

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

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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 on this 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 reviews the different types of human shields in international law and thereafter other 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 individuals are present, will also be discussed. Furthermore, the possibility of VHS forfeiting civilian status and protections when civilians directly 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 is prevalent in countries such as Sierra Leone¹, Somalia², Iraq³, and Serbia⁴. 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 direct

¹Rule 97 on Customary International Humanitarian Law (compiled by the ICRC) ‘The use of Human Shields’, online at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule97 accessed on 28 September 2012.

²*Ibid* 1.

³Daniel P Schoenekase, ‘Targeting Decisions regarding Human Shields’ (2004) 84(5) *Military Review* 26, 26-7.

⁴Douglas 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.

military 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

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:

(i) *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 target⁵.

(ii) *Involuntary human shields or hostages*

Art. 57 (1) of the AP-I prohibits the use of the civilian population or individual civilians to render certain points or areas immune from military operations, in particular attempts 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 war⁶ – abducted children and used them as human shields against government forces. Saddam Hussein also used involuntary human shields during the Operation Desert Storm in Iraq⁷ 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.

(iii) *Voluntary human shields (VHS)*

Persons in this group voluntarily position themselves in such a manner that they protect or consequently shield a potential military objective.⁸ 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:

⁵Schoenekaseop cit note 26.

⁶Schoenekse op cit note 1 at 27.

⁷'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.pdf accessed on 1 September 2013.

⁸Schoenekase op cit note 1 at 26.

‘Like workers in munitions factories, civilians acting as human shields, whether voluntary or 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.’⁹

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.’¹⁰

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

Art. 50 (1) of the AP-I provides 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.

⁹Human 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.

¹⁰Crimes of War Project, ‘In America’s Sights: Targeting Decisions in a War With Iraq,’ online at www.crimesofwar.org/print/onnews/iraq-print.html, accessed on 05 April 2012.

As already stated, VHS do 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'.¹¹ 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.

(i) *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-1.¹² 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.¹³

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 regular combatants: they find themselves in the crosshairs of military hostilities'¹⁴ and hence the need to establish their primary status and immunities under international law.

¹¹S. Bosch, 'Voluntary human shields: status-less in the cross hairs?' 2007 *Comp. & Int'l L.J. S. Afr* 322 at 324.

¹²*Ibid* 326.

¹³*Ibid* 327.

¹⁴*Ibid* 329.

(ii) *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.¹⁵ 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.¹⁶ 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, and do not fall within the special protections afforded to the medical and religious personnel.

(iii) *Civilians*

In the event of doubt as to a person's status, such a person will be presumed to be a civilian.¹⁷ 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*,¹⁸ the court found it unnecessary to decide on this matter and said that such a decision would depend on the facts of each case.

However, the Israeli court, although not binding internationally, stated in *PCATI*¹⁹ in relation to human shields that:

¹⁵ *Ibid* 329.

¹⁶ *Ibid* 330.

¹⁷ AP-1 art 50(1).

¹⁸ *Prosecutor v Dusko Tadic Case ICTY IT-94-1, Opinion and Judgment 7 May 1991.*

¹⁹ *PCATI* (2006) HCJ 769/02, [36] (Israel), <http://elyon.l.court.gov.il/eng/home/index.html> accessed online on 24 August 2013.

‘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 of the spectrum, a civilian bearing arms who is on his way to (or from) the place where 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 and financing hostile acts. In between are the hard cases, where the function that the civilian performs determines how direct a part he takes in the hostilities; in this middle area, collecting intelligence, servicing weapons, and functioning as a ‘human shield’ are direct acts of participation.’²⁰

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:

‘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.’²¹

²⁰Oma Ben-Naftali and Keren Michaeli, ‘International Decisions: Legality of Preventive Targeted Killings - International Armed Conflict’ (2007) 101 *American Journal of International Law* 459, 460, discussing PCA T1.

²¹Michael N. Schmitt, ‘Humanitarian Law and Direct Participation in Hostilities by Private Contractors and Civilian Employees’ (2004) 5 *Columbia Journal of International Law* 533.

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 take to 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*.²²

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 beneficial to discuss 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'.²³ 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;
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.²⁴

²²*Prosecutor v Dusko Tadic Case*(note 18 above).

²³"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.

²⁴*Ibid* 1016.

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.²⁵ 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, taking into consideration Art. 50 (1), it seems most 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

²⁵ *Ibid* 1019.

attacking parties may fear the legal consequences of attacking military objects or personnel shielded by VHS.

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 result from 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'.²⁶ Hence, commanders need to apply some principles before any decision on attack in such areas is made. These three principles are:

(i) *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.

(ii) *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

²⁶Bosch op cit note 11 at 334.

objectives (combatants or objects) on the other hand and to use weapons capable of discrimination between them.²⁷

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'.²⁸ 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).

(iii) *Principle of military necessity*

Any attacks should be limited to legitimate military objects and must be justified by military necessity.²⁹ 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 those who are under attack. Those being attacked should not allow VHS to approach possibly targeted military personnel or objects.

²⁷Michael 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.

²⁸Schoenekase (note 1 above) 29.

²⁹*Ibid* 29.

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 under international law.

V CONCLUSION

It is concluded that VHS who position themselves near purely 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 dead invokes 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. The ICRC, 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.³⁰

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*³¹ 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 site remains 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 the above 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 pronouncement 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.

³⁰ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2007) 867 *International Review of the Red Cross* 719, 728.

³¹*Prosecutor v Dusko Tadic Case* (note 18 above).