Humanitarian Law' 798.

⁷⁸⁵ Ibid 798-799.

⁷⁸⁶ Reeves & Thurner 'Are we reaching a tipping point?' 2.

⁷⁸⁷ Ibid.

⁷⁸⁸ Ibid.

citizens. The former relates *inter alia* to a state's sovereign right to freely pursue national interests without being unduly restricted on the battlefield⁷⁸⁹. The latter caters to the well-being of the citizens through the provision of 'public goods'⁷⁹⁰. A state's position on matters related to the two abovementioned objectives are evidenced in the policy decisions states make, and there is a balance sought between the interests of the state and the interest of individuals⁷⁹¹.

This intra-state balance is equally sought inter-state on an international level, maintained through international law which seeks to balance the sovereign interests of individual states with the common interests of the international community. The interests of individual states in IAC are pursued by its armed forces and informed by matters of military necessity. Whereas, the interests of the international community are reflected in the norms of IHL, specifically drafted to place limits on the means and methods of war in order to further humanitarian considerations.

The humanity-necessity balance is reflected in IHL through various ways. Firstly, the St Petersburg Declaration explicitly recognises that 'the necessities of war ought to yield to the requirements of humanity'⁷⁹². There exists a specific aim of ensuring that there are adequate limits placed on the conduct of hostilities to ensure that the effects of war are contained between the warring parties as much as possible. Secondly, the 1907 Hague Convention IV reflects the balance subtly through its preamble which states that the document was 'inspired by the desire to diminish the evils of war, as far as military requirements permit'⁷⁹³. Similarly, the 'Martens Clause' within Hague Convention IV, reflects

⁷⁸⁹ Schmitt 'Military necessity and humanity in International Humanitarian Law' 799.

⁷⁹⁰ Ibid.

⁷⁹¹ Ibid.

⁷⁹² Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868. Available at <https://www.icrc.org/applic/ihl/ihl.nsf/52d68d14de6160e0c12563da005fdb1b/dbe0afb2065e0d7ec125641e0031f38c?OpenDocument> (Accessed 19 August 2015).

⁷⁹³ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

a general desire to find an appropriate balance between the two competing interests. The 'Martens Clause' effectively sought to deny any arguments maintaining that 'all which is not forbidden in international law is permitted'⁷⁹⁴. In essence, the clause illustrates that even where new situations might arise in IAC for which there is no clear guidance, it still does not relieve combatants of their duties to ensure that at all times the interests of humanity are also considered. Finally, each and every law contained in the LOIAC has been drafted on the basis of the humanity-necessity balance. The general goal of reducing the harsh effects of war is therefore infused within each and every IHL norm. Dinstein provides:

The laws of war are all based on a subtle balance between two opposing considerations: military necessity, on the one hand, and humanitarian sentiments on the other ... Each one of the laws of war discloses a balance between military necessity and humanitarian sentiments, as produced by the framers of international conventions or as crystallized in the practice of States. The equilibrium may be imperfect, but is legally binding in every form that it is constructed. It is not the privilege of each belligerent, let alone every member of its armed forces, to weigh the opposing considerations of military necessity and humanitarianism so as to balance the scales anew. *A fortiori*, it is not permissible to ignore legal norms on the ground that they are overridden by one of the two sets of considerations⁷⁹⁵.

Dinstein further elaborates:

In actuality, [the LOIAC] in its entirety takes a middle road, allowing belligerent States much leeway (in keeping with the demands of military necessity) and yet circumscribing their freedom of action (in the name of humanitarianism) ... Every single norm of LOIAC is moulded by a parallelogram of forces: it confronts a built-in tension between the relentless demands of military

⁷⁹⁴ Schmitt 'Military necessity and humanity in International Humanitarian Law' 800.

⁷⁹⁵ Dinstein Y 'Military necessity' in Dolzer R (et.al. eds) *Encyclopaedia of Public International Law* (1982) 274 274.

necessity and humanitarian considerations, working out a compromise formula. The outlines of the compromise vary from one LOIAC norm to another. Still, in general terms, it can be stated categorically that no part of LOIAC loses sight of humanitarian considerations. All segments of this body of law are stimulated by a realistic (as distinct from purely idealistic) approach to armed conflict⁷⁹⁶.

Accordingly, we find that where there is express regulations provided in the LOIAC, this ought to be strictly adhered to. This is because the drafters would have considered the humanity-necessity balance and formulated the regulation to give effect thereto. These provisions are an expression of the standards states have committed to and a deviation therefrom would be met with the appropriate legal ramifications. In the event that IHL is silent on a new emergence in IAC the Martins Clause stipulates that combatants are still required to consider the interests of humanity.

The modern advances in technology, amongst other factors, has the tendency to strain the norms of IHL. The laws governing IAC are context driven and mainly address the issues currently faced and those which are relatively foreseeable. Accordingly, IHL will necessarily need to evolve from the previous context to the next, and be informed by the perceptions of the international community at the time. It has been noted that the evolution of IHL has shifted the humanity-necessity balance generally in favour of humanitarian considerations⁷⁹⁷.

To illustrate this evolutionary process one needs only to juxtapose the pre-WWII and the post-WWII codification of the humanity-necessity balance. Pre-WWII treaties governing the conduct of hostilities focused primarily on states and their agents⁷⁹⁸. The treaties proliferated at the time concerned: privateering, neutrality, blockades, the protection of the armed forces, the opening of

⁷⁹⁶ Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* 16-17.

⁷⁹⁷ Schmitt 'Military necessity and humanity in International Humanitarian Law' 805.

⁷⁹⁸ Ibid 806.

hostilities, merchant shipping, and limitations on the use of certain weapons⁷⁹⁹. Whilst some provisions in the 1899 and 1907 Hague Regulations envisaged some form of protection for the civilian population, it was minimal⁸⁰⁰. The protections in question only concerned belligerent occupation⁸⁰¹.

However, post-WWII saw a considerable drive for greater limits on the means and methods of war, and the need for general civilian protections. The change in focus was necessitated by the extensive devastation that occurred as a result of WWII⁸⁰². In 1945, an International Military Tribunal was established to preside over matters regarding war crimes and crimes against humanity⁸⁰³. Shortly thereafter in 1948, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN. In 1949, the four Geneva Conventions were introduced, and whilst the first three conventions related to combatants, the fourth was exclusively adopted to provide protections to the civilian population⁸⁰⁴. This marked the first ever treaty to be adopted that dealt solely with civilian protections. Moreover, certain instruments were created to afford specific protections to particular individuals and objects. Examples are the 1954 Hague Cultural Property Convention and its two protocols (1954 and 1999); the 1976 Convention on the Prohibition of Military or any other Hostile use of Environmental Modification Techniques; and Optional Protocols to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict, and on the Sale of Children, Child Prostitution and Child Pornography of 2000⁸⁰⁵. The humanitarian measures adopted by states to avoid a repeat of the tremendous devastation caused by WWII related to issues regarding property with significant cultural value worthy of protection, prohibition of a state's recourse to modifying the environment for military means, and extensive

⁷⁹⁹ Ibid. Schmitt refers to the 1856 Paris Declaration on Maritime Law, the 1864 Geneva Convention on the Wounded and Sick, the 1868 St Petersburg Declaration, and the 1899 and 1907 Hague Conventions.

⁸⁰⁰ Ibid 806-807.

⁸⁰¹ Ibid.

⁸⁰² Ibid 807.

⁸⁰³ Ibid 807-808

⁸⁰⁴ Ibid 808.

⁸⁰⁵ Ibid.

protections afforded to children. The evolution from minimal, to general, to specific protections for the civilian population is clearly appreciable.

Notwithstanding the great proliferation of protections for civilians and civilian property, limits were also imposed on a state's choice of weaponry. Previously, these laws were constructed to protect combatants, but with the advent of greater civilian protections being afforded in general, drafters were now required to assess the effects of certain weapons on the civilian population⁸⁰⁶. Examples of the documents which were adopted to ensure that a state's choice of weapons were also conducive to the general protections afforded to civilians and civilian property are: CCW Protocol II of 1980 along with amended Protocol II of 1996, CCW Protocol III of 1980, the 1997 Ottawa Convention, CCW Protocol V of 2003, and the Convention on Cluster Munitions⁸⁰⁷. The protections which emanated from the abovementioned treaties relate *inter alia* to limitations on the use of incendiary weapons against or near civilians and forested locations, prohibitions against the use of booby traps and antipersonnel mines, and creating a system to deal with the explosive remnants of an armed conflict⁸⁰⁸. This illustrates how the furtherance of humanitarian considerations have ultimately led to the restrictions imposed on the armed forces of states. The concept of military necessity was consequently less permissive.

Even more illustrative of the development of IHL is the adoption of the 1977 Protocols Additional to the Geneva Conventions of 1949. It was felt, in the years leading up to the adoption of these Additional Protocols, that the laws of war were not adequate to regulate the emerging forms of warfare that included guerrilla warfare, and an increased prevalence of non-IAC⁸⁰⁹. These changes in the methods of warfare had the effect of endangering the civilian population⁸¹⁰. As a result, the two Additional Protocols were adopted with the

⁸⁰⁶ Ibid 809.

⁸⁰⁷ Ibid.

⁸⁰⁸ Ibid.

⁸⁰⁹ Ibid.

⁸¹⁰ Ibid.

first dealing with those matters under IAC, and the second focusing on issues relative to non-IAC⁸¹¹. AP I is considered ‘the first comprehensive endeavour to carefully assess where the balance between military necessity and humanity lay’⁸¹². This is due to its provisions engendering ‘a new sensitivity to the humanity component of IHL’⁸¹³. AP II is the first treaty to regulate only non-IAC⁸¹⁴. Prior to AP II, Common Article 3 of the 1949 Geneva Conventions applied to non-IAC, and only afforded the ‘most basic of protections to persons taking no active part in the hostilities’⁸¹⁵. Signifying perhaps most clearly the extensive development of IHL, AP II effectively ‘established a protective regime for the civilian population’ in a context where:

[T]he “enemy” is by definition acting unlawfully under domestic law irrespective of any treaty. Additional Protocol II therefore added little to the practical prescriptive regime. Moreover, the reciprocity inherent in treaties governing international armed conflict is non-existent in the context of intrastate conflict because the domestic “rebels” are not party to relevant international instruments. Consequently, Additional Protocol II was, for states party thereto, a self-imposed limit on military necessity in the name of humanity. Their adoption of Additional Protocol II absent the reciprocity motivation further illustrates the extent to which the necessity-humanity dynamic had been revolutionized in the years following the Second World War⁸¹⁶.

