AN ARTISTIC AND POLITICAL BROUHAHA: THE RIGHT TO FREEDOM OF EXPRESSION VERSUS THE RIGHT TO DIGNITY

Allison Vadachalam
4th year LL.B, University of KwaZulu-Natal, Howard College

'Art is not what you see, but what you make others see.'[1]

I INTRODUCTION

The recent furore over an artistic work – Brett Murray's *Umkonto We Sizwe* (*The Spear of the Nation*) (hereafter referred to as '*The Spear*') has prompted heated debate regarding the extent of the protection of the right to freedom of expression and the balancing of that right against the rights to dignity and privacy. Of particular importance is the role that politics played in these debates; the artworks were criticised mainly by politicians and their affiliates – the subject of one of the artworks being the President of South Africa, Jacob Zuma. The intersection of the realms of art, politics and the law led to intense discussion by both detractors of the President and his supporters: those who advocated the extension of free expression and those who called for its culling.

Should the law attempt to reign in a right as important as freedom of expression, given the foundation upon which our nation is built, that is, participatory democracy? In this regard, it was held in the *Mamabolo*[2] case that 'freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution' – that is, a society premised on a citizenry aware of their rights and who are empowered to partake in democratic processes for the purposes of creating a more effective and efficient state[3] through the receipt and dissemination of relevant information. This right, particularly in the context of political speech, is fundamentally important and should not be infringed upon through its limitation when its exercise offends the political sensibilities of some. However, due regard must be had to the line that art and artists sometimes cross – when the art becomes an infringement of the rights to dignity and privacy. Yet, given the importance of political debate that art

[1] Edgar Degas, artist (1834-1917).
[2] *S v Mamabolo* 2001 (3) SA 409 (CC).
[3] *Ibid* para 28.

often catalyses, and the censorship effect its restriction could possibly engender – should the law be more tolerant of art, especially when political issues are involved?

This article will first examine the importance of the constitutionally entrenched right of freedom of expression and track its development in South African legal jurisprudence, as well as international and regional protection of the right. This is in order to determine the meaning and extent of the right. Secondly, the article will examine the limitations placed on the right to freedom of expression – namely, the common law actions of defamation and the constitutional imperative of balancing of rights. Lastly, the article will attempt to explain the furore surrounding *The Spear* and will analyse the arguments made.

II THE RIGHT TO FREEDOM OF EXPRESSION

(i) The philosophical basis of the right

(a) The right to free expression generally

Thomas Emerson, an American jurist who writes about the First Amendment to the United States Constitution (the provision protecting the right to free speech) argues that there exist four principle reasons for the protection of this right in a democratic society:

1. It allows for self-actualisation, as citizens voice their opinion on the matters concerning themselves and the state, and in so doing, affirm their inherent dignity;
2. It aids the quest for truth which is essential to the creation of an open, transparent and accountable government, and which, when stifled, hinders social debate;
3. It allows for meaningful social commentary and engagement with the state, essential to participatory democracies;
4. It promotes social cohesion and fosters a nation that is able to rationally engage, despite differing opinions, allowing for the creation of consensus and tolerance.[4]

[4]Emerson, T.I. '*The System of Freedom of Expression'* (1970) 6-7.

Dworkin, a famed American jurist, suggests that these reasons be reduced to two – firstly, that it is an instrumental right as it can foster a responsive government; and secondly, that it is an end in itself, as it is a right that is required in every modern legal society, where citizens are recognised as responsible moral agents – with the capability of forming judgments and disseminating opinions.[5]

Emerson also argues that the right to freedom of expression:

> 'involves limitations upon the power of the state to interfere with or abridge them ... The state also has a more affirmative role to play in the maintenance of the freedom of expression in modern society. It must protect persons and groups seeking to exercise their rights from … interference … It must also undertake positively to promote and encourage freedom of expression.'[6]

(b) The right to freedom of artistic expression

The importance of artistic expression, it is argued, can be analysed through either a neo-Marxist or liberal approach, which are in fact counterpoised.[7] For the neo-Marxist approach:

> 'art was an important weapon in the ideological struggle between classes. It could reinforce just as it could undermine the power of the exploiters, could serve to defend class oppression or, on the contrary, contribute to the education and development of the consciousness of the toiling masses, bringing them closer to victory over their oppressors'.[8]

Thus, according to the neo-Marxist approach, art was necessarily political. 'The artist is a political actor, occupying a particular class position and situated at a particular historical conjuncture, and is not simply a neutral observer or commentator.'[9] This view is contrasted with libertarianism, which is opposed to neo-Marxism's focus on the group struggle and the pivotal role that art plays for that particular class and society as a whole. This approach focuses more on the individual and on individual

[5]Davis, D. 'Freedom of Expression' in H. Cheadle, D.M. Davis & N.R.L Haysom (eds*) South African Constitutional Law: Bill of Rights* 2nd ed (2011) 11-3.
[6]Emerson *op cit* note 4 above, 3-4.
[7]Stephen Allister Peté and Sarah Pudifin 'Spring was rebellious, but it's all over now – Public Art, Politics and the Law in post-apartheid South Africa' (2011) 32 3 *Obiter* 363.
[8]*Ibid.*
[9]*Ibid.*

freedom – and the creation of art for art's sake.[10] 'It is very important to liberal thinkers that this individual freedom, [wherein] individuals … decide upon and live out their own particular conceptions of the good, be jealously guarded against inroads due to societal pressures.'[11] A prominent liberal thinker, John Stuart Mill, put forward a jurisprudential theory, referred to as the 'harm principle'. Like Bentham and Austin (other well-known advocates of the liberal approach), Mill was a utilitarian, who believed that choices and actions should have, as their outcome, the maximisation of pleasure and the minimisation of pain. The principle states that a person should be free to act as they please, provided that their actions do not harm another person. Mill argues that '[t]he only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it'[12], and further that '[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others'[13]. Thus, for Mill, the only acceptable infringement of an individual's freedom by the law is for the purpose of preventing harm to another.

It is clear from these theories of the right to freedom of expression, that it is one which is vitally important for the proper functioning of a modern participatory democracy, and further, that the right to freedom of artistic expression should be fiercely protected. The realisation of the right can affect society as a whole, as is argued by Emerson, Dworkin and the neo-Marxists. This is through the creation of public forums for debate regarding government; the education and development of society as a whole; the fostering of a more well-informed electorate; and the creation of meaningful dialogue between citizen and government. Essentially, these arguments encapsulate the idea of the right being instrumental in the creation of a more open and responsive government, which gives basis to Emerson's liberalism argument – the right to free expression is deserving not only of protection, but also of encouragement by the state.

We can further deduce that the rights of dignity and free expression are linked; that in being able to freely express yourself, you are also affirming your dignity. This argument links to the liberal theories of Emerson, Dworkin and Mill. The right to free

[10]Pete and Pudifin *op cit* note 7 above, 364.
[11]*Ibid*.
[12]*Ibid.*
[13]Pete and Pudifin *op cit* note 7 above, 364.

expression is an end in itself – the creation of art for art's sake, as it should be the right of every citizen in a modern liberal democracy to be able to voice their opinions on matters, where this exercise of the right does not cause harm to another. The exercise of this right, according to Emerson and Dworkin, allows for the realisation of the right as an end in itself. Where citizens are able to form, express and disseminate their own and others' opinions – the right to free expression intrinsically gives meaning to and affirms the right to dignity, as there is recognition of the capability of individuals to form opinions and of the imperative of their being able to do so freely and in an informed manner.

