

LAW OF ARMED CONFLICT AND THE NOTION OF VOLUNTARY HUMAN SHIELDS: ANY WAY OUT OF THE QUAGMIRE?

Hagler Okorie*

Abstract

The growing prevalence of voluntary human shields in recent armed conflicts have exposed a significant lacuna in the existing international humanitarian law legal regime, and this requires urgent regulation as a result of the conducts and consequences of contemporary armed conflicts. This work explores some of the challenges that any attempt at regulation must address including assessing voluntariness and issues of capacity, limitations against direct participation in hostilities, the prohibition against shielding legitimate military targets, state responsibility, uniformity and concordance with existing international humanitarian law, and limiting targeting decisions motivated by reciprocity. The paper adopts the doctrinal research method of data collection using analytical approach in reviewing the relevant laws, statutes, textbooks and judicial decisions relative to the subject. The work concludes with a proposal for the nature, form and contents of future regulation in issues relating to voluntary human shields for the purposes of an effective respect and compliance with the rules and principles of the laws of armed conflict, otherwise referred to as "international humanitarian law (IHL)".

Keywords: armed conflict, legitimate military targets, direct participation in hostilities, military objectives and voluntary human shields.

Introduction

International humanitarian law (IHL) has for some time prohibited¹ the use of involuntary human shields² and the misuse of the civilian population as proximity shields³ near to legitimate military objectives. The basis for this prohibition is the reality that any civilian presence in the theatre of armed conflict affects the targeting decisions taken by the attacking commanders and consequently can affect the outcome of the hostilities. However, the emergence and growing prevalence of voluntary human shields (VHS) in recent asymmetric armed conflicts has exposed a significant lacuna in the existing IHL regime.

In November 1997, CNN reported that 'thousands of Iraqis (mostly women and children) were volunteering to act as human shields throughout the country',⁴ in and around industrial complexes and factories, as well as around the presidential palace of Saddam Hussein-

* Okorie, H. Ph.D, FICMC, FC Arb, Notary Public & Justice of the Peace is an Associate Professor of Law at the Faculty of Law, Imo State University, Owerri.

¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (hereafter AP I) art 51(7).

² Where protected persons are forced to maintain a presence near a potential target through coercive means, effectively shielding the target, and forcing the attacking commander to consider the possible collateral damage (Ezzo & Guiora 'A Critical Decision Point on the Battlefield - Friend, Foe, or Innocent Bystander', *University of Utah Legal Studies Paper No. 08-03 at 12*).

³ Where 'a belligerent force has chosen to co-mingle with the civilian population in an effort to gain protective cover provided by a surrounding civilian population' (ibid at 12). In such instances, the belligerent falls foul of the directive contained in I art 58(a) 'to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives'.

⁴ 'Iraqis volunteering as human shields' CNN World News Special (14 November 1997), available at <<http://edition.cnn.com/WORLD/9711/14/iraq.al.sahhat.presser/>> (accessed on 10 August 2024).

'vowing to put their lives on the line to prevent an attack'.⁵ 'Popular committees' were being proliferated with the purpose of deploying further VHS.⁶ In April 1999, during NATO's Kosovo campaign, thousands of Serbians (including Serbian politicians) stood in chain-like formations on Brankov Bridge and near the town of Novi Sad, to prevent the locations from being targeted and destroyed by the NATO Allied Forces.⁷ In March 2011, it was reported that thousands of Libyans, including women with babies⁸ and children,⁹ had made their way to Muammar Gaddafi's 'fortified' Bab Al-Aziziyah compound,¹⁰ to shield their leader from possible airstrike by Allied Forces. This turned out to be an effective strategy, as it led to the Allied Forces abandoning an attack 'after spotting civilians in the vicinity'.¹¹ In 2014, several foreign nationals from the United States, the United Kingdom, New Zealand, Australia, Spain, Sweden and Venezuela occupied the Al Shifa Hospital, in an attempt to ward off Israeli air strikes after several hospitals had been severely damaged and rendered unusable.¹² These activists confirmed 'there were no weapons or Hamas members in the hospital',¹³ and they stayed in the hospital and 'constantly moved between wards and departments to provide maximum protection'¹⁴ on a shift basis.

The use of a VHS is not a novel practice, and is unlikely to fall into disuse as a feature of asymmetric warfare.¹⁵ In this work, we explore why there is an urgent need for the regulation of VHSs. We discuss briefly some of the challenges that any attempt at regulation will have to address: assessing voluntariness and issues of capacity, limitations against direct participation in hostilities, prohibition against shielding legitimate military targets, state responsibility, uniformity and concordance with existing IHL, and limiting targeting decisions motivated by reciprocity. We conclude with a proposal for the form and content of future regulation.