The LOIAC is accordingly developed as a need emerges. A way in which the need is evidenced is through an evaluation of whether the current laws are effectively maintaining the humanity-necessity balance, else change is necessary to forestall general disregard for the law. Apart from the societal context and advancement in technology, other factors play a role in influencing the development of IHL. The judgments delivered by international courts and tribunals, and the proliferation of non-government organisations such as

⁸¹¹ Ibid.

⁸¹² Ibid 810.

⁸¹³ Ibid.

⁸¹⁴ Ibid.

⁸¹⁵ Ibid.

⁸¹⁶ Ibid 811.

Amnesty International exert considerable influence on the current interpretations of the LOIAC⁸¹⁷. Accordingly, there has been a transference of power, at least to a small degree, between states and international institutions. States do still have the final say, in that they retain the ability to either opt in or out of the international treaties⁸¹⁸. Therefore, whilst the international institutions do not always direct their efforts to finding the perfect equilibrium between military necessity and humanitarian considerations, states are free to refuse to adopt any laws that do not adequately account for both the competing interests⁸¹⁹.

History is testimony to the devastating effects that arise when either military necessity or humanitarian considerations gain primacy⁸²⁰. Reeves and Thurner posits:

If the Law of Armed Conflict becomes less about fixing the technical limits at which necessities ought to yield to the requirements of humanity and more just about restricting military operations, conflict participants will increasingly view the law as an unrealistic body of theoretical norms. If it is dismissed as impractical, the Law of Armed Conflict will greatly diminish in importance, and consequently, becomes a less effective regulatory regime⁸²¹.

It is clear that disequilibrium between the competing interests might cause warfare to 'devolve into the brutality and savagery that has historically defined it'⁸²².

iii. Voluntary human shields and the humanity-necessity balance

⁸¹⁷ Ibid 816-837.

⁸¹⁸ Ibid 816.

⁸¹⁹ Ibid.

⁸²⁰ Reeves & Thurner 'Are we reaching a tipping point?' 2.

⁸²¹ Ibid 12.

⁸²² Ibid.

Rubinstein and Roznia posits that the humanity-necessity balance is constantly brought into the spotlight when considering the proportionality of an attack. As the previous section indicated that VHSs complicate an application of the proportionality principle, it therefore follows that VHSs would negatively impact on the humanity-necessity balance. Rubinstein explains:

There is no absolute prohibition against civilian casualties because IHL tolerates some civilian casualties during a military action. The desired equilibrium between considerations of humanity and military necessity is expressed by the principle of proportionality which prohibits any “attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”⁸²³.

VHSs and their ability to affect the outcome of conflict by forcing greater humanitarian consideration raises the question as to whether or not this practice ought to be considered appropriate. The VHSs effectively straddle the boundaries of IHL in order to use legal protections to prevent an otherwise legal act (targeting and destroying a military objective). This ability brings about a situation where states are unable to pursue their legitimate goal of weakening the adversary. Moreover, the strategy not only provides a defensive benefit, but also an offensive benefit. This is because the shielding party is still able to launch attacks at the adversary, thus placing itself in an operationally superior position. The benefits the shielded party obtains comes at the cost of endangering the lives of many innocent civilians.

The increased prevalence of civilians during armed conflict in the context of VHSs, means that an attacking force needs to be more cautious of the proportionality of an attack. The greater the number of civilians in the vicinity,

⁸²³ Rubinstein & Roznai ‘Human shields in modern armed conflicts’ 100.

the more likely it is that an attack would be disproportionate. Military necessity and humanitarian considerations would need to be balanced and considering the great numbers of VHSs that have been witnessed during shielding campaigns, more often than not humanitarian considerations would dictate that an attack would be disproportionate. The manner in which this proportionality assessment had been influenced, in the context of voluntary human shielding, is a cause for concern. The shielded force had manipulated the circumstances in order to acquire such an advantageous position. It is an abuse of the protections afforded to civilians for military means, and should not be allowed under IHL.

(aa) How the current regulation of voluntary human shields causes disequilibrium in the humanity-necessity balance

Legal contradiction

The way in which IHL currently deals with the prevalence of VHSs leads to a legal contradiction. The law seeks to remove civilians and protect them against the harsh effects of war. However, it is the law, itself, that provides the VHS with its extensive protections which asymmetrically inferior states seek to exploit. As pointed out earlier, there exists no prohibition against voluntary human shielding.

VHSs are civilians who do not directly participate in hostilities. Moreover, their presence before a legitimate military objective is not prohibited under IHL. Thus, we find that states are especially cautious when planning attacks where VHSs are deployed. The media coverage of IAC constitutes an effective deterrence for any attacks that might possibly cause a disproportionate amount of civilian casualties. Whilst states are obliged to remove the civilians under their control from the vicinity of an attack, this is not an absolute. The advantages of having

the VHSs shielding their objectives from attack is apparent to armed forces, and accordingly, a *bona fide* attempt to remove their presence before a military objective is not always forthcoming. Additionally, one can argue that the voluntary nature of the shield's conduct negates any sense of control over their presence.

Therefore, the law is at a want for an effective regulation of VHSs. More specifically, the *presence* of VHSs should be expressly regulated. The moment a VHS is allowed to take up a shielding position in front of a legitimate military objective it complicates an application of the LOIAC. As it stands, the law protects the unscrupulous⁸²⁴. It allows armed forces the liberty to acquiesce to the presence of civilians shielding their legitimate military objectives. This is a stark contradiction in stated goals and the effected outcomes of IHL, evinced through IHL's current approach of allowing underhanded shielding tactics in asymmetric warfare. A mere appreciation for the civilians' protected status is not enough. In order to avoid errors during the planning of an attack and possible civilian deaths, IHL needs to address the core of the problem: a lacuna that enables civilians to voluntarily maintain a shielding position before a legitimate military objective. A greater onus should be placed on the shielded state to remove these civilians in order to prevent collateral damage. This will ensure that the equilibrium between humanity and necessity is maintained and that the operation of IHL reflects its goal of reducing the harsh effects of IAC.

Voluntary human shielding provides the shielded party with an operational advantage (defensive and offensive)

Not only does the current IHL regulation of VHSs increasingly place civilians in jeopardy, contradicting its stated goals, but it also unfairly presents the shielded party with offensive and defensive advantages. Defensively, the presence of VHSs protects otherwise legitimate military objectives, prolonging the shielded

⁸²⁴ Rogers *Law on the Battlefield* 129.

state's ability to use such military objective and maintain a fighting chance. It must be appreciated that a state's deliberate preservation of its military objectives through an exploitation of the protections afforded to those who ought to be removed from the scene of conflict, should not be allowed. Moreover, the shielded state has the ability to then launch attacks at the enemy from behind a wall of civilians. Thus, creating a situation where the enemy cannot retaliate in its defence without causing extensive harm to the civilian population. Both the defensive and offensive operational advantage emanating from the ineffectually regulated presence of VHSs turns the humanity-necessity balance on its head⁸²⁵. Schmitt explains:

The use of human shields ... skews the law's fragile military necessity-humanitarian considerations balance by leveraging its protections for military ends⁸²⁶.

We find that instead of the protections afforded to civilians being used to ensure a reduction of the loss of innocent lives and damage to civilian property, it is being used to further military agendas. Moreover, the current formulations of the IHL classification process, the DPH test, and the proportionality assessment, is already as lenient as reasonably possible. Any alterations to these fundamental aspects of IHL, in the context of VHSs, would not only be ineffective at alleviating the problems encountered regarding VHSs, but will severely decrease the protections afforded to the civilian population in general. Schmitt elaborates on this point with a specific focus on the proposals for a discounted value being attached to VHSs during the proportionality assessment:

By compensating [discounting values attached to VHSs as proposed by Dinstein] for the military advantage a party using human shields gains through its violation of the law, the approach recalibrates the military necessity-

⁸²⁵ Schmitt 'Human Shields in International humanitarian Law' 57.

⁸²⁶ Ibid 25.

humanitarian considerations balance. Yet, it is flawed in that it makes no commensurate correction in humanitarian considerations for factors such as the increased jeopardy in which the tactic places civilians, especially vulnerable protected persons⁸²⁷.

This serves to further substantiate the view that the *presence* of VHSs needs to be regulated under IHL in order to be effective. Any alteration to the application of the DPH test or proportionality assessment would not properly address both military necessity and humanitarian considerations. It will only have the effect of bringing into question the relevance of a legal system that contradicts its reason for being by eroding the protections afforded to innocent civilians.

iv. Conclusion

An increase in the amount of civilians present before a legitimate military objective requires greater precautions on the part of an attacking force. It has the potential to negate considerations of military necessity at the hands of those who seek to use humanitarian protections to further military goals. The practice of voluntary human shielding heightens tensions between states, and is primarily used in asymmetric warfare by an inferior state wishing to gain some sort of operational advantage. However, as illustrated, an erosion of the protections afforded to civilians would not alleviate the current problems faced regarding VHSs. It leads to a situation that does not align with the spirit and purport of IHL, and necessitates a sincere look at means through which the presence of VHSs can be regulated under IHL to restore an equilibrium between considerations of military necessity and humanity. Only this will provide a sense of legitimacy to the IHL regulation of VHSs.

⁸²⁷ Ibid 53.