(ii) International and regional protection of the right

(a) International protection

The right to freedom of expression is provided for internationally by Article 19 of the Universal Declaration of Human Rights (UDHR)[14] and the International Covenant on Civil and Political Rights (ICCPR). The ICCPR (which is based on the UDHR, and hence the similarity of provisions), in Article 19(2), provides: 'Everyone shall have the right to freedom of expression; [which] shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'[15]

(b) Regional protection

Three regional human rights instruments all provide for the right: their provisions reiterate those of the UDHR and ICCPR. The European Convention on Human Rights (ECHR) in Article 10,[16] the American Convention on Human Rights (ACHR) in Article 9,[17] and the African Charter on Human and Peoples' Rights (ACHPR) in Article 13, [18] all confirm the fundamental character of the right for modern democracies. That freedom of expression is so highly protected a right underscores its critical importance.

[14]United Nations General Assembly Resolution 217A (III), 10 December 1948.
[15]UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976.
[16]Adopted 4 November 1950, entered into force 3 September 1953.
[17]Adopted 22 November 1969, entered into force 18 July 1978.
[18]Adopted 26 June 1981, entered into force 21 October 1986.

(iii) The right in South Africa

South Africa has signed, ratified or acceded to the international instruments referred to above and is also a party to the African Charter on Human and Peoples' Rights. This therefore lends credence to South Africa's commitment to give meaningful effect to the right to freedom of expression.

(a) The Constitution and legislation promulgated by Constitutional injunction

The Constitution of the Republic of South Africa, 1996, provides for the right in section 16. It states:

> '1. Everyone has the right to freedom of expression, which includes-
>
> […] (b) freedom to receive or impart information or ideas;
>
> (c) freedom of artistic creativity […]'[19]

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA') gives content to the rights of freedom of expression and dignity, and is the tool through which those constitutional rights must be accessed and enforced. The court in *MEC for Education, KwaZulu-Natal & Others v Pillay*[20] held that 'a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right.'[21] Sections 10 and 12 of the Act relate to freedom of expression and provide for the circumstances in which the right can be justifiably limited. Thus, in order to bring an action restricting the right of freedom of expression, it must be brought in terms of PEPUDA. The *Pillay* case is relevant not only in the context of highlighting the principle of avoidance, but is equally (if not more so) relevant in the discussion of freedom of expression as a matter falling within the jurisdiction of the Equality Court. The facts of *Pillay* concern a young woman wearing a nose stud contrary to a school code of conduct, with the

[19] Section 16(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter, 'the Constitution').
[20] MEC for Education, KwaZulu-Natal & others v Pillay 2008 (1) SA 474 (CC).
[21] *Ibid* para 38-40.

banning of same deemed to 'limit a person's right to express her religion and culture which expression is central to the right to freedom of expression'.[22]

The importance of this right has been highlighted in other case law as well. O'Regan J of the Constitutional Court in *South African National Defence Union v Minister of Defence and Another*[23] stated:

> 'Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.'[24]

In *NM and others v Smith and Others,*[25] O'Regan J expanded on this: '[freedom of expression] is indispensable not only because it makes democracy possible but also because of its importance to the development of individuals for it enables them to form and share opinions and thus enhances human dignity and autonomy.'[26] It is thus clear that the right to freedom of expression is fundamental in our nation. This concept is indicated in numerous cases – in *Case and another v Minister of Safety and Security and others, Curtis v Minister of Safety and Security and Others,*[27] Mokgoro J held that 'freedom of expression is one of a "web of mutually supporting rights" in the Constitution. It is closely related to … the right to dignity'.[28] Furthermore, in *National Media Ltd & Others v Bogoshi,*[29] the court held that the right is 'essential in any attempt to build a democratic social and political order … the matrix, the indispensable condition of nearly every other form of freedom.'[30]

It is clear that the rights of free expression and dignity are inextricably linked in our jurisprudence, which leads one to believe that they are to be weighed up against each other and not merely pitted against the other as mutually exclusive

---

[22] *Ibid* para 94.
[23] *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC).
[24] *Ibid* para 7.
[25] *NM and others v Smith and Others* 2007 (5) SA 250 (CC).
[26] *Ibid* para 145.
[27] *Case and another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC).
[28] *Ibid* para 27.
[29] *National Media Ltd & Others v Bogoshi* 1998 (4) SA 1196 (SCA).
[30] *Ibid* para1207J-1208C.

rights. It is further evident that the right of freedom of expression is one highly valued not only by our law, but also by many other modern democracies in the world,[31]and is thus unambiguously deserving of protection. Freedom of expression is especially important with artists as they play an important role in questioning the realities that exist in the state and often catalyse and initiate public debate and discussion on the issues pertinent to the running of the state. As argued by Emerson, the right to freedom of creativity (which includes the right to freedom of artistic creativity), should be protected and encouraged by the state. The corollary of this argument should apply: the right to freedom of expression should be protected from state interference. This protection should be provided even when it addresses issues the government may be sensitive about, and in particular when this relates to their performance as members of the executive.

(b) What does the right to artistic expression entail in South Africa?

The right to free expression in South Africa is not narrowly defined[32] and may include the displaying of posters, and also painting and sculpting. As artists are often responsible for radical criticisms of the functioning of society, their work has often been sought to be controlled by governments, lest the artwork upset sensitive people.[33]

The court in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another*[34] dealt with the alleged infringement of the Carling Black Label trademark (owned by the respondents) by the appellants – who used the trademark in a parodying t-shirt in

[31]The United States of America, for example – where the right as contained in The First Amendment to the United States Constitution 1787, is strongly protected. This can be illustrated by cases such as *Nelson v Streeter* 16 F.3d 145 (7th Cir. 1994), where a painting by student David Nelson depicted the late Chicago Mayor Harold Washington in women's lingerie, which some Chicago state officials attempted to censor. The court held that the attempt to remove the painting from public view amounted to a violation of the artist's right to free expression. The right is also enshrined in the German Constitution (Article 5 of the Basic Law for the Federal Republic of Germany, 1949). In a recent case involving German artist Thomas Meese, the court held that his performance of the prohibited Hitler salute amounted to an acceptable artistic expression: BBC News Europe, 'German artist Jonathan Meese wins Nazi salute case'. Available at http://www.bbc.co.uk/news/world-europe-23710715, accessed 16 September 2013.

[32]*De Reuck v Director of Public Prosecutions (Witswatersrand Local Division)* 2003 (3) SA 345 (CC) at para 48.

[33]Ian Currie, Johan de Waal '*Bill of Rights Handbook*' 5th ed. (2006) 370.