⁵ 'Saddam thanks human shields; announces a day of victory' BBC World News (20 November 1997), available at <<http://newsbbc.co.uk/2/hi/world/monitoring/33345.stm>> (accessed on 10 August 2024).

⁶ CNN *op cit* note 4.

⁷ 'Human chains guard NATO targets' BBC News (9 April 1999), available at <<http://news.bbc.co.uk/2/hi/europe/314953.stm>> S de Belle 'Chained to cannons or wearing targets on their T-shirts: Human in (accessed on 20 April 2015), international humanitarian law' (2008) 90:872 International Review of the Red Cross 883-884, 15 years on: Looking back at rt.com/news/yugoslavia-kosovo-nato-bombing-705/ NATO's "humanitarian" available at <<https://www.rt.com/news/yugoslavia-kosovo-nato-bombing-705/>> (accessed on 10 August 2024).

⁸ Thousands of Libyans packed into Muammar Gaddafi's heavily fortified Tripoli 2016). compound on Saturday Bulletin 2 human shield against possible air strikes by available at <<http://worldbulletin.net/servisler/haberYazdir/71350/haber>> (accessed on 10 August 2024).

⁹ Libya: Gaddafi's "voluntary" human shields in good voice' The Telegraph March <http://www.telegraph.co.uk/news/africaandindianocean/libya/8396464/Libya-Gaddafis-voluntary-human-shields-in-good-voice.html> (accessed on 10 August 2024).

¹⁰ World Bulletin *op cit* note 8.

¹¹ The Telegraph *op cit*. note 9.

¹² 'American among <<http://www.mcclatchydc.com/2014/07/13/233190/-among-volunteer-human-shields-at-gaza-hospital.html>> (accessed on 10 August, 2024), available at 13 August 2016); 'Netanyahu targets Hospital from International volunteers attacks Glee <<http://www.globalresearch.ca/13-shields-to-protect-shifa-hospital-for-research-news>> (25 July 2014), available at [netanyahu-targets-gaza-hospitals-international-volunteer-as-human-shields-2015](http://www.globalresearch.ca/13-shields-to-protect-shifa-hospital-for-research-news)).

¹³ McClatchy DC *op cit*. note 12.

¹⁴ Global Research News *op cit*. note 12.

¹⁵ Asymmetric warfare encompasses "unorthodox, indirect, surprising, [unlawful] or even 'unthinkable' methods" of challenging the military dominance of other nations' (Ezzo *op cit* note 2 at 20-21, who cites Lambakis *op cit* note 2).

The Urgent Need for the Regulation of Voluntary Human Shields under International Humanitarian Law

Voluntary human shields are not expressly or indirectly prohibited under existing IHL. That is not to say that there are not certain presumptions which apply to them under existing IHL applicable in international armed conflicts. They are, for example, classed as civilians by default, since they do not fulfill the definitional requirement of a combatant.¹⁶ As a consequence of their default civilian status, they are prohibited from participating directly in hostilities. However, VHS freely and intentionally locate themselves in the vicinity of the hostilities, fully aware of the effect that their presence might have on the targeting decisions of the belligerent parties. Some laud VHSs for taking a stand to ensure that belligerents limit the 'brutality of warfare'¹⁷- forcing belligerents to practise "virtuous" warfare even in the most asymmetrical of conflicts, and particularly when the adversary provokes "inhumane" behaviour'.¹⁸ The reality is that:

Even though human shields call upon the realization of principles of international humanitarian law in the regulation of armed conflict, they also enter into a peculiar relationship with the law, one that legitimates their actions, on the one hand, and becomes an object of critique, on the other.¹⁹

Leaving the legal position of VHSs in armed conflicts solely up to their default classification as civilians does not address several complications which their mere presence brings to the theatre of hostilities:

Firstly, their very classification as civilians, together with the attendant immunity from direct attack, is what VHSs exploit in order to immunize a target from enemy attack. Their presence provides a significant operational advantage for the shielded party and is prone to abuse. The uncertainty which surrounds how one responds to an attack launched from the vicinity of VHSs, places the attacking force in a morally challenging situation-making adversary to retaliate without violating the norms of IHL. This state of affairs is then exploited by the shielded party.

Secondly, the current IHL framework is ambiguous on the rights and duties of VHSs, and the duties of belligerent parties where VHSs are present. This ambiguity makes the use of VHSs an attractive strategy through which a party can preserve its military objectives. The obligation upon a belligerent 'to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives' in terms of Article 58 of Additional Protocol I (AP I),²⁰ is not absolute, and it is doubtful whether the states being shielded can be said to have 'control' over the VHS given their deliberate refusal to leave the combat zone. Accordingly, a violation of AP I Article 58 is not viewed with the same severity as a violation of Article 51(7) of AP I (the prohibition against involuntary human shielding). Considering the significant operational advantage that VHSs can provide by complicating targeting decisions and influencing the outcome of the hostilities, it is likely that combatants will run the risk of violating Article 58 of AP I in order to enjoy the operational advantage

¹⁶ S Bosch, 'Voluntary human shields: Status-less in the crosshairs?', (2007) *Comparative and International Law Journal of Southern Africa*, 40:3, 322-349; S Bosch, 'Targeting decisions involving voluntary human shields in international armed conflicts: In light of the prohibition against civilian direct participation in hostilities', (2007) *Comparative International Law Journal of Southern Africa* 447-473.