CHAPTER IV

A PROPOSAL FOR SUITABLE FUTURE REGULATION OF VOLUNTARY HUMAN SHIELDS

(a) The need for reform

Voluntary human shielding is not prohibited under IHL, and the manner in which IHL aims to regulate this non-state actor's presence in the theatre of armed conflict is wholly inadequate. The actor is not expressly dealt with which leaves a lot depending on interpretations of the basic principles of IHL. Only an express regulation of VHSs will be suitable considering the actor's propensity to operate in the grey areas of IHL. Regulative means can be effective in ensuring firstly, that VHSs are not permitted to shield military objectives, and secondly, if they fail to comply with these regulations they, and the state benefitting from their shielding activities, are held criminally liable.

i. What the previous chapters have revealed regarding the position of the voluntary human shield under international humanitarian law

In modern IAC the greatest challenge faced by armed forces emanate from the increasingly 'blurred lines of distinction' that accompany asymmetric warfare⁸²⁸. Combatants are required to make life-or-death decisions under immense time constraints and with 24hour media scrutiny. In instances where the status of a person is uncertain, this person is protected by IHL through a presumption operating in favour of civilian status. Thus, where lines are blurred individuals with uncertain status are given the benefit of the doubt, and the attacker is at

⁸²⁸ Geiss & Siegrist 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?' 45-46.

risk of either harming innocent civilians or hesitating and being killed by a combatant who is disguised as a civilian. VHSs do not pose a physical threat to an adversary in and of themselves. However, their presence can be used to preserve military objectives as well as launch attacks that the adversary is unable to retaliate against without violating the norms of IHL. It serves as a significant operational advantage for the shielded party, and is prone to abuse as a result. The practice of voluntary human shielding is an established one in IAC, and because it is not expressly prohibited, it places greater numbers of civilians in jeopardy. For this reason alone the presence of VHS in the theatre of armed conflict is cause enough for serious reform. As Geiss and Siegrist reflected on the current state of the LOIAC in the context of the conflict in Afghanistan:

[C]ontroversy has increasingly arisen over the interpretation of existing rules. As conflict structures become more and more diffuse, legal certainty and clarity of humanitarian law prescriptions become ever more important. It is no coincidence that a number of so-called expert clarification processes with regard to the notion of direct participation in hostilities or air and missile warfare have been organized in recent years. All of these processes have touched upon important conduct of hostilities issues. At the same time, a number of long-standing questions and ambiguities, inherent for example in the proportionality principle or the definition of military objectives, remain unresolved and insufficiently discussed⁸²⁹.

Bargu posits that VHSs ‘stand as active embodiments of long-standing humanitarian attempts that have sought to regulate and contain the brutality of warfare’⁸³⁰. This view is supported by Dunlap who states that “the presence of human shields necessitates the practice of ‘virtuous’ warfare even in the most asymmetrical of conflicts, and particularly when the adversary provokes

⁸²⁹ Ibid.

⁸³⁰ Bargu B ‘Human shields’ (2013) *Contemporary Political Theory* (2013) 1-19 6-7.

'inhumane' behaviour⁸³¹. Irrespective of the generally praiseworthy reaction of attacking forces in the face of VHSs, the reality is that:

Even though human shields call upon the realization of principles of international humanitarian law in the regulation of armed conflict, they also enter into a peculiar relationship with the law, one that legitimates their actions, on the one hand, and becomes an object of critique, on the other⁸³².

There is a growing discourse on the need for IHL to keep pace with the rapidly changing character of IAC. The existing laws are being stretched to the uttermost and perpetuates uncertainty experienced during targeting decisions. It has, however, been observed that 'the more international humanitarian law has developed, the more civilian deaths have been recorded'⁸³³. An observation that seems to suggest that 'international law is ineffective and underenforced'⁸³⁴. Moreover, it sheds light on an increasing 'militarization of concepts internal to humanitarian law'⁸³⁵. Civilians are more now than ever before at serious risk as technological advances and modern combat tactics highlight the weaknesses in IHL. In the context of voluntary human shielding, modern combat tactics bring conflict in closer proximity to the civilian population which leads to complicated targeting operations. Combatants are required to seek out legitimate targets in and amongst innocent civilians. Even when the combatant has a legitimate military objective within striking distance, the presence of civilians surrounding the target causes the combatant to refrain from attacking - the risk of excessive collateral damage causing both a moral and legal obstacle. In ordinary circumstances where the civilians are inhabitants of a village who have not been able to remove themselves from the vicinity, the combatant merely suspends the attack to a later time when it would not cause excessive harm to the civilians. However, the tactic of voluntary human

⁸³¹ Ibid. Citing Dunlap CJ 'A virtuous warrior in a savage world' (1997-1998) *United States Air Force Academy Journal of Legal Studies* 8.

⁸³² Ibid 7.

⁸³³ Ibid 10.

⁸³⁴ Ibid.

⁸³⁵ Ibid.

shielding does not allow for such a suspending of an attack. The shields are called upon to patriotically guard against attacks on otherwise legitimate military objectives. It must be noted that VHSs are not to be encouraged to shield legitimate military objectives.

Bargu seems to glorify voluntary human shielding as ‘cultivators of the very enthusiasm of the global public’⁸³⁶, the ‘symbolic bulwarks of against violence’⁸³⁷, the ‘moral agents taking the protection of others on themselves’⁸³⁸. This however fails to appreciate the potential of VHSs to take up the guise of humanitarian activists in order to further the military objectives of the state they shield. Bargu insists that ‘[v]oluntary human shields stand as the embodied reminders of the barbarism of contemporary warfare waged in the name of humanity’⁸³⁹. It must, however, be appreciated that the very notion of ‘warfare’ stands in contrast to the humanitarian ideals of ‘peace’. Accordingly, there cannot be absolute consideration paid to the concept of humanity in the context of warfare as warfare implies a temporary breach of that peace. Thus, we find that IHL attempts to reduce the harsh effects of warfare, as much as reasonably possible, through balancing the interests of military necessity and humanitarian considerations. Wars waged with a just cause, or in the name of humanity, cannot allow non-combatants to affect its outcome. War is waged between those authorised to engage in hostilities, on the proviso that they, in turn, are lawfully targetable by the opposing forces. VHSs are not authorised to participate in hostilities and, accordingly, their presence before a legitimate military objective stands in direct contrast to the attempts made by IHL to remove innocent civilians from the theatre of conflict. The practice of voluntary human shielding is not outlawed under current IHL, but it should be, to the extent that a civilian may not voluntarily maintain a shielding position before a legitimate military objective. The practice contradicts the spirit and purport of IHL and, consequently, complicates an application of the general legal framework meant to protect the innocent. Bargu’s praise of VHSs does not take

⁸³⁶ Ibid 5.

⁸³⁷ Ibid 13.

⁸³⁸ Ibid 14.

⁸³⁹ Ibid.

into consideration how the conduct of VHSs endangers the lives of the general civilian population. Were it not for the international community's general acceptance and adherence to the LOIAC that guides them to consider VHSs as being protected under IHL we might have had large scale civilian deaths. Thus, whilst the attacking armed forces are respecting IHL, the same cannot be said of VHSs and the shielded states who acquiesce to their presence before its military objectives. Ultimately, the inverse of Bargu's contention is true: VHSs use their humanitarian protections to further military goals. This is appreciable from the conduct of VHSs maintaining shielding positions before military objectives, as opposed to civilian objectives. The preservation of the former has no value to the general civilian population and serves a single goal: furthering the military interest of the shielded state.

As VHSs retain the ability to choose whether or not to shield, it does not fall under the article 51(7) of AP I's prohibition against involuntary human shielding. Furthermore, IHSs and VHSs ought not to be regulated through a single provision. The two actors are too different in nature and effect to permit such singular means of regulation. VHSs blur the lines of distinction to an extent that runs deeper than involuntary human shielding: it does not only forestall attacks, but raises the question as to whether or not there is a legal nexus between their actions and the objectives of the shielded state. The legal nexus would be required in order to punish the shielded state for resorting to shielding tactics that run counter to the spirit and purport of IHL. Ultimately, the only basis upon which the shielded party could be held liable for the VHSs' presence before a legitimate military objective is through a failure 'to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives' in terms of article 58 of AP I⁸⁴⁰. Here again, the issue pertains to whether or not the state being shielded has 'control' over the VHSs. Moreover, the obligation is not absolute. Accordingly, a violation of Article 58 of AP I is not met with the same severity as a violation of the Article 51(7) of AP I prohibition against involuntary human shielding. The effect of this

⁸⁴⁰ AP I article 58(a).

is that there exists very little disincentives for the use of VHSs under the current IHL regulatory framework.

ii. The aspects of voluntary human shielding that will need to be addressed in order to formulate an effective regulation of their presence in international armed conflict

(aa) There is no provision made under international humanitarian law to specifically deal with the voluntary human shield's presence

The fact that there is no express regulation of VHSs under IHL begs the question as to whether or not the actor was indeed foreseen by the drafters. Currently, VHSs are afforded a default civilian status with extensive protections, irrespective of their reasons for shielding an otherwise legitimate military objective. A VHS may have differing motives attached to the practice of shielding, and as such their regulation should appreciate the complexities that accompany their presence. The DPH test and the proportionality assessment both fail to recalibrate the humanity-necessity imbalance caused by VHSs in IAC. Therefore, only an express regulation that seeks to counter the practice from the outset, removing the ability of a civilian to voluntarily assume a shielding position before a military objective, will be effective in ensuring that the practice is discontinued. Of course, the regulation would need to be realistic and not overly burden combatants in their targeting decisions. This is possible, as will be indicated by the proposal made for a suitable future regulation of VHSs.

(bb) Underhanded tactics

The fact that VHSs are not expressly regulated or effectively discouraged in IHL means that states, especially those who constitute the inferior party in asymmetric warfare, will resort to voluntary human shielding either as a tactic from the outset or as a last resort to further their own military objectives. This ability to call upon civilians to effectively act as a human defensive system through exploitation of the law, casts a shadow on the morality of the conflict at hand. It endangers civilians in a manner that brings the letter and spirit of IHL into disrepute. The tactic ought to be prohibited in a concerted manner so as to ensure that the stated objective of IHL - to reduce the calamities of warfare – is progressively achieved. Should the practice of voluntary human shielding continue as a result of a continued reluctance to formulate an appropriate regulation of VHSs, we might find that states grow impatient and reluctant to uphold their end of the ‘legal bargain’ whilst the adversary seemingly enjoys an operational advantage provided through the tenets of IHL. As Geiss and Siegrist provides:

Direct attacks may easily be evaded by assuming civilian guise. Feigning protected status, mingling with the civilian population, and launching attacks from objects that enjoy special protection are all most deplorable but seemingly inevitable consequences of this logic. Protection of military objectives that cannot so readily be concealed may be sought by the use of human shields, thereby manipulating the enemy’s proportionality assessment, in addition to violating the precautionary principle laid out in Article 58 of Additional Protocol I and part of customary IHL applicable in both international and non-international armed conflict⁸⁴¹.