[34]*Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC).

order to make a social comment. The court dismissed the claim that the trademark was infringed, as the likelihood of economic prejudice had not been established.[35] Importantly, Sachs J held that:

> 'Whatever our individual sensibilities or personal opinions about the T-shirts might be, we are obliged to interpret the law in a manner which protects the right of bodies such as Laugh it Off to advance subversive humour. The protection must be there whether the humour is expressed by mimicry in drag, or cartooning in the press, or the production of lampoons on T-shirts.'[36]

Sachs J further went on to state that there was a risk to societies taking offence to irreverence – as being detrimental to their existence. Instead, he holds that humour is one of the 'great solvents of democracy' that 'enables a multitude of discontents to be expressed in a myriad of spontaneous ways. It is an elixir of constitutional health'.[37]

III THE LIMITATIONS OF THE RIGHT TO FREEDOM OF EXPRESSION

(i) Constitutional balancing of rights

The Constitution contains specific limitations on the right to free expression in section 16(2), which provides that:

> '2. The right in subsection (1) does not extend to-
>
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'[38]

Further to this, the Constitution is built on the pillars of three conjoined, reciprocal and foundational values: human dignity, equality and freedom. None of the rights provided for in Chapter 2 are absolute and are all capable of limitation in terms of section 36. Thus, the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of

[35] *Ibid* para 66.
[36] *Ibid* para 108.
[37] *Ibid* para 109.
[38] Section 16 (2) of the Constitution.

protection as is the right to freedom of expression.[39] Furthermore, the courts have iterated that there exists no hierarchy of rights – the one taking primacy will depend on the facts of the case at hand.[40] Also, due to the horizontal application of our Bill of Rights, certain rights entrenched in the Bill can be invoked as between individuals, and not only as against the state. This means that it is possible for private individuals to enforce their constitutional rights against another private individual who has infringed that right.

PEPUDA gives further content to the limitations on the right to freedom of expression:

> Section 10 provides:
>
> 'Prohibition of hate speech
>
> (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-
>
> (a) be hurtful;
>
> (b) be harmful or to incite harm;
>
> (c) promote or propagate hatred … .'[41]
>
> Section 12 provides that:
>
> 'No person may-
>
> (a) disseminate or broadcast any information that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, is permitted.'[42]

The Equality Court has been specifically established to enforce PEPUDA. One of the more well-known decisions handed down by the Equality Court, and relating to hate speech, is that of the utterances made by Julius Malema (the former leader of the African National Congress (ANC) Youth League) in January 2009, in response to a question as to why Jacob Zuma should be voted into power. He stated that:

---

[39] Davis *op cit* note 4 above, 11-4.
[40] *S v Mamabolo (E-TV &Others intervening)* 2001 (3) SA 409 (CC) para 41.
[41] Section 10, Promotion of Equality and Prevention of Discrimination Act 4 of 2000.
[42] *Ibid* section 12.

> 'When a woman didn't enjoy it [sex], she leaves the next morning. Those who had a nice time will wait until the sun comes out, request breakfast and taxi money. In the morning that lady requested breakfast and taxi money. You don't ask for taxi money from somebody who raped you.'

Given the obvious harm and degradation which such a statement could cause, Sonke Gender Justice filed a complaint with the Equality Court in February 2009 – requesting a declaration that Malema's remarks constituted hate speech. They sought an order of a public apology and compensation from Malema. The Equality Court's decision in March 2010 was emphatic that Malema's statement did in fact constitute hate speech under PEPUDA, because his 'words could reasonably be construed as being hurtful, harmful and demeaning to women'.[43]Accordingly, the Equality Court ordered Malema to make an unconditional public apology within two weeks and to pay R50 000 compensation to People Opposing Women Abuse (POWA), within four weeks of the judgment.

The purpose of the elucidation of the Malema matter is to highlight that the Equality Court has the requisite power to hand down far-reaching and binding decisions. This Court would not hesitate to make pronouncements on matters concerning the infringement of the rights to dignity and privacy on the basis of expression that does not constitute protected speech, and potentially amounts to unfair discrimination.

At this juncture, however, it is necessary to invoke the jurisprudence which has developed thus far to determine when conduct constitutes unfair discrimination. In the case of *Harksen v Lane NO and Others,*[44] the court devised a two-fold test:

> 'The determination as to whether differentiation amounts to unfair discrimination under s 8(2) requires a two stage analysis. Firstly, the question arises whether the differentiation amounts to 'discrimination' and, if it does, whether, secondly, it amounts to 'unfair discrimination.'[45]

Conduct is regarded as differentiation when there is conduct that results in the individual being treated differently from others. The differentiation, when based on a listed ground (contained in section 9 of the Constitution) including, inter alia, race,

[43]*Gender Justice Network v Malema* 2010 (7) BCLR 729 (EqC) at 737.
[44]*Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).
[45]*Harksen supra* note 28 at para 46

gender, sex and disability, or an analogous ground[46] will be deemed to be unfair discrimination – unless there is a justification for the conduct.

Through the integration of common law principles and rights and the balancing of individual rights, the courts have developed a unique theory in deciding which right takes precedence. In *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)*[47] for example, the Supreme Court of Appeal held that the determination of which right takes precedence lay in the limitation clause of the Bill of Rights.[48]

It is clear that these constitutional restrictions on the right to freedom of expression are geared toward the prohibition of hate speech and unfair discrimination. Given South Africa's historical context, the right to dignity is critical.[49] As the right to dignity was a right that was denied to entire groups and generations of people, to argue that it is not as important as the right to freedom of expression would be unacceptable.

All this said, however, given that South Africa is a developing country and a relatively young democracy, it is imperative that we challenge those who hold power accountable – for the powers we grant them to exercise over us and the nation as a whole. In this way, we are not only engaging meaningfully with the state and our

---

[46]Section 9(2) of the Constitution.

[47]*Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) at para 9.

[48]Subsection (1) provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

Subsection (2) provides that, except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

[49]In *President of Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) at 728H-729B, the court remarked:

> 'The prohibition on unfair discrimination in the interim constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. *At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups'.*

leaders, but affirming our right to dignity as citizens. Further, through challenging those in power, we will develop the country and its functionaries as a whole, as the very power of a democratic country lies in its people, and when those people begin to engage in meaningful debate about the state of affairs of their country, those in power will begin to be held accountable for their actions. This will be done not only by courts of law, but also by the people who have voted the government into power – the idea being to foster the growth of good governance. The very notion of accountability means that those holding public office should tolerate criticism if their conduct does not meet the expectations of the electorate.[50] However, such criticism is still constrained by common law and statutory restrictions.

(ii) Common law restrictions

These constitutional 'tests' are often pitched against the common law *actio iniuriarum*. This delictual action protects personality interests – that is, the right to dignity, privacy, reputation and identity. The action allows for the court to make a juridical assessment as to the apportionment of damages, taking in to account, inter alia, the status of the person whose rights were infringed, the extent of the harm and tone of the slight, and the reach of the wrongful conduct.

The courts have debated whether the merging of the two actions which are diametrically opposed – constitutional and civil – is legally sound. The issue was resolved in the case of *National Media Ltd and Others v Bogoshi,*[51] where it was held that the merging of the two fields is permissible. However, due regard must be had for the factors of reasonableness and the balancing of the rights to reputation and dignity.