¹⁷ B Bargu, 'Human Shields', (2013) *Contemporary Political Theory*, 6-7.

¹⁸ *Ibid.* Citing CJ Dunlap 'A virtuous warrior in a savage world', (1997-1998) *United States Air Force Academy Journal of Legal Studies*, 8.

¹⁹ *Ibid* at 7.

²⁰ AP I art 58(a).

provided by VHSs. Without a more expressed directive in the IHL regulatory framework, there is little motivation for belligerents to cease their misuse of VHSs.

Thirdly, many of the IHL principles such as proportionality in attack and assessments of military necessity were conceptualized in an era when VHSs were not a pressing consideration. The International Committee of the Red Cross (ICRC) has itself noted that it is 'unlikely that the human shielding norm was originally devised to cover an event where individuals acted knowingly and on their own initiative'.²¹ The express and voluntary conduct of VHSs situating themselves near the conflict raises questions of whether the principles of proportionality should apply in instances where VHSs are incidentally harmed during strikes on legitimate military objectives. The failure of IHL to officially regulate the actions of VHSs makes it extremely difficult for commanding officers to make proportionality assessments when VHSs are near legitimate military targets. In short, IHL, has not kept pace with the rapidly changing character of armed conflict-in particular with respect to the new participant: the VHS.

Fourthly, the abuse by VHSs of their civilian status can erode the IHL protections afforded to ordinary civilians. Such a move will undermine the spirit and purport of IHL and could possibly unsettle the equilibrium between considerations of military necessity and humanity.

Finally, the current failure to adequately regulate the movement and actions of VHSs also raises questions pertaining to their potential direct participation in hostilities (DPH).²² In the ICRC's Interpretive Guidance test for DPH,²³ the voluntariness of the shielding actor's conduct has given rise to debate about whether the actor should be considered a direct participant in hostilities, and, accordingly, be stripped of their traditional protection against direct attack.²⁴ Proponents of this view argue that:

The modern battlefield has become ever more dangerous for the soldiers operating therein and that therefore their margin of discretion regarding the use of lethal force should be enlarged.²⁵

Relying on this reasoning, some suggest 'that voluntary human shields are *per se* directly participating in hostilities, thereby losing their protection from direct attack'.²⁶ However, when measured against the ICRC's Interpretive Guidance test for DPH, it is clear that VHSs are not given separate consideration, and they therefore retain their civilian protections. While this is the most appropriate outcome, legal experts and military commanders remain dissatisfied with this default position since it leaves many issues unresolved, Neither the DPH test nor the proportionality assessment succeed in recalibrating the imbalance caused - in the humanity versus military necessity equilibrium - by the presence of VHSs in conflict situations.

²¹ ICRC/International Institute of Humanitarian Law, (2007)30th San Remo Round ICRC/Int Current Issues of International Humanitarian Law, *The Conduct of Hostilities, Background Document*, 9 (as mentioned in M Schmitt, 'Human shields in international humanitarian law', (2008-2009) *Israel Yearbook on Human Rights*, 39.

²² Bosch, 'Targeting decisions' *op cit.* note 16 at 447-473.

²³ N Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law', ICRC, 2009 (hereafter Interpretive Guidance), available at <<https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>> (accessed on 10 August 2024).

²⁴ R Geiss & M Siegrist, 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?' (2011) *IRRC*, 45-46, available at <<https://www.icrc.org/eng/assets/files/review/2011/irrc-881-geiss-siegrist.pdf>> (accessed on 10 August 2024) 21.

²⁵ *Ibid.*

²⁶ *Ibid.*

Modern asymmetric conflicts, with increasingly 'blurred lines of distinction',²⁷ require combatants to make life-or-death decisions under strict constraints and intense 24-hour media scrutiny. The presence of a VHS forces combatants to choose between refraining: from attacking certain targets (or attack under extremely restrictive rules of engagement), therefore risking degraded military effectiveness, or attack the targets effectively and risk collateral damage.²⁸

For as long as the *status quo* remains ambivalent, these decisions will be necessarily complicated, and commanders have to 'read between the lines' of outdated IHL principles.