The practice of human shielding can to a degree be likened to that of those who feign a civilian status. The objective of such practice is, of course, to deter attacks in order to gain an operational advantage. It is submitted that article 58 of AP I is not an adequate disincentive. The provision is not imperative enough to constitute an effective discouragement. Considering the advantage that the

⁸⁴¹ Geiss & Siegrist ‘Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?’ 19-20.

use of VHSs can supply to an armed force, it is likely that the combatants would run the risk of violating article 58 of AP I, nonetheless.

(cc) The effect of the voluntariness of the VHS's conduct

In general criminal law, the voluntary nature of a person's conduct is enough to have such person be held blameworthy for the consequences of their actions⁸⁴². However, IHL, in an attempt to regulate the presence of human shields from an objective perspective, places the onus on the belligerent parties to the armed conflict. This is why we find that the article 51(7) of AP I prohibition does not distinguish between IHSs and VHSs. Yet, is not possible to regulate the two types of shields with a single provision. Whilst some may argue that both IHSs and VHSs are prohibited under IHL, such purported regulation is not proving effected in reality. The moral values attaching to a state's conduct when a state forcefully uses involuntary human shields is vastly different to a situation where it acquiesces to or calls upon the presence of VHSs. In the latter scenario, we might even find that VHSs choose to remain in the vicinity of a military objective, despite attempts by the shielded state to remove these civilians in terms of article 58 of AP I. As we have seen, eroding the protections afforded to civilians will have serious consequences during the proportionality assessment. It is submitted that the voluntary nature of the shield's conduct must attract some degree of liability for the shield itself. To place the burden solely on the shielded party would run counter to the realities of IAC and general legal principles.

(dd) The need for protection through international humanitarian law

Despite the use of VHSs being an underhanded strategy, the VHSs themselves should be protected through IHL. The passiveness of the VHS's conduct ought

⁸⁴² Ibid 27.

not to attract hostile attempts at removing their presence. As was seen through the case studies conducted, VHSs often constitute both women and children. Moreover, the VHS is classified as a civilian and article 8 of GC IV provides that '[p]rotected persons may in no circumstances renounce in part or in entirety the rights secured to them'⁸⁴³. It is only when the civilian directly participates in the hostilities that he or she loses their protected status for the duration of such direct participation. Accordingly, the VHS is and ought to be protected through IHL from the harsh effects of war. Any regulation of their presence would need to ensure that the actor is removed from the theatre of conflict not through an erosion of their protections, but an appropriate legal sanction.

(ee) Questions of reciprocity

The fact that one party to the conflict stands to gain from the presence of VHSs and another stands to lose, further instils the need for an appropriate regulation of the actor's presence in IAC. If such legal intervention is not forthcoming we might find that the attacking force resorts to violating the precepts of IHL. As Geiss and Siegrist notes:

If one belligerent constantly violates humanitarian law and if such behaviour yields a tangible military advantage, the other side may eventually also be inclined to disregard these rules in order to enlarge its room for manoeuvre and thereby supposedly the effectiveness of its counter-strategies⁸⁴⁴.

This will bring into question the legitimacy of the LOIAC. The laws as they stand are not adequately balancing issues of military necessity and humanitarian considerations. IHL currently adheres to a 'unanimously accepted non-application of the *tu quoque* principle' otherwise known as the 'principle of

⁸⁴³ GC IV article 8.

⁸⁴⁴ Geiss & Siegrist, 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?' 19-20.

reciprocity'⁸⁴⁵. The non-application of the principle of reciprocity is mentioned in article 51(8) of AP I which states that:

Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take precautionary measures provided for in Article 57⁸⁴⁶.

Accordingly, the protection of the civilian population is not premised on a mutual adherence to IHL. Even if one party violates the LOIAC the other is still required to observe IHL. Whilst the non-application of the principle of reciprocity might *prima facie* seem like an unrealistic obligation on states, considering the nature of IAC, it has however been noted that:

Experience, especially in Afghanistan, has shown that strict adherence to fundamental humanitarian precepts is conducive to the achievement of long-term strategic objectives. Conversely, repeated violations of humanitarian law, even if they seem to promise short-term military gains, in the long run may undermine the credibility and reputation of a party to the conflict, with potentially detrimental consequences for its ability to pursue diplomatic, humanitarian, developmental, and other strategies that may be vital for achieving long-term strategic goals. Even the short-term military advantages that may be hoped to be gained by violating humanitarian rules are often negligible. Superfluous injury and unnecessary suffering are just that: superfluous and unnecessary. They hardly further the (military) objectives pursued⁸⁴⁷.

Thus, the non-application of the principle of reciprocity serves as both a protective measure against unnecessary harm being inflicted to civilians and a realistic reminder to states that their objectives are best pursued through

⁸⁴⁵ Bouchie de Belle 'Chained to cannons or wearing targets on their T-shirts' 899.

⁸⁴⁶ Ibid.

⁸⁴⁷ Geiss & Siegrist, 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?' 20.

adherence to IHL, which aims to balance considerations of military necessity and humanity. It has been noted that:

[M]ultinational forces thus frequently act within a framework that puts stricter limitations on them and that seems necessary in a context where casualties and destructions, even when within the limits of IHL, could endanger the primary strategic goals. It therefore seems safe to conclude that, in Afghanistan, frequent disregard of humanitarian rules has not led to a forthright race to the bottom in terms of compliance with humanitarian rules. The predominant realization is rather that compliance with IHL continues to serve vital (state) interests even in the absence of traditional conceptions of reciprocity⁸⁴⁸.

Ideally, a regulation of VHSs would rectify the current situation where one party (the shielded party) obtains a benefit from the presence of the non-state actors, whilst the other party (the attacking party) is disadvantaged. It will prevent any possible resort to unlawful means of warfare and maintain the necessary equilibrium in the humanity-necessity balance. This will further have the effect of creating greater certainty during targeting decisions and improve the security of the civilian population. Moreover, the ability of inferior states in asymmetric warfare to endanger civilians in order to further their military objectives would be removed, and in so doing allow the conflict to be dealt with speedily – reducing the window of possibility for civilians to be harmed during IAC.

(ff) Questions regarding the principle of distinction

As mentioned, the primary sting behind the presence of VHSs is the blurring of the lines between what is targetable and what is not targetable. The uncertainty causes hesitation by placing an attacking force in a morally challenging

⁸⁴⁸ Ibid.

situation, which is then exploited by the shielded party. This has led to desperate attempts at redressing the unfair operational advantage shielded states enjoy:

[I]n response to an increasingly difficult distinction between fighters and protected persons in practice, proponents of this view [of holding VHSs to be direct participants] suggest a widening of the legal category of persons who may be legitimately attacked. Generally speaking, this line of argument is often based on the premise that the modern battlefield has become ever more dangerous for the soldiers operating therein and that therefore their margin of discretion regarding the use of lethal force should be enlarged. Contemporary debate surrounding the interpretation of the notion of ‘direct participation in hostilities’ – an activity that temporarily deprives civilians of their protection from direct attack – particularly the endorsement of rather generous interpretations of this notion and its temporal scope, are reflective of this tendency. For example, the assumption that so-called voluntary ‘human shields’ are *per se* directly participating in hostilities, thereby losing their protection from direct attack⁸⁴⁹.

Accordingly, if a regulation of the prevalence of VHSs is to be successful, it would need to ensure that the regulation is applicable in reality. This would require a carefully thought out course of action that will account for the need of combatants to make decisions on the basis of objectively verifiable considerations. VHSs cannot be considered direct participants, and as such the burden on combatants cannot be reduced to the point where they are free to shoot and kill without distinction. Regulation of the presence of VHSs and IHSs need to be different even though they both essentially enjoy the same protected status under IHL. Measures need to be implemented to make the VHSs distinguishable from other actors (including IHSs) in the theatre of conflict.

The requisite ‘free will’ that needs to be present in order for a person to be considered a voluntary human shield

⁸⁴⁹ Ibid 21.

Melzer in his defence of the *Interpretive Guidance* referred to key factors that would need to be addressed by any proposed regulation of VHSs. The factors pertained to the setting of perimeters that would aid combatants to ascertain when exactly a person can be rightfully considered a VHS. Melzer notes:

The vast majority of situations involving human shields, however, are likely to fall into a grey-zone full of intricate questions no military commander or soldier should be expected to resolve: How much “free will” is required for an act of human shielding to become “voluntary,” how much coercion or social pressure to make it “involuntary”? For example, can civilians be regarded as voluntary human shields if they refuse to leave their home although a rocket launch-pad has been positioned on their roof? Do all inhabitants of a village, including women and children, necessarily act voluntarily when they gather around the house of an insurgent commander to prevent an impending aerial attack? What about civilians providing soldiers with food and overnight shelter in an area prone to insurgent attacks?⁸⁵⁰

It is submitted that whilst these are valid concerns, they are not beyond the realm of proper regulation assisting combatants in operations on the ground level. As to how much free will is required the answer is simple; if it is clear that the shields in question are not chained to military objectives, held at gunpoint or otherwise compelled to maintain a shielding position, then such shield would be a VHS. Moreover, VHSs usually indicate the voluntary nature of their shielding activities by voicing their displeasure at the current conflict and stating their patriotic allegiance to the shielded state. This is distinguishable from the subdued and dire expressions on the faces of those who are forced to shield.

How much ‘free will’ is necessary to consider an act of human shielding as ‘voluntary’ and how much coercion is necessary to make it ‘involuntary’

⁸⁵⁰ Melzer ‘Keeping the balance’ 871.