Two cases which are integral to the discussion of freedom of expression regarding political figures and the common law action, are *Holomisa v Khumalo*[52] and *Mthembi-Mahanyele v Mail & Guardian Limited.*[53] In both cases, defamatory remarks were made in a newspaper about the plaintiffs. Joffe J in *Mthembi-Mahanyele* held that a cabinet minister cannot sue for defamation 'where the

[50]It has convincingly been argued in the case of *Government of the Republic of South Africa v Sunday Times* 1995 (2) SA 221(T) that the ability of a person to be a contributing member of society depends on the freedom of the media and how the media carry out their constitutional mandate.
[51]*Bogoshi supra* note 19 at para 4.
[52]*Holomisa v Khumalo* 2002 (3) SA 38 (T).
[53]*Mthembi-Mahanyele v Mail & Guardian Limited* 2004 (6) SA 329 (SCA).

statement complained of [is linked] to the performance of her work as a member of government and was made without malice.'[54] The majority, however, held that Joffe J went too far in elevating freedom of expression above dignity,[55] holding that blanket immunity for defaming cabinet ministers would undermine protection of their dignity.[56] In *Holomisa*, it was argued that political figures in the public eye must allege and prove the falsity of defamatory statements, before claiming damages. This argument was rejected, however.[57] The majority of the court in *Mthembi-Mahanyele* held correctly that a blanket amnesty would undermine the integrity of the politician to their right to dignity; however, the basis of the argument in *Holomisa* should be considered. In arguing that politicians are required to prove the inaccuracy of the alleged defamatory statements, the court, it can be argued, was essentially stating that there should be a higher standard of proof for expressions relating to the performance of the duties of a politician holding office. From this we may deduce that in making a political comment, the right to free expression should be afforded a higher standard of protection.

Another relevant case is that of *Tshabalala-Msimang v Makhanya,*[58] where the applicant, the Minister of Health, sought an interdict ordering the respondents to return her medical records, which they had unlawfully acquired, and requested that the newspaper be interdicted from publishing comments on those records (which comments would have inevitably been negative and disparaging, given the information contained in the records). The court refused the order prohibiting publication, by stating that 'great stress was laid on the importance of freedom of the press'. It considered that the applicant was a public figure and that by the nature of her position she could not object when her actions were publicised. 'In such a case' the court held, 'her life and affairs have become public knowledge and the press in its turn may inform the public of them.' This was despite the fact that the clinic records had been obtained unlawfully.[59]

---

[54]*Mahanyele supra* note 35 para 40.
[55]*Mahanyele supra* note 35.
[56]Victoria Bronstein 'What you can and can't say in South Africa' *Democratic Alliance Newspaper*, available at *http:/www.da.org.za/docs/548/Censorshipvictoriabronsstein_pdf&gt*, accessed 27 July 2013 at 9.
[57]*Ibid*.
[58]*Tshabalala-Msimang v Makhanya* 2008 (6) SA 102 (W).
[59]Carole Lewis, Privacy and freedom of expression: Too private to publish? Privacy and the individual Forum, at 32, available at *www.sabar.co.za/law-journals/2012/december/2012-december-volume025-no3-pp28-33.pdf*, accessed on 20 July 2013.

Given that the lives of politicians are often of great interest to the public, they are often highly publicised and their actions are criticised by many. However, this is to be distinguished from the fact that certain information is in the public interest. It follows that information which is already known to the public about the politician, as in *Tshabalala-Msimang*, should not be barred from being expressed.

Further, because politicians are public figures, not only should the press have the added protection of freedom to comment on their lives – this right should also be extended to artists as well. The role of the artist is as important as the role of the press. The press begins the conversation and provides the relevant information required to form an educated opinion; artists provide a lasting and instant impact – viewing the matter from another angle or instantly elucidating a situation which may still be hazy for some.

Another important factor to be taken into account when balancing the rights and using the standard of reasonableness, is context. That is, the context within which the alleged infringement of the right to dignity occurred through the exercise of the right to freedom of expression. In the case of *Le Roux v Dey*,[60] the body of a school headmaster was, in a picture, superimposed onto the body of an apparently gay bodybuilder in a seemingly compromising position with another man: a schoolboy 'joke'. The Constitutional Court held in this case that the image had been defamatory but reduced the award of damages. Given that in this context the individual whose rights were being infringed was not in the public sphere and that the extent of the publication was restricted to a limited group of people – as opposed to being made known to the public at large – it can be argued that the context of making a political statement regarding a public political figure is a markedly different context and is thus distinguishable. The expression in *Le Roux v Dey* served no apparent purpose, and was labelled as a 'schoolboy joke' and dismissed as such, whereas a political statement about a public figure does serve a purpose and should be deserving of protection, even where the statements or message contained in the artistic work, for example, may be vexatious or embarrassing to the politician implicated (as in the *Tshabalala-Msimang* case). The purpose of a political statement, as mentioned previously, is to catalyse political discourse and debate, which is essential in any modern democracy.

[60] *Le Roux v Dey* 2011 (3) SA 274 (CC).

IV CASE STUDY: BRETT MURRAY'S '*THE SPEAR'*

(i) Background

The Spear was part of an art collection by Brett Murray, named 'Hail to the Thief II', and was exhibited at the Goodman Art Gallery in Johannesburg during May 2012 – as well as on the website of the gallery and the website of the City Press newspaper. The painting was taken to be a political message about disgruntlement and 'condemnation of the conduct and behaviour of the ANC, the ruling party in South Africa. The person portrayed in the painting [bears] a striking resemblance to President Jacob Zuma.'[61] The inspiration for the image is the Victor Ivanov[62] poster, '*Lenin Lived, Lenin is Alive, Lenin Will Live'*. This poster, produced by Ivanov in 1967, was used as propaganda. Murray's painting resembles the original artwork to a great degree, but differs in one respect – the root of the furore – as the President is painted with a flaccid penis hanging outside of his pants.

The ANC launched an action in the South Gauteng High Court for the removal of the image from the Gallery, claiming it infringed the President's right to dignity. However in the ANC's press release no reason for their regard of the painting as a violation of the president's dignity was given, except to say that the artwork was 'distasteful and vulgar'.[63] The painting was eventually removed from both websites and the gallery when it was sold to an international buyer and legal action was then withdrawn.

(ii) The supporter

Murray suggests that his reason for painting *The Spear* was not prompted by the 'intention to hurt, humiliate or insult',[64] rather, that it 'is a work of protest or resistance art, and it is a satirical piece.'[65] He argues that:

---

[61]Goodman Gallery v Film and Publication Board *In re: Appeal against classification of the painting known as The Spear and the electronic version of it,* Film and Publication Tribunal 8/2012 at para 1.
[62]Russian artist (1924-).
[63]Pierre de Vos 'On the President, his penis, and bizarre attempts to censor a work of art' at 3, available at *http://constitutionallyspeaking.co.za/on-the-president-his-penis-and-bizarre-attempts-to-censor-a-work-of-art/*, accessed 12 August 2013.
[64]Brett Murray 'Why I painted 'The Spear'', available at spear *http://www.zapiro.com/Sponsored-by/Brett-Murray-Why-I-painted-the-Spear/* at 1, accessed 12 August 2013.