Considering the debate surrounding these new actors and the increased prevalence in armed conflicts, one wonders why something more deliberate has not been done to effectively regulate the prevalence of VHSs in a manner that accords with the objectives of IHL. The reluctance to formulate an appropriate plan for the regulation of VHSs only serves the interests of those belligerents who abuse the presence of VHSs to serve their own operational advantage. The continued failure to regulate the presence and actions of VHSs disadvantages those states who are observing IHL, and further risks the lives of ordinary civilians who might be positioned as a shield in a quasi-voluntary manner.

Challenges Facing the Future Regulation of Voluntary Human Shields

A regulatory regime aimed at VHSs will need to address several fundamental issues. Of paramount importance is assuring that a VHS is indeed acting voluntarily, and that their actions do not fall foul of the IHL prohibition against the use of involuntary human shields.²⁹ So, for example, when the inhabitants of a dwelling refuse to remove themselves from the vicinity when a local combatant mounts a rocket launcher on their roof, this does not automatically categorize them as VHSs—even if they provide the combatant with food and a place to rest. The same is true when a military force is based in an inhabited village:

The mere presence of villagers does not render them voluntary shields. This is so even if they elect to remain in the village despite an opportunity to depart. Those who remain may be too elderly or infirm to leave. They may too be frightened to leave, for fleeing from the village may be very dangerous. They may wish to remain to safeguard their property and possessions. Whatever the rationale for their presence, it is only when they refuse to depart because they wish to complicate the enemy's action that they qualify as voluntary shields.³⁰

Such civilians find themselves in the midst of the conflict by no conscious choice of their own and are at best to be considered involuntarily human shields or proximity shields. The belligerent parties that strategically engineered the circumstances so that the civilian population and the military were co-located ought to be tried for either violating a duty to remove civilians under their control from the vicinity of a military objective,³¹ or violating the IHL prohibition against locating military objectives within the civilian population.³²

²⁷ *Ibid.*

²⁸ Ezzo *op cit* note 2 at 10.

²⁹ AP I art 51(7).

³⁰ Schmitt *op cit* note 21 at 39.

³¹ AP I art 58(a).

³² AP I 58(b).

Voluntary human shields, on the other hand, usually indicate the voluntary nature of their shielding activities by voicing their displeasure at the current conflict, and by stating their intention to shield the civilian population. They intend to maintain a position in the vicinity of a specific objective - with the aim of deterring attacks. The mere fact that the military might guide human shields to specific sites, like the thousands of Libyans who shielded Gaddafi's presidential compound in 2011, does not negate the freedom which the shields retain to exercise of their own volition. The crucial test of the voluntariness of their actions is their ability and freedom to remove themselves from the vicinity of a site, the moment they wish to do so. Provided the shields in question are not chained to military objectives, held at gunpoint or otherwise compelled to maintain a shielding position - then such shields would be considered VHSs.

Closely linked to the notion of voluntariness is the issue of legal capacity to act in a voluntary manner, and the generally accepted notion that certain individuals have limited capacity to act in a voluntary manner due to youth or mental incapacity. In most domestic legal systems, children are considered susceptible to manipulation and therefore generally unable to voluntarily consent in a legally binding way to life-threatening activities - without a parent or guardian's assistance. Children enjoy special protection under IHL, which immediately makes their presence highly valuable to those wishing it to shield certain strategic targets. Any regulation of VHSs will have to preclude certain groups of individuals (for example manipulate minors and the mentally challenged) from having the necessary legal capacity to consent, so that voluntariness can be assured and risks of manipulation of VHSs can be minimized. A regulatory regime would need to include an undertaking by VHSs that they are aware of, or indeed appreciate, the very real risk they are undertaking.

Once voluntariness and capacity have been established, it is imperative that VHSs are made aware that there are legal limitations upon their actions. As civilians, they are not permitted to participate directly in the hostilities. Some jurists³³ argue that a VHS's conduct automatically constitutes direct participation in hostilities, assuming that the purpose of their shielding is to 'enhance the survivability of military assets'³⁴ of a particular state - which in turn amounts to serving the 'military interests of one of the parties to the disadvantage of the other'.³⁵ This stance, however, which effectively revokes all civilian protections which VHSs would have enjoyed, is contrary to the principle that 'protected persons may in no circumstances renounce in part or in entirety the rights secured to them'.³⁶ Al-Duaij, De Belle, Lyall, Fusco and Van Engeland³⁷ maintain that the mere presence of VHSs does not on its own constitute a military threat or cause any of direct harm to a party in international armed conflict.³⁸ It is fair to concede that the presence of VHSs does complicate matters of distinction and therefore targeting decisions. Hague notes that:

In general, we should presume that individuals retain their basic rights, absent decisive reason to believe that they have made themselves morally liable to decisive force. It follows that it is epistemically impermissible to target civilians, or to discount collateral harm to

³³ Including: Schmitt, Rubinstein, Roznia, Ezzo & Guiora (