The act of voluntary human shielding is voluntary on the basis of the civilian having the freedom to choose whether to shield, where to shield and for how long. A crucial illustration of the voluntary nature of their actions is the ability to abrogate – remove themselves from the vicinity the moment they wish to do so – indicating a lack of coercion on the part of the shielded party. Objectively, this voluntariness can be ascertained through information gathered as to the morale of the shields and whether or not there are combatants from the shielded state exerting control over these shields in a manner that restricts their freedom of movement. If the ICRC were to host a conference and call upon delegates from states across the globe a set of criterion could very well be formulated to assist combatants in their decision-making when faced with VHSs. It is strongly felt that the presence of VHSs ought not to be encountered in the vicinity of legitimate military objectives. There are objectively verifiable considerations that could be used to formulate a check-list guide to inform combatants' action on ground level.

Are those who refuse to leave a besieged village or a residential building with a military weapon attached to it considered voluntary human shields?

In the context of IAC, where inhabitants of a village or a building with a rocket-launcher on its roof refuse to remove themselves from the vicinity, they are not to be considered VHSs. The reason being VHSs seek out conflict zones for military objectives to shield. Schmitt shares a similar view:

That “voluntary shielding” only occurs, as a matter of law, consequent to the shield’s intent to frustrate enemy operations cannot be overemphasized. Consider a military force based in a village. The mere presence of villagers does not render them voluntary shields. This is so even if they elect to remain in the village despite an opportunity to depart. Those who remain may be too elderly or infirm to leave. They may be too frightened to leave, for fleeing from the village may be dangerous.

They may wish to remain to safeguard their property and possessions. Whatever the rationale for their presence, it is only when they refuse to depart because they wish to complicate the enemy's actions that they qualify as voluntary shields⁸⁵¹.

The civilians mentioned find themselves in the midst of the war by no conduct of their own. These civilians are at best to be considered IHSs. The house with the rocket-launcher on its roof is a dual-use site. Accordingly, the presence of civilians would need to be factored into the proportionality assessment in order to ascertain whether an attack would be permissible. Civilians within the building cannot be considered VHSs, because although they choose to remain in the building the prevailing circumstances are prevalent by no fault of their own. One might even go so far as to view both the above examples as being analogous to that of proximity shields where the close proximity is due to no desire or voluntary act of the civilian. Instead, the state that strategically engineered the circumstances where the civilian and military are co-located, ought to be tried for either violating a duty to remove civilians under their control from the vicinity of a military objective⁸⁵², or violating the IHL prohibition against locating military objectives within the civilian population⁸⁵³.

Can civilians be held to act voluntarily when they take up a shielding position before the residence of a commander in order to deter attacks?

The manner in which Melzer poses the question seems to imply a questionability surrounding the voluntariness of the civilian's conduct where a commander's residence is shielded. An instance of shielding not unlike the thousands of Libyans who shielded the presidential compound of Gaddafi in 2011. Perhaps the doubt surrounding the volition of the shields in question similarly emanates from a call made for civilians to shield certain objectives by a state, and the subsequent heeding of the call by civilians. It is submitted that

⁸⁵¹ Schmitt 'Human shields in international humanitarian law' 39.

⁸⁵² AP I article 58 (a).

⁸⁵³ AP I article 58 (b).

the mere fact that the military guides the shields to sites that are most advantageous to preserve, does not detract from the freedom of the shield to exercise their own volition in the circumstance. It is distinguishable from involuntary human shielding where the shield has no choice at all. Moreover, it should be appreciated that the most controversial of shielding activities would necessarily pertain to attempts at shielding military objectives. These military objectives are of value to the shielded party and, especially in asymmetric warfare, the most effective means through which to ensure its preservation is by using VHSs. Even more effective would be shielding activities performed by women and children. If these women and children were forced to take up shielding positions it would cause an international uproar. However, if the women and children perform their functions voluntarily it is less frowned upon by the international community. Perhaps the shielded state, not being as severely punished as one would expect for shielding activities being performed by women and children, serves as a further indication of the current lacuna in the LOIAC. The ability of civilians, women and children included, to maintain a presence before a military objective is made possible by a failure of IHL to expressly address the practice of voluntary human shielding. As it has been noted by the ICRC: It is 'unlikely that [the human shielding] norm was originally devised to cover an event where individuals acted knowingly and on their own initiative'⁸⁵⁴ Returning to Melzer's question, the answer is affirmative: the nature of the object being shielded does not influence the voluntariness of the civilian's conduct. It might, however, guide the VHSs to where their volition can be exercised most effectively.

Can civilians be considered voluntary human shields if they provide soldiers with food and overnight shelter in an area prone to attacks?

⁸⁵⁴ ICRC/International Institute of Humanitarian Law, 30th San Remo Round Table on Current Issues of International Humanitarian Law, The Conduct of Hostilities, Background Document, Aug. 2007; 9. As mentioned in Scmitt M 'Human shields in international humanitarian law' (2008-2009) 39.

In the circumstances Melzer describes with his question there is no human shielding taking place. It is merely a matter of combatants coming into close contact with civilians. Here the civilian is at risk of being incidentally harmed during an attack on the combatants. The situation is analogous to general co-location of civilians and combatants where the enemy forces need to satisfy the precautionary measures stipulated in article 57 of AP I before launching an attack. If the conduct of the civilians do not indicate an intention to shield the combatants or other military objectives then it cannot be inferred that they are indeed VHSs. The civilian must intend to maintain a position in the vicinity of a military objective with an aim of deterring attacks. Accordingly, where the civilian merely provides food and a place to rest to combatants they are not VHSs *per se*.

(gg) The difference in punishments exacted against violations of article 57 and article 58 of AP I

As it stands, states do not need to capture civilians and force them to shield a military objective from attack. This would constitute a war crime as it violates article 51(7) of AP I. Instead, combatants are able to call upon civilians to take up shielding positions as a way of deterring attacks from 'the bad enemy state'. The practice of voluntary human shielding is not prohibited under article 51(7) of AP I. At worst the shielded state can be considered to have violated the article 58 of AP I obligation to remove civilians under its control from the vicinity of a military objective. However, this would be tricky to prove considering the voluntary nature of VHSs militating against 'control' being exerted over them by the shielded party. Moreover, the article 58 of AP I provision is not absolute and concerns that which is feasible in the circumstances. Thus, it does not constitute an effective deterrent against the use of VHSs. Any proposed regulation against the use of VHSs to deter attacks against legitimate military objectives will need to authoritatively and unequivocally make such practice unlawful and exact serious punishment upon those who violate the norm.

(hh) Dual use sites

Modern armed conflict has brought war to within the midst of the civilian population. An effect of this has been the blurring of the lines distinguishing targetable objectives from those that are not targetable. Especially in asymmetric warfare, states are increasingly utilizing civilians and civilian objects 'to make an effective contribution to military action'⁸⁵⁵. Article 52 of AP I headed 'General protection of civilian objects' stipulate the following with regard to civilian objects⁸⁵⁶:

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used⁸⁵⁷.

IHL defines civilian objects in the negative and thus we find that those objects which serve a military purpose and whose destruction would constitute a military advantage to the enemy are military objects. It should always however be kept in mind that generally all objects are potentially useful to the military and thus combatants are required to assess carefully whether in the circumstances an object is indeed a legitimate military objective. As Geiss and Siegrist point out:

⁸⁵⁵ Geiss & Siegrist 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?' 26.

⁸⁵⁶ AP I article 52.

⁸⁵⁷ Ibid paragraphs 1-3.

Generally speaking, it is not disputed that power grids, industrial and communication facilities, computer and cell-phone networks, transportation systems, and other infrastructure including airports and railways – all of which primarily fulfil civilian functions – can become lawful military targets if they meet the criteria laid out in Article 52 paragraph 2 of Additional Protocol I, also reflecting customary IHL applicable in non-international armed conflicts. In fact, each and every civilian object could theoretically become a military objective, provided that it cumulatively fulfils the respective criteria⁸⁵⁸.

To further complicate matters we might even find that a single object is used simultaneously for both civilian and military purposes. The object in question is then classified as a 'dual-use' object⁸⁵⁹. In such instance the object is classified as a 'dual-use' object which requires combatants to assess 'under what circumstances (and for how long) an attacker may conclude that they are legitimate military objectives'⁸⁶⁰. The ICRC Commentary is said to qualify an object on the basis of its 'intended future use' as opposed to its intrinsic purpose⁸⁶¹. Meaning the purpose to which it is put as opposed to only that for which it is naturally used. However, there is a difficulty experienced in determining exactly when 'it becomes sufficiently clear or sufficiently reasonable to assume that an object's purpose is to contribute effectively to military action'⁸⁶². Combatants are required to make their assessments on a case-by-case basis and based upon the information before them in the circumstances. The ICRC at its 28th International conference provided the following guidelines to combatants making targeting decisions:

It should be stressed that "dual-use" is not a legal term. In the ICRC's view, the nature of any object must be assessed under the definition of military objectives

⁸⁵⁸ Geiss and Siegrist 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?' (2011) 27.

⁸⁵⁹ Ibid.

⁸⁶⁰ Ibid.

⁸⁶¹ Ibid 27-28.

⁸⁶² Ibid.

provided for in Additional Protocol I. Thus, it may be held that even a secondary military use may turn such an object into a military objective. However, an attack on such an object may nevertheless be unlawful if the effects on the civilian use of the object in question violate the principle of proportionality, i.e. if it may be expected to cause excessive incidental civilian damages or casualties, or if the methods or means of the attack are not chosen with a view to avoiding or at least minimizing incidental civilian casualties or damage⁸⁶³.

Thus, although an object is considered as having a secondary military function ('dual-use') object an attack on such object will need to be proportional. Combatants will have to ascertain whether the military advantage anticipated from the destruction of such object will outweigh the incidental harm caused to civilians and civilian objects within the vicinity. If VHSs were to shield such objectives the likelihood of the attack being disproportionate will be much higher. An outright military objective and a dual use object is capable of lawful destruction provided the precautionary measures stipulated in article 57 of AP I is observed. VHSs shielding such (military or dual-use) objectives do not alter the status of the VHSs under IHL – the VHS remains a problematic presence that needs to be properly regulated. Whereas, in the event a VHS shields a civilian objective there is no legal contradiction or imbalance between considerations of humanity and military necessity. The presence of a VHS before a civilian object merely bolsters the already protected status of the civilian object. The civilian object could be a national monument, a water tower or another object significant only to the civilian population in general.

iii. Proposals offered by experts that have been proven to be inadequate at regulating the presence of voluntary human shields

⁸⁶³ 28th International Conference of the Red Cross and Red Crescent Geneva December 2003, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', Report prepared by the International Committee of the Red Cross Geneva, September 2003 11 available at https://www.icrc.org/eng/assets/files/other/ihlcontemp_armedconflicts_final_ang.pdf (accessed 12 November 2015).