> 'Satire is critical entertainment. While I might be attacking and ridiculing specific targets … I am actually … articulating my vision of an ideal world … What satire can do in a political context is that it can be seen as a political contestation as it opens political debate. The resulting debate that has surrounded this work is in itself evidence that this does happen and that artwork can provoke these debates, however unsettling they might be. There is therefore no reason for artists to be censored, however uncomfortable this might be for individuals and for society at large. For me, *The Spear* … is a metaphor for power, greed and patriarchy.'[66]

One of his supporters argues that 'given the protection for artistic freedom in the Constitution and the many exceptions in our law made for the expression of such artistic creativity, I am almost 100 percent certain that the ANC's proposed legal action will not be successful. In a democracy, courts seldom order the censoring of a work of art – even if that work of art makes fun of the President and his philandering patriarchal ways.'[67] The view held by Murray's supporters is encapsulated in the liberal approach to art taken by Emerson, Dworkin and Mill and has the characteristics and effects of art sought by the neo-Marxists. The very purpose of art is to provoke thought and create dialogue on issues plaguing society that are often not brought to the fore. The public outcry and extended interest in this painting is testament to that fact – as argued by Murray. Given the importance of the right to free expression as outlined by the liberal thinkers and its multi-level provision and protection, it would be unlikely that a claim to limit the right would succeed.

The history of the most recent Zuma/Zapiro fracas lends support to this argument – where claims by the President of infringement of his rights to dignity and reputation were brought against the alleged offender, Jonathan Shapiro ('Zapiro'), a political satirist. In 2008, the Presidency instituted action against Zapiro, *inter alia*, for a published cartoon created by Zapiro, depicting the President, Jacob Zuma, loosening his pants in readiness to rape the figure of 'Lady Justice', who is held down by his 'cohorts' (ANC Youth League then-leader, Julius Malema, *inter alia*).[68] This cartoon was seen to be defamatory by the Presidency as it conveyed the message that the President was 'in the process of abusing the justice system in a

---

[65] *Ibid*.
[66] Murray, note 64 above at 2.
[67] De Vos, note 63 above at 3.
[68] Glynnis Underhill and Verashni Pillay 'Zapiro cartoon: Zuma surrenders, drops lawsuit', available at *www.mg.co.za/article/2012-10-28-zuma-avoids-zapiro-court-showdown-over-cartoon*, accessed 12 August 2013.

vile and degrading [manner as in the context of rape]'.[69] In 2012, Zuma abandoned the R5 million damages case against Zapiro. Interestingly, the case went before the South African Human Rights Commission (SAHRC), which held that the cartoon 'did not constitute hate speech, unfair discrimination or a violation of any human right enshrined in the Constitution'.[70] Although the cartoon may have been offensive and in bad taste, it nevertheless displayed a 'level of free, open, robust and even unrestrained criticism of politicians by a journalist and had stimulated valuable political debate', the SAHRC found.[71]

In light of this decision by the SAHRC, the rulings of the Equality Court in the Malema case, the multiple Constitutional Court judgments regarding the right to free expression including, *inter alia*, *Laugh It Off Promotions CC*[72] and *South African National Defence Union*[73] – it is quite likely that a claim for defamation and/or infringement of dignity claim instituted in terms of PEPUDA or the Constitution, against Murray would be unsuccessful. *The Spear*, like the 'Lady Justice' cartoon, calls into question the private life of the President, his character and thus, his suitability for his office.[74] It should therefore, in the same vein as the SAHRC finding in the 'Lady Justice' cartoon, be an acceptable and protected form of free artistic expression.

(iii) The detractor

In an article, one of Murray's detractors, Mzukisi Makatse (a member of the African National Congress and African National Congress Youth League), levelled three criticisms at the artwork:

1. Art cannot exist independently, apart from social and economic factors, and abstract forms of art based on idealism are irrelevant;
2. Art arises from the realities of life and is formed through concrete investigation;

[69] *Ibid.*
[70] Underhill and Pillay, note 68 above.
[71] *Ibid.*
[72] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC).
[73] *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC).
[74] The President of the Republic of South Africa, Jacob Zuma, was acquitted of rape charges in 2006, which is the incident to which the 'Lady Justice' cartoon eludes, and, arguably, to which *The Spear* eludes. Underhill and Pillay, note 68 above.

3. Art is not devoid of the class, race, gender and political issues in the South African context.[75]

He further argues that the painting was informed by Murray's 'white economic oligarchy, resulting [in] the racist connotations being the logical consequence'[76] and further, that 'white people might be forgiven for not seeing what the fuss is all about. After all blacks have been subjected to such inhuman treatment for centuries and they should [get used to it and move on] as some have advised.'[77]

This understanding of art is biased and quite narrow – art is a form of education and often contains important and deeply-layered political messages, as is argued by the neo-Marxists. It is the expression not only of the world as it is, but as it should be, for if 'we are only permitted to view 'correct' or 'positive' works, then art's primary function is destroyed'[78]. Although artists should be mindful of the context of the country and the rights they may be infringing upon through the exercise of their rights – the dignity of politicians – they should not be hindered by these considerations to the point where there is no true freedom, and censorship reigns in an attempt to avoid 'hurt feelings'.

To call for the limitation of the content of an artist's work is to call for censorship of the art, and is contradictory to the very notion of free expression – which term itself denotes no limitation to the right. In the same vein as Mills, it can be argued that the exercise of the right must be borne only insofar as it does not cause harm to another. It is my argument that the right, in the context of political critiques, is borne to a greater extent and the harm caused to the politician be reached only at the top end of this higher threshold. As a nation, we need to begin the reformation process with intentionality; artists play a major role in this process and in society as a whole, and should not be suppressed when making political statements. It is apparent that they create a forum for public debate (*The Spear* is a prime example of this)[79] about

[75]Mzusiki Makatse 'Why The Spear Outraged Us' at 1, available at *http://www.amandla.org.za/special-features/the-spear-and-freedom-of-expression/1300-why-the-spear-outraged-us--by-mzukisi-makatse*, accessed 26 July 2013.
[76] *Ibid* at 2.
[77]Makatse, note 75 above.
[78]Steve Cox 'Censorship is stifling Australia's artistic freedom of expression', available at *http://www.the guardian.com/artanddesign/Australia-culture-blog/2013/jun/14/art-censorship-freedom-expression-australia*, accessed 10 September 2013.
[79]Bongani Kona 'Jacob Zuma Wants His 'Spear' Removed from Art Gallery UPDATE', available at *http:/www.okayafrica.com/stories/Jacob-zuma-wants-his-spear-removed-from-art-gallery/*, accessed 18 September 2013.

state issues and challenge the competency and fitness of those in power – essential requirements in any modern democracy.

V CONCLUSION

'To stifle creative expression is to bind and gag our very souls.'[80] This quote expresses the argument made in this article – if artists are to be eternally cautious of stepping on toes (should they produce a work which may engender political controversy and be sued for it), this may lead to the stifling of their opinions, which may, in turn, lead to the stifling of political debate in general. The argument is made that there should be greater tolerance of political expression and critique made through art relating to politicians and political parties, organs of state and public servants. There should not be a blanket amnesty, but this type of criticism should be borne with a greater amount of tolerance – given their importance.

The right to dignity of the politician is still vitally important, but this should be balanced against the two-fold rights of: (1) the artist to freely express himself (with limitations on this conduct) and the link of this to the artist's right to dignity in being able to give his/her opinion; and (2) the people of the country to receive these imparted ideas and form opinions. What the second point entails is that the right to dignity will be affirmed when people have the power to challenge those in power; to exercise their watch-dog powers of ensuring accountability; and to recognise their critical mass and begin to question authorities and structures.

'The Spear: Art, Race, Dignity – A Public Debate', available at *http:/www.wits.ac.za/newsroom/eventitems/201206/16398/event_item_16398.html*, accessed 18 September 2013.
Robyn Dixon 'South African gallery closes after controversial work is defaced', available at *http:/www.latimesblog.latimes.com/world_now/2012/05/south-african-gallery-closes-vandalism-of-controversial-work.html*, accessed 18 September 2013.
[80]Curtis Verdun, artist (1962 -).

CIVILIANS AT WAR: ASSESSING THE DICHOTOMY IN THE LEGAL STATUS OF VOLUNTARY HUMAN SHIELDS

Moreblessing Z. Bhero

Final Year LL.B Student, University of KwaZulu-Natal, Howard College

I INTRODUCTION

The issue of human shields (particularly voluntary human shields) in International Humanitarian Law (IHL) is discussed, with the hope of stimulating debate and discussion onthis matter. This perennially contentious issue is evidenced by the increase in the use of voluntary human shields (VHS)and the lack of a definite legal status for them in IHL. The discussion reviewsthe different types of human shields in international law and thereafterother categories of persons in IHL and their various obligations, as well as the protections afforded to them in relation to VHS. It will be argued that the most suitable category or status for VHS at present is that of a civilian. The legal consequences of attacking this group and the various principles to be taken into account when attacking areas where such individualsare present, will also be discussed. Furthermore, the possibility of VHS forfeiting civilian status and protections when civiliansdirectly participate in hostilities – such as shielding military camps or objects – will be critically deliberated.

The term human shields relates to the presence of non-combatants, which result in the protection of certain objects or areas from attack.The use of human

shields isprevalent in countries such as Sierra Leone[81], Somalia[82], Iraq[83], and Serbia[84].The rationale behind using human shields is that 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and directmilitary advantage anticipated' is a violation of Art. 51(5) (b) of the Additional Protocol I (AP-I) to the Geneva Conventions (GC).

The prohibition on the use of human shields is now regarded as customary international law. This prohibition is echoed in Art. 51(7) of (AP-I), which states that:

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

It is important to note that there are different categories of human shields and Art. 51(7) clearly relates to human shields that have been directed to act as human shields by the parties to the conflict in question. However, as previously mentioned, there are persons who act as human shields without any coercion – VHS.Accordingly, it is crucial to distinguish between these different groups before the status of VHS can be discussed in greater detail.

II THE CATEGORIES OF HUMAN SHIELDS

[81]Rule 97onCustomary International Humanitarian Law (compiled by theICRC) 'The use of Human Shields', online athttp://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule97 accessed on 28 September 2012.
[82]*Ibid* 1.
[83]Daniel P Schoenekase, 'Targeting Decisions regarding Human Shields' (2004) 84(5) *Military Review* 26, 26-7.
[84]Douglas H Fischer, 'Human Shields, Homicides and House Fires: How a Domestic Law Analogy Can Guide International Law regarding Human Shield Tactics in Armed Conflict' (2007) 57 *American University Law Review* 479.

Human shields can be divided into three categories. In consideration of the different political and possibly legal ramifications of attacking targets where these human shields are present, it is important to differentiate the types of human shields employed:

a) *Proximity human shield*

These human shields are usually not coerced or voluntary but rather the combatants bring the potential object of attack closer to the areas where such human shields may be. Therefore, by virtue of their close proximity to a military objective, they present the likelihood for collateral damage – which military planners would have to consider when striking the target[85].

b) *Involuntary human shields or hostages*

Art. 57 (1) of the AP-Iprohibits the use of the civilian population or individual civilians to render certain points or areas immune from military operations, in particularattempts to shield military objectives from attacks or to shield, favour or impede military operations. It further prohibits the parties to the conflict from directing the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.This group of human shields is usually coerced into shielding a legitimate military objective, in violation of Art. 57. An example is when the members of the Revolutionary United Front – during the Sierra Leone civil war[86] – abducted children and used them as human shields against government forces. Saddam Hussein also used involuntary human shields during the Operation Desert Storm in Iraq[87]when invading Kuwait. Foreign nationals were taken hostage and strategically placed so as to prevent attacks on Iraq military objects. These acts were unquestionably a violation of IHL.

c) *Voluntary human shields (VHS)*

[85]Schoenekaseop cit note 26.
[86]Schoenekse op cit note 1at 27.
[87]'Putting Noncombatants at Risk: Saddam's Use of Human Shields',on-line at https://www.cia.gov/library/reports/general-reports-1/iraq_human_shields/iraq_human_shields.pdfaccessed on 1 September 2013.

Persons in this group voluntarily position themselves in such a manner that they protect or consequently shield a potential military objective.[88]Much debate revolves around the legal status of this group as it has been argued that they have formed a quasi-combatant status through their participation in hostilities. The Human Rights Watch has said that this category;

> 'Like workers in munitions factories, civilians acting as human shields, whether voluntaryor not, contribute indirectly to the war capability of the state. Their actions do not pose a direct risk to opposing forces. Because they are not directly engaged in hostilities against an adversary, they retain their civilian immunity from attack. They may not be targeted,although a military objective protected by human shields remains open to attack, subject to the attacking party's obligations under IHL to weigh the potential harm to civilians against the direct and concrete military advantage of any given attack and to refrain from attack if civilian harm would appear excessive.'[89]

However, some scholars and legal experts have argued that VHS forfeit their immunity when they engage in hostilities and have stated that:

> '…[Human shields] who voluntarily take up positions at the site of legitimate military objectives, does not constitute civilian collateral damage, because those voluntary human shields have assumed the risk of combat and, to that extent, have compromised their noncombatant immunity.'[90]

It is clear from these conflicting views that there is a lacuna in international law in this regard, and thus the status of VHS is one that needs to be ascertained with greater urgency.

III THE POSSIBLE STATUS OF VHS

[88]Schoenekase op cit note 1 at 26.
[89]Human Rights Watch, Backgrounder, 'International Humanitarian Law Issues in a Potential War in Iraq,'online at www.hrw.org/backgrounder/arms/iraq0202003.html,accessed on 05 April 2012.
[90]Crimes of War Project, 'In America's Sights: Targeting Decisions in a War With Iraq,' online atwww.crimesofwar.org/print/onnews/iraq-print.html,accessed on 05 April 2012.