This paper was drafted with the specific purpose of evaluating the proposals submitted by various experts from around the world and to ascertain which suggestion has the most merit. Two broad schools of thought can be extrapolated from the various expert opinions: those who take a humanitarian stance and those who hold a pragmatic military view. As the entire body of IHL consists of norms drafted with the particular goal of striking a realistic balance between humanitarian considerations and issues of military necessity it is not surprising that the two predominant schools originate from the two foremost considerations in IHL.

(aa) The pragmatic military approach

The experts who advocate for a pragmatic military approach to the regulation of VHSs maintain that their conduct constitutes direct participation in hostilities. Experts on this side of the argument include the likes of Dinstein, Schmitt, Rubinstein, Roznia, Ezzo and Guiora⁸⁶⁴. The argument is that the purpose of voluntary human shielding is to ‘enhance the survivability of military assets⁸⁶⁵’ of a particular state, which in turn amounts to serving the ‘military interests of one of the parties to the disadvantage of the other’⁸⁶⁶. Others argue that the VHSs should not lose their protections on the basis of the voluntary nature of their conduct, but rather on the basis of their decision to shield military objectives⁸⁶⁷. This approach can once again be based on the perception that a VHS ‘aids and abets⁸⁶⁸’ a particular state, giving rise to a loss of immunity against an attack. Some experts on the side of military pragmatism argue that if VHSs are not considered direct participants then at least they should be discounted during the proportionality assessment or given an alternative status

⁸⁶⁴ Bargu B ‘Human shields’ (2013) *Contemporary Political Theory* (2013) 1-19 8.

⁸⁶⁵ Ezzo & Guiora ‘A critical decision in the battlefield’ 10.

⁸⁶⁶ Bargu ‘Human shields’ 8.

⁸⁶⁷ Ibid.

⁸⁶⁸ Ezzo & Guiora ‘A critical decision in the battlefield’ 10.

under IHL 'so that they benefit neither from civilian immunity nor from combatant privileges'⁸⁶⁹.

As has been illustrated during the course of this paper VHSs cannot be considered direct participants in hostilities. Moreover, any arguments for a discounted value being placed on VHSs during the proportionality assessment is similarly unacceptable. The reasons being that both these attempts at regulating the prevalence of VHSs would be ineffectual and serve only to further legitimise the harming of civilians. The international community recognises the protected status of VHSs as is seen from their reluctance to attack a military objective shielded by VHSs. The proportionality principle already constitutes a legitimising of civilian casualties and as such no discounting of values placed on civilian lives should be tolerated. Article 8 of GC IV regarding the inalienability of the rights afforded through IHL strikes such an approach at its core.

(bb) The humanitarian approach

Those who advocate for a humanitarian approach argue that VHSs are to retain their status as civilians under IHL with its full scope of protections. Experts on this side of the table include Al-Duaij, De Belle, Lyall, Fusco and Van Engeland⁸⁷⁰. It is maintained that the presence of VHSs do not constitute a military threat or cause any form of direct harm to a party in IAC⁸⁷¹. Some experts maintain a moderate humanitarian approach and posit that VHSs should lose *de facto* protection on account of their close proximity to a military objective⁸⁷². This would of course necessarily relate to an adjustment during the

⁸⁶⁹ Bargu 'Human shields' 8.

⁸⁷⁰ Ibid.

⁸⁷¹ Ibid. Citing 'International Humanitarian Law Issues in a potential war in Iraq' *Human Rights Watch* (Human Rights Watch Briefing Paper 20 February 2003) and Bouchie De Belle 'Chained to canons or wearing targets on their T-shirts'.

⁸⁷² Ibid. Citing Haas J 'Voluntary human shields: status and protection under international humanitarian law' in Arnold R & Hildbrand P (eds.) *International Humanitarian Law and the 21st Century's Conflicts: Changes and Challenges* (Lausanne Switzerland: Editions Interuniversitaires Suisses) 210.

proportionality assessment and find resonance with Schmitt and Dinstein of the pragmatic military school⁸⁷³.

The experts on the side of the humanitarian school of thought are appreciative of the VHSs protected status under the current IHL provisions. Such protected status is not only a correct application of the prevailing LOIAC, but also a necessary. VHSs do not pose any threat to a state. They do, however, complicate matters of distinction and therefore targeting decisions. If VHSs were not afforded a protective status they would not have been able to impact hostilities like they do. If VHSs were indeed targetable, those who are forced to shield as IHSs in the same vicinity are likely to get harmed when attacking forces strike against those they consider to be VHSs. It creates a possibility for errors in judgement where possibly someone who was thought to be a VHS was indeed an IHS. Haque notes that:

In general, we should presume that individuals retain their basic rights absent decisive reason to believe that they have made themselves morally liable to decisive force. IT follows that it is epistemically impermissible to target civilians, or to discount collateral harm to civilians, absent decisive reason to believe that they are neither involuntary shields nor passersby. Since decisive evidence of voluntary presence and intent to shield is hard to come by in armed conflict, it is seldom epistemically permissible to target or discount collateral harm to voluntary shields⁸⁷⁴.

Moreover, it is viewed that if involuntary human shielding does not make the shield liable for any harm that may be caused to him or her, because he or she is not morally blameworthy for their presence before a legitimate military objective, it then follows that in order to attach liability to the VHS there must be

⁸⁷³ Ibid.

⁸⁷⁴ Haque A 'Human Shields' in Frowe H & Lazar S (eds.) *The Oxford Handbook of the Ethics of War* (2015) 13.

some grounds upon which to hold the VHS morally blameworthy for their intentional shielding acts. With regard to this Haque opines:

Presumably, almost all civilians willing to serve as voluntary human shields subjectively believe that the defending force they aid fights for a just cause. Often, their belief is reasonable, that is, epistemically justified by the evidence available to them. Civilians who serve as voluntary human shields in support of what they reasonably believe is a just cause are not morally blameworthy even if they intend to shield and are not coerced. Indeed, it is remarkable that defenceless civilians would make themselves vulnerable to death and dismemberment for the sake of what they believe to be a just cause. Certainly, such civilians are not so morally blameworthy that by shielding military targets they forfeit their basic rights⁸⁷⁵.

Thus, any approach which seeks to remove the protections afforded to a civilian in the case of voluntary human shielding has the effect of further endangering the lives of the civilian population. It is argued that considering IHL does not expressly deal with the prevalence of VHSs, the moral aim of IHL (to reduce the calamities of war) should guide the conduct of hostilities⁸⁷⁶. Haque explains:

[T]he moral aim of the law of armed conflict should be to help soldiers conform to their moral obligations. Yet treating all voluntary shields ... as direct participants in hostilities [or discounting them during the proportionality assessment] will not help combatants conform to their moral obligations. On the contrary, such a position will lead combatants fighting for a just cause to kill voluntary shields unnecessarily or disproportionately and will lead to combatants fighting for an unjust cause to kill more innocent civilians than they would otherwise⁸⁷⁷.

Therefore, under the current IHL a default classification of a VHS as a civilian (when compared to the suggestions offered by those on the side of military

⁸⁷⁵ Ibid 19.

⁸⁷⁶ Ibid 23.

⁸⁷⁷ Ibid.

pragmatism) is the approach which most closely relates to the ultimate aim of reducing harm caused to civilians and civilian objects. It accordingly is the view that best guides combatants in their moral obligation to ensure that the civilian population is protected at all times. However, the humanitarian approach is not without flaws. An express regulation of voluntary human shielding is required to alleviate the undesired situation where a civilian can voluntarily assume a position before a legitimate military objective in order to manipulate the course of hostilities. Whereas IHL seeks to remove civilians from the theatre of conflict, the current approach (the humanitarian approach) makes it appealing to states to instead either move conflict closer to the civilian population or call upon the civilian population to shield certain military objectives. The present IHL regulation of VHSs permits such a tactic. Voluntary human shielding is not prohibited as involuntary human shielding is in terms of article 51(7) of AP I. Furthermore, the way in which article 58 of AP I is phrased raises questions as to whether one could argue that VHSs fall under the control of the shielded state. Even if does, article 58 of AP I does not demand their removal from the vicinity of a military objective, it merely requires that the shielded state do all that is feasible in the circumstances. Thereby not constituting an effective disincentive to the practice of voluntary human shielding.

iv. The proposal that will effectively regulate the presence of voluntary human shields

As the current regulation of VHSs has the effect of frustrating an attacking state, whilst simultaneously affording the shielded state with an unfair defensive and offensive operational advantage, there exists a need for reform. The various proposals offered by experts from around the world emanating from either the pragmatic military or humanitarian school of thought, do however leave much to be desired. It is submitted that the proposals offered by the experts are inadequate as they all tend to regulate the effects of the VHS's presence as opposed to their actual presence. This is perhaps premised on the view that article 51(7) of AP I covers both voluntary and involuntary human shielding,

which has been shown to be untrue. Any effective regulation of a VHS would necessarily have to be aimed at prohibiting the presence of a VHS before a legitimate military objective in such a way that it does not overly burden combatants in their decision-making during military operations.

The proposed regulation pertains to the drafting of a treaty and the establishment of a non-government organisation (hereafter NGO) mandated with the registration, deployment, educating and general organisation of VHSs in IAC, much like that envisaged by Al-Duaij⁸⁷⁸. It is necessary for the ICRC to host an international conference in order to allow delegates from across the globe to mutually engage in the formulation of the treaty document, codifying an express regulation of the presence of VHSs in IAC that will harmonise the interests of humanity with issues of military necessity and, accordingly, give effect to the spirit and purport of IHL⁸⁷⁹. The document can either be a free standing treaty, or be attached as an annexure to the Geneva Conventions⁸⁸⁰. Provisions encapsulated within this treaty regulation would necessarily need to first and foremost prohibit the voluntary shielding of a legitimate military objective, define what a VHS is, and provide guidance to both civilians wishing to act as VHSs and combatants who encounter VHSs.

(aa) The proposed prohibition against voluntary human shielding of a legitimate military objective

Under the current IHL there is a need for an express prohibition against civilians shielding military objectives. The civilians who voluntarily shield military objectives blur the lines distinguishing combatants and civilians, thereby endangering the general civilian population. Moreover, the ability of a civilian to significantly impact the course of hostilities does not comport with the goal of

⁸⁷⁸ Al-Duaij N 'The volunteer human shields in international humanitarian law' (2010) 2 *Oregon Review of International Law* 117 137-140.

⁸⁷⁹ Ibid.

⁸⁸⁰ Ibid.

IHL to remove civilians from the scene of conflict. The presence of VHSs complicate targeting decisions of an attacking force, which in turn constitutes an unfair operational advantage to the shielded party. The disequilibrium caused in the humanity-necessity balance through the presence of VHSs has the added effect of causing general complications with an application of the precautions in attack, and the principle of proportionality. Therefore, it is submitted that civilians should be prohibited from shielding military objectives.

The effect of the prohibition against civilians shielding military objectives is that the only time voluntary human shielding would be lawful is if the civilian was shielding a civilian objective. Accordingly, there would be lawful voluntary human shielding and unlawful voluntary human shielding. Moreover, in the event that civilians are encountered in the vicinity of a military objective they are to be presumed IHSs with protected civilian status. If information leads a commander to believe the civilians in question are actually unlawful VHSs, then the treaty should have a provision - stipulating the appropriate protocol in such circumstances - granting the commander the power to order the shielded state to remove the civilians as is required under article 58 of AP I. In the event that the shielded state refuses to do so, then the shielded state would summarily be held to have violated the article 58 of AP I obligation and an appropriately severe punishment should follow. The commander of the attacking state should then have further recourse to demand that the unlawful VHSs be extradited for having contravened international law, themselves. The extradition of the unlawful VHSs should be to a neutral state, for example: the state which houses the VHS NGO, or an alternative state approved by the VHS NGO, for example: the home state of the shield if they are not citizens of the shielded state.

The proposed regulation is aimed at removing the ability of civilians to shield military objectives in terms of a method which appreciates the position of combatants on the ground. It would be of little use to suggest an alternative regulation of VHSs if it cannot be applied by combatants in concrete military operations. It is submitted that the current proposal does not place too great an

onus on the parties involved in IAC. It is believed that states would advocate for the adoption of the treaty and encourage its enforcement as the removal of the presence of civilians before military objectives reduces the time, money and human lives expended during a conflict. Less states would be inclined to use VHSs to shield their military objectives and, accordingly, the course of hostilities would be streamlined which means less time and opportunity for civilians to be harmed. States are able to pursue the legitimate objective of weakening their opponents and have the conflict resolved as speedily as possible.

Moreover, the treaty would highlight the duties of a shielded state to remove the civilians from the vicinity. As it stands, very few international law cases have tried a shielded state for violating its article 58 of AP I duties. The legal processes suggested by the proposal could be useful aids to an attacking state and reduce the burden upon their shoulders during targeting decisions. Moreover, the proposal would also make the precautions in attack and duty of the shielded party less theoretical by creating an environment that is less complex for international courts and tribunals to adjudicate. The shields that remain present before a military objective can have only the motive of supporting the shielded party, as a mechanism has been established for those wishing to act in opposition to war through the VHS NGO, and the shield in question did not opt to make use of it. Too long has IHL allowed a shielded party to essentially 'draw the foul' of the attacking party by using civilians to shield their military objectives⁸⁸¹. It should be acknowledged that the shielded state also has a duty to ensure the protection of civilians, and should be severely punished in the instance it uses civilians to further its own military objectives.

(bb) The proposed legal definition of a voluntary human shield

⁸⁸¹ Skerker M 'Just war criteria and the new face of war: human shields, manufactured martyrs, and little boys with stones' (2004) 3:1 *Journal of Military Ethics* 27 28-30.

The proposed legal definition of a VHS, based on that provided by Al-Duaij, is: ‘a civilian, registered with the VHS NGO, who voluntarily and impartially, seeks to protect civilians and civilian objects, through using his or her body as a human shield, and who at all times retains the unconditional freedom to abrogate from such shielding position at any time he or she wishes’⁸⁸². The definition would have practical significance on the battlefield as the VHS NGO would make it mandatory for their registered VHSs to wear distinctive clothing brandishing a recognisable emblem, not unlike that of the UN. This would lessen the burden of combatants on ground level with regard to status verification of individuals encountered on the battlefield. Those wearing the distinctive clothing would be categorised as lawful VHSs and the other civilians would either be considered ordinary civilians or IHSs (as there is no difference in protections afforded each), unless and until such time information provided to commanders lead them to believe that a civilian’s presence before a military objective is both voluntary and intended to deter attacks. In the latter instance, the shield would be an unlawful voluntary human shield and an attacking state is guided to follow the protocol mentioned above.

Civilian

In terms of this requirement commanders are to apply the ordinary IHL definition of ‘civilian’ as contained in article 50 of AP I.

Registered with the VHS NGO

A VHS’s presence in IHL would only be lawful if it is sanctioned by the VHS NGO. A civilian, from anywhere in the world, may apply to the VHS NGO to partake in humanitarian shielding missions in conflict zones across the globe. The VHS NGO would assess the motives of the civilian, look into their

⁸⁸² Al-Duaij ‘Volunteer human shields in international humanitarian law’ 124-133.

backgrounds, and decide whether or not the civilian is of a certain character that he or she would strictly adhere to the directives provided by the organisation. Should the organisation approve the application, it will then be required to educate the aspirant VHS of the general principles of IHL, emphasise the dangers associated with IAC, and stipulate appropriate protocols to follow in the event of an emergency situation on the battlefield. After the successful completion of such programme, the VHS NGO registers the civilian for a specified mission of the organisation's own choice, in order to nullify any possibilities for partiality on the part of the shielding civilian. The limits of a civilian's authorisation to shield is clearly stipulated on the ID card provided to him or her before embarking on his or her mission. Each aspirant shield would also be required to sign an indemnity form releasing the organisation of any liability with regard to any injuries sustained by the civilian as a result of the shielding campaign. Finally, a set of distinctive clothing, that needs to be returned to the organisation upon the completion of the shielding campaign, would be provided to the registered VHSs.

Voluntarily and impartially seeks to protect civilians and civilian objects

A lawful VHS seeks to conduct shielding campaigns in the name of humanity and therefore only shields civilians and civilian objectives. In order to ensure that the civilian has a *bona fide* motive of doing a good to society, the civilian would have to act of their own volition without any intention of supporting any side to the conflict to which they are sent on their shielding campaign. The impartiality of the civilian is guaranteed through the VHS NGO retaining the ability to decide where the civilian would be conducting his or her shielding campaign. A screening process would be conducted by the VHS NGO to prevent a situation where a civilian gains access to a conflict zone with the intention to use his or her protections to unlawfully shield military objectives. 'Civilians' would once again be those individuals as envisaged in article 51 of AP I. 'Civilian objectives' are all those objectives which do not 'by their nature, location, purpose or use make an effective contribution to military action and

whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'⁸⁸³.

Uses his or her body as a human shield

A lawful VHS would have to conduct himself or herself within the limits of the civilian status they are afforded under IHL to maintain their protected status. Accordingly, the shielding civilians would not be allowed to carry any arms with them on the mission. Only trained operatives of the VHS NGO, who accompany the civilians on their shielding campaign, would be authorised to carry small firearms that are to be kept concealed so as to negate any confusion with regard to whether or not they are indeed civilian. The firearm is only to be used when necessary for purposes of self-defence. As the trained operatives would be trusted individuals, skilled in the art of combat, they would provide adequate protection to the group of shielding civilians they accompany. The only purpose the civilians serve on their shielding campaigns is to bolster the protections that IHL already affords to civilians and civilian objectives through their physical presence. Their presence would act as an active reminder to combatants of the general protections afforded to civilians and civilian objectives.

Who at all times retains the unconditional freedom to abrogate from such shielding position at any time he or she wishes

The ability of a civilian to cease their shielding activities is the distinguishing factor between those who are voluntary human shields and those who are involuntary human shields. Any form of involuntary human shielding is expressly prohibited under IHL (article 51(7) of AP I). Whereas, in terms of the newly proposed regulation, voluntary human shielding is only prohibited to the extent that civilians may not voluntarily shield a military objective. The moment a

⁸⁸³ AP I article 52 (1) read in conjunction with AP I article 51(2).

civilian on a shielding campaign with the VHS NGO wishes to abrogate from their shielding activities they are to be taken to a place of safety - a base camp in peaceful territory - as soon as it is reasonably possible and safe to do so.

(cc) The proposed regulation of voluntary human shielding explained by way of example from the perspective of the attacking party

The attacking state has located a legitimate military objective - a large stationary rocket launcher - situated three kilometres to the east of a national monument that is being shielded by civilians in clothing that indicate their affiliation with the VHS NGO. In the vicinity of the rocket launcher are what seems to be two distinct groups of civilians. A group of five civilians, on the side of the rocket launcher that faces south, are accompanied by three armed men in combat apparel. On the side of the rocket launcher facing west, a group of women and children, approximately twenty in total, are currently positioned. The children are playing in the sand whilst the women watch them nervously.