Art. 50 (1) of the AP-Iprovides that in the event that a person does not fit into any of the other categories provided for by the Protocol, or in the case of doubt as to a person's status, then such person will be considered to be a civilian. Art. 45(1) also states that a protected status (prisoners of war) is to be granted to any persons to whom such status is in dispute, until the status is determined by a competent tribunal.

As already stated, VHSdo not fit clearly into any of the categories of protected persons and this is a matter of concern as it is the status of persons 'which informs the protections afforded under international law'.[91] It is crucial at this point to look at the different categories of persons in international law, their protections (or not),and then address them in relation to VHS.

a) Combatants

Combatants are required to be members of a State's armed forces. Art. 43 of the AP-1 require that such armed forces be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict. Therefore, to acquire combatant status, one would have to satisfy the requirements for combatant status set out in the 1907 Hague Regulations,the Geneva Conventions and the AP-1. [92] These requirements are:wearing a distinctive sign that is recognisable from a distance, that such persons have a Commander, conduct their operations in accordance with the laws and customs of war, and carry their arms openly during and in preparation for an attack.[93]

It is clear that VHS have little in common with combatants as they neither carry arms openly nor distinguish themselves from the civilian population by use of a distinctive sign or uniform. Neither can the VHS qualify for the status of *levee en masse* as they have not 'spontaneously taken arms against invading troops; without having had time to form themselves into armed units', as required by Art.4A of the GC III. Despite all these differences, 'In one important respect, however, VHS do share something in common with

[91]S. Bosch, 'Voluntary human shields: status-less in the cross hairs?'2007 *Comp. & Int'l L.J. S. Afr* 322 at 324.
[92]*Ibid* 326.
[93]*Ibid* 327.

regular combatants: they find themselves in the crosshairs of military hostilities',[94]and hence the need to establish their primary status and immunities under international law.

b) Non-combatants

These are members of the armed forces that are denied use of weapons and are precluded from being awarded civilian status. Therefore, non-combatants are not protected by a prohibition on attack.[95] This group comprises persons such as legal services, and medical and religious personnel.

Persons in this group have the right to defend themselves in the event of an attack and contribute to the achievement of military advantage and are military objectives open to attack with no need to make special considerations or collateral damage calculations by the attacking party.[96] However, this excludes medical and religious personnel who are afforded protection in the GC I, and can never form part of military objective as other non-combatants.

In accordance with the definition of non-combatants, VHS do not qualify under this group as they are not members of an armed force,anddo not fall within the special protections afforded to the medical and religious personnel.

c) Civilians

In the event of doubt as to a person's status, such a person will be presumed to be a civilian.[97]A civilian, according to Art. 50 of the AP I, is anyone who does not fit into any of the other categories provided for by the Protocol. Civilians are not authorised to directly participate in hostilities and enjoy protected status. Exactly when the actions of civilians amount to direct participation in hostilities has not, however, been decided. In the case of *Tadic*,[98] the court found it unnecessary to decide on this matter and said that such a decision would depend on the facts of each case.

[94]*Ibid* 329.
[95]*Ibid* 329.
[96]*Ibid* 330.
[97]AP-1 art 50(1).
[98]*Prosecutor v DuskoTadicCase* ICTY IT-94-1,Opinion and Judgment 7 May 1991.

However, the Israeli court, although not binding internationally,stated in *PCATI*[99] in relation to human shields that:

> 'Certainly, if they 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. They themselves are victims of terrorism. However, if they do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities.'

This court was also well paraphrased by Ben-Naftali and Michaeli as follows:

> 'A civilian takes a 'direct part' in hostilities when he is physically engaged in [the hostilities]or when he plans, decides on, and sends others to be thus engaged. At one end ofthe spectrum, a civilian bearing arms who is on his way to (or from) the placewhere he will use (or had used) them, clearly is taking a direct part in hostilities.At the other end are cases of indirect support, including selling of supplies andfinancing hostile acts. In between are the hard cases, where the function that thecivilian performs determines how direct a part he takes in the hostilities; in thismiddle area, collecting intelligence, servicing weapons, and functioning as a'human shield' are direct acts of participation.'[100]

In determining whether there has been direct participation in hostilities, Schmitt has proposed that the subjective intention of the persons involved should be taken into account. Along with this, he uses the 'but for' test to establish whether the causal proximity of the foreseeable consequences of the act amount to 'direct participation' in hostilities. He simply states that:

---

[99]*PCATI* (2006) HCJ 769/02, [36] (Israel), http://elyon I .court.gov.il/eng/home/index.htmlaccessed online on 24 August 2013.

[100]Oma Ben-Naftali and KerenMichaeli, 'International Decisions: Legality of Preventive Targeted Killings - International Armed Conflict' (2007) 101 *American Journal of International Law* 459, 460, discussing PCA T1.

> ‘It is not necessary that the individual foresaw the eventual result of the operation, but only that he or she knew his or her participation was indispensable to a discrete hostile act or series of related acts.’[101]

As much as this may appear to be a viable manner of establishing the element of ‘direct participation’, it must be noted that this method also poses questions and may not derive an accurate and just answer in all cases. It is submitted that the intention of VHS is usually to express their strong views against the war and therefore the intention is to protest against the war rather than to bear arms against the attacker. Further, it would be incredibly difficult and possibly time-consuming for commanders faced with a decision on the appropriate course of action to taketo begin trying to ascertain the subjective intentions of the VHS. The possibility of making objective and operable rules for the armed forces would also be significantly limited if subjective intention were to be a factor that needed to be taken into consideration.Perhaps it is this difficulty that deterred the court to pronounce on this matter in*Tadic.*[102]

The International Committee of the Red Cross (ICRC)has also made recommendations on the possible interpretation of the term ‘direct participation’. Although their recommendations have been widely criticized and are not binding, it is certainly beneficialtodiscuss them. What is perhaps most relevant is their recommended criteria for ‘direct participation’ set out in their report on‘Guidance on Direct Participation in Hostilities’.[103] It is suggested in the document that the following criteria be met before an act can be considered direct participation:

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

[101]Michael N. Schmitt, ‘Humanitarian Law and Direct Participation in Hostilities by Private Contractors and Civilian Employees’ (2004) 5 *Columbia Journal of International Law*533.
[102]*Prosecutor v DuskoTadicCase*(note 18 above).
[103]“Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.”Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009.

3. The 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 another.[104]

This is arguably the most detailed test that has been proposed at an international scale for the element of direct participation. The document goes further to discuss each element, so as to give more clarity as to how each of these requirements may be fulfilled.The first two requirements appear to be clear; however with the third requirement, a question that is likely to arise is 'what is the required threshold and how is it determined?' According to the guidelines, for a specific act to reach the threshold of harm required to qualify as direct participation in hostilities, it must be likely to adversely affect the military operations or military capacity of a party to an armed conflict. In the absence of military harm, the threshold can also be reached where an act is likely to inflict death, injury or destruction on persons or objects protected against direct attack.[105] Furthermore, all three requirements must be met before an act is classified as direct participation. However, whether any of the above suggested tests will be applied still remains to be seen.