In total there are approximately twenty five civilians in the vicinity of the rocket launcher. An air strike on the rocket launcher, the only feasible way of destroying it, would almost certainly kill all the civilians and the three armed combatants. The advantage anticipated from the airstrike weighed against the deaths of the civilians in question determines that the attack would be disproportionate and, therefore, unlawful. In terms of the proposed treaty, combatants in these situations where unlawful VHSs are present (the women and children as they are shielding a military objective) are to issue a warning to the shielded party and demand that they remove the civilians as per article 58 of AP I, or else be held liable for a violation of IHL. If the shielded party has not removed the women and children from the vicinity within a reasonable amount of time after the warning has been issued, then the attacking party must relay such information to headquarters for a charge to be issued against the shielded

state for such violation. Thereafter, if it is possible in the circumstances, the attacking state is to communicate to those acting as unlawful voluntary shields that their continued presence before a military objective is a criminal offence, and if they do not remove themselves from the vicinity they will be extradited and tried for their contravention of IHL. If the unlawful voluntary shields still persist in their shielding activities, the combatants are to refrain from attacking and instead place political pressure on the state failing to remove the unlawful voluntary shields from the vicinity of the rocket launcher. The attack can be launched at an alternative time when the civilians are no longer of such number so as to cause the strike to be disproportionate. The shielded state is to be tried alongside the civilians identified as having shielded the rocket launcher for a violation of IHL. If the shielded state is a signatory of the treaty regulating VHSs (thereby committing to having their armed forces refrain from using unlawful VHSs and assist in the extradition of individual civilians found guilty of such practices) or if the proposed regulation has reached customary status, then the shielded state rightly ought to be severely punished. The punishment to be exacted would have to be deliberated at the international conference convened to formulate the treaty regulating VHSs and be of an adequate severity to deter the use of unlawful voluntary shields.

If there is a consistent enforcement of the rule prohibiting civilians from shielding a military objective, backed up with severe consequences for those found guilty of such practices, then the outcome of the conflict would be rather different from that mentioned above. The shielded party would instead remove the civilians when the attacking party so demands as it would be cognisant of the fact that the objective stands to be destroyed in any event. It would thus be imprudent of the shielded state to preserve the military objective at the cost of the severe sanctions that will certainly be imposed. Moreover, in the event that the shielded state is met with any resistance from the civilians they attempt to remove from the vicinity, those individuals can be tried for their unlawful acts in the domestic courts of the shielded state if they are citizens of the shielded state, or extradited to the home country of the shields in the event that they are foreign citizens, or be extradited to a state determined by the VHS NGO. It would serve as an

adequate discouragement to both states and individual citizens, through measures complimenting the spirit and purport of IHL.

v. Conclusion

The proposed treaty regulating the presence of VHSs in IAC would necessarily contain within it:

- 1) A legal definition of a 'voluntary human shield';
- 2) A prohibition against civilians voluntarily shielding military objectives;
- 3) A provision stipulating that states making use of such unlawful voluntary shields, and those individuals conducting the unlawful shielding activities, would be held criminally liable and punished severely;
- 4) A set of provisions that requires the establishment of an organisation tasked with registering VHSs, setting out its powers and responsibilities; and
- 5) A provision setting out the appropriate protocol for combatants to follow during the planning stages of an attack where shields are found in the vicinity of the targeted military objective.

The exact content of these provisions might be negotiated at an international conference convened for such purposes. Moreover, the ICRC could be tasked with hosting such a conference and leading the discussions on the appropriate means through which to regulate the presence of VHSs in IAC. The most fundamental purpose of this paper was to illustrate how the two independent schools of thought that currently dominate the current discourse on the regulation of VHSs are tipping the scales of the humanity-necessity balance. As a result, the proposed regulation embodies an approach that serves as an

adequate and balanced compromise between the two schools of thought. Moreover, it allows combatants to distinguish between lawful and unlawful voluntary shields with greater ease, highlighting instances where the enemy has resorted to unlawful means of warfare. This would ensure that the precautionary measures in attack are enforced with greater efficacy. The shielded state's refusal to remove civilians from the vicinity of a military objective would be clear for all to see, making the subsequent punishing of the shielded state, for a violation of its IHL duty easier. Whereas the current approach to VHSs essentially cause the AP I article 58 obligation to be theoretical, the proposal provides an approach that would give teeth to the provision. Consequently, both an attacking and shielded party would be inclined to adhere to the tenets of IHL, as a violation thereof would attract too great a punishment to make the use of voluntary human shielding a prudent tactic in IAC. Perhaps most significant of all is the fact that the proposed regulation does not erode the protections of civilians, neither does it impose greater burdens upon combatants on ground level, nor does its outcomes contradict the spirit and purport of IHL. It would also not alter the basic principles of IHL or complicate an application of the proportionality principle with matters of abstract discounting of lives. The proposal compliments the general IHL framework by being easily implementable, and giving effect to the objectived of reducing the harsh effects of armed conflict.

Conclusion

VHSs propose a perplexing legal conundrum within the context of IHL. The actor strides the lines separating military necessity and humanity as well as the line separating a combatant from a civilian. The uncertainty surrounding the actor serves to indicate the inadequacy of the current IHL framework. As this paper has sought to illustrate: only an express regulation would settle the academic debate on the laws governing VHSs and alleviate the problems the current legal interpretations cause in combat situations.

There is a need for a provision in IHL that prohibits the practice of civilians voluntarily placing themselves before legitimate military objectives. Civilians who take up a shielding position before a civilian objective do not materially influence the outcome of armed conflict in a way that contradicts IHL. The voluntary presence of civilians before military objectives must be completely prohibited as a mere treatment of the problems caused by the presence of VHSs is insufficient. Regulating VHSs through either discounting their value during the proportionality assessment or classifying them as combatants has the effect of stretching the basic principles of IHL beyond reasonable bounds. The broadened interpretations will only further cause the legitimate killing of individuals to spread wider than intended, thereby increasing the amount of unnecessary deaths. On the other hand, it must be noted that although the international community have instinctively treated VHSs as protected individuals it does not mean that attacking states might not eventually decide to attack irrespective of the shields' presence. Military objectives constitute legitimate targets and states ought not to make that which is legitimate illegitimate through means that are not conducive to the fundamental goal of IHL to protect the civilian population. Thus, whilst the shields rightly cannot lose their protected status, they should at least not be permitted to take up such

shielding positions before military objectives. The civilian protections afforded to VHSs is premised on their non-participation in the conflict, and as their shielding activities do not amount to DPH their punishment should not be death or serious injury. VHSs cause a legal obstacle and thereby influence the outcome of armed conflict to a significant degree. Accordingly, they ought to be arrested and imprisoned. As for the shielded states, they are to be held to have committed a war crime (a more severe and discouraging crime than that which currently relates to a violation of article 58 of AP I) where they have failed to remove the presence of VHSs before military objectives.

The paper brings together all the different views on the most appropriate way to regulate the presence of VHSs. The findings of the research leads to the conclusion that the best way forward is through a treaty that contains within it an express prohibition against civilians voluntarily shielding military objectives. The proposal made comports to the general IHL legal framework and would alleviate the uncertainties combatants face when having to make targeting decisions where VHSs are involved. Formulated as it is, the proposal strikes a suitable compromise between the concerns of a human rights lawyer and a military commander. Thus, this approach will find support among the members of the international community and bring an air of legitimacy to the relationship between IHL and VHSs.

Additionally, the findings of the research paper provides a sound basis upon which numerous consequential aspects can be further researched. Firstly, subsequent research efforts can be focused on the exact content of the proposed treaty provision. The treaty would have to look at matters from the perspective of both the attacking and shielded party. It would need to set out exactly what would constitute an adequate warning to the shielded state and VHSs, as well as the steps to follow to commence proceedings whereby pressure is placed on the shielded party to have the shields removed. The treaty could incorporate a provision that summarily deems a shielded state to have acquiesced to the presence of VHSs before their military objectives in situations

where the warnings were not heeded to allow for swift punishment to be meted out when it matters most. The treaty would also have to provide for the establishment of an NGO to manage the deployment of lawful VHSs in IAC. Secondly, research efforts could specify the duties the NGO will necessarily have to fulfil. The NGO would necessarily need to be the link between the parties engaged in the IAC and ensure that the recruited civilian shields are only positioned in front of civilian objectives. Furthermore, the NGO would have to equip the civilian shields with a basic understanding of the principles of IHL and see to it that the shields are acting purely in the interests of humanity. Thirdly, appropriate measures need to be implemented to ensure that states are able to extradite civilians who have been found guilty of voluntarily shielding a military objective. This would be increasing the powers states have to remove civilians found before their military objectives. Perhaps the treaty organisation might have some role to play in this, as their neutral status could possibly allow them to arrest and extradite the unlawful voluntary shields. Lastly, research can be conducted on setting adequate punishment for violations of the newly drafted prohibition against voluntary shielding in order to discourage the practice for not only the states employing voluntary shielding tactics, but also individual shields. This dualistic means of punishment should accommodate instances where the presence of the civilian was at no point linked in any way to the operations of the shielded state.

In the interim, however, it would be no surprise to find VHSs being used where a weak state expects aggression from a superior state. The ineffectiveness of the current IHL framework to deal with the VHS's controversial influence on modern warfare is apparent. Until such time as express regulations are formulated and put into practice, the civilian population would continue to be at the mercy of warring parties. It is not hard to imagine a future where states would take matters into their own hands and punish shielded states for their unscrupulous tactics by not withholding their attacks. This is very likely to happen in situations where the shielded state is launching attacks from behind a wall of VHSs. In both the above scenarios it is the civilian who stands to suffer. Just as the means through which war is waged evolves with time, so too should

the LOIAC. Voluntary human shielding is not a novel practice and clearly illustrates how the law, as it stands, has the undesired effect of drawing the theatres of war closer to the civilian population. These shields constitute nothing more than pawns to be disposed in order to advance the interests of an armed force. Accordingly, change needs to be effected to ensure IHL maintains its relevance by enforcing the protections afforded to the civilian population. The proposed regulation is one such measure that will adequately address the controversial VHS in a way that aligns with the purport of IHL and the realities of modern armed conflict.

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LIST OF ACRONYMS

CDDH	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva 1974-1977 (abbreviation used in Conference documents).
DPH	Direct Participation in Hostilities
IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Convention of the Red Cross
ICTY	International Criminal Tribunal for Yugoslavia
IED	Improvised Explosive Device
IHL	International Humanitarian Law
IHS	Involuntary Human Shield (IHSs: plural)
LOIAC	Law of International Armed Conflict
NATO	North Atlantic Treaty Organisation
NGO	Non-government Organisation
PCATI	Public Committee against Torture in Israel
UNTS	United Nations Treaty Series
USC	United States Code
VHS	Voluntary Human Shield (VHSs: plural)