The legal presumption provided for in Art. 50(1) of AP I, is arguably wide enough so as to also clothe VHS as civilians. The fact that VHS cannot be categorised as members of armed forces or do not fit into any other category within IHL further supports this presumption. In accordance with this, it can be argued that VHS could claim all the protections afforded to civilians. It is exactly because of the protected status that civilians hold, that VHS are so effective – because an attack on them could possibly be a breach of the AP-1. However,it is submitted that VHS can forfeit their civilian protections by participating directly in hostilities, as has previously been discussed. Although VHS play a passive defensive role in hostilities, their presence affects the decisions that may be taken by opposition forces. In some of the instances it is also the direct intention of such persons to resist attacks by the opposition forces and partake in the hostilities.

Accordingly, at present, taking into consideration Art. 50 (1), it seemsmost appropriate to afford the VHS the status of a civilian and the protections thereof. It is noted that this is not entirely fitting as they use their status to help armed forces gain military advantage, and do so with full knowledge of the unlawfulness of their conduct. This disadvantages the opposition forces and may compromise the element of 'fairness'in war, as the attacking parties may fear the legal consequences of attacking military objects or personnel shielded by VHS.

[104] *Ibid* 1016.
[105] *Ibid* 1019.

IV LEGAL CONSEQUENCES OF AN ATTACK ON VHS

The proposed status of VHS means that war planners need to take into account any possible losses of life when attacking an object shielded by VHS. The harm to a VHS 'might only be condoned where a concrete and direct military advantage would resultfrom an attack, and where the harm caused to the VHS is an unavoidable and proportionate side effect of a lawful attack upon a military objective'.[106] Hence, commanders need to apply some principles before any decision on attack in such areas is made. These three principles are:

a) Principle of proportionality

Art. 51(5) (b) of the AP-I requires that anticipated loss of life and damage to property not be excessive in relation to the concrete and direct military advantage to be gained. This means that when collateral damage is unavoidable or expected then there is a need to ensure that such damage is proportionate to the advantage to be gained. For example, the opposition forces cannot bomb a city hall with over 1000 VHS so as to kill one soldier, as the loss of life and damage to property would not be proportionate to the advantage of killing one soldier.

b) Principle of discrimination

This principle is codified in Art.51 (4-5) and Art.57 (2) (a) (i) of the AP-I, which prohibits any indiscriminate attacks. This principle has been further defined as:

> '…A general principle of the law of armed conflict that requires an attacker to distinguish between civilians and civilian objects on the one hand and military

[106]Boschopcit note 11 at 334.

objectives (combatants or objects) on the other hand and to use weapons capable of discrimination between them.'[107]

Therefore, civilians must not be objects of an attack and must be protected from attacks. Militia must therefore distinguish between military objects and combatants and civilian objects and civilians.Attacks must be directed at specific military objectives and cannot 'employ a method or means of combat which cannot be directed at a specific military objective'. [108] If a commander ordered carpet bombing, for example, he would not be exercising this principle and would be in breach of AP I if there was any loss of civilian life (VHS included).

c) Principle of military necessity

Any attacks should be limited to legitimate military objects and must be justified by military necessity.[109] Art. 52 (2) of the AP I 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, 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.'

Art. 8(2) (b)(IV) of the Roman Statute also criminalises attacks on civilian objects.

In light of the above principles, it is clear that an attack on civilians during a war would amount to a grave breach of various provisions in international treaties – which have become customary international law. This could render the responsible persons guilty of war crimes. It is submitted that the responsibility of protecting the VHS not only lies with the attackers, but also thosewhoare under attack. Those being

[107]Michael N. Schmitt, 'Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict'(2008) 19 MICH.J. INT'L L. 1051, 1075.
[108]Schoenekase (note 1 above) 29.
[109]*Ibid* 29.

attacked should not allow VHS to approach possibly targeted military personnel or objects. Accordingly, such persons or authorities should take the reasonable and necessary steps to prevent the presence of, or an attack on, VHS. Failure to do this should render these authorities also criminally liable underinternational law.

V CONCLUSION

It is concluded that VHS who position themselves nearpurely military objects(e.g. barracks)unlawfully participate in hostilities and could potentially undermine their protected status. The issue in question is whether their participation amounts to‘direct participation’, which would result in the forfeiture of their civilian protection. If so, they could be held responsible for their unauthorised actions. Although the conduct in itself is mostly passive participation, this does not exclude the element of directness. This is because the mere passive act of sitting or standing around and protecting a purely military objective could easily – if not always – amount to some resistance to an attack by the opposition, which then directly serves the purpose of making the opposition reconsider its strategies. This could possibly weaken their position in the circumstances.

However, this is not purely a matter of law, as there are also political, social and moral implications to be considered. The gruesome picture of hundreds of unarmed people who are passively resisting an attack (even on a military object or personnel) lying deadinvokes strong emotions of aversion or repulsion, and a sense of injustice. It would also appear to defeat the very purpose of international humanitarian law which, as stated earlier, is inspired by the considerations of humanity and mitigation of human suffering– as well as balancing these with military necessity. In this very spirit it is difficult to establish a definite position that would be beneficial to all parties. TheICRC, in their review on the status of VHS,stated that:

> ‘It is difficult to see what other measures, apart from: (a) loss of immunity from attack, (b) internment if warranted by security reasons, (c) possible forfeiture of certain rights and privileges during internment and (d) criminal charges, could be applied to persons who have directly participated in hostilities without exposing them to the risk of serious violations of their right to life, physical integrity and

personal dignity under [international humanitarian law], such as attempts to relax the absolute prohibition of torture, and cruel and inhuman treatment.'[110]

Although some courts have pronounced opinions on the meaning of direct participation and various suggestions have been advanced, the position remains as posed in *Tadic's*[111] case– where the court stated that such a decision on whether a certain act amounted to direct participation would be based on the merits of each case.

The issue seems to be uncontroversial when it comes to VHS who position themselves at purely civilian sites. This is because VHS on these sites do not constitute a legitimate military target, and will retain their essentially civilian status as they do not participate directly in hostilities. A similar presumption seems to apply in the case of civilians who position themselves at sites used for dual purposes. Art. 52 of AP I requires that where an object is normally used for civilian use, and may be used to make an effective contribution to military action, that object is presumed not to be used as a site of military action. Therefore, the siteremains as a civilian object and the VHS in this location would retain their civilian status.

Despite this debate, militia are still required to take into account theabove principles when calculating the collateral damage likely to result from an attack on shielded objects, until a competent tribunal has decided upon the definite status of VHS in IHL.Accordingly, it is submitted that attacks on VHS are unlawful due to the legal presumption of a civilian status which clothes them. Therefore, while we await the pronunciation of their precise legal status and any protections afforded thereby, any attack on them would be unlawful unless it would be proportionate and necessary to achieve a concrete military advantage, or the harm caused to the VHS was an unavoidable and proportionate side effect of a lawful attack upon a military objective.

[110]ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2007) 867 International Review of the Red Cross 719, 728.
[111]*Prosecutor v DuskoTadic Case* (note 18 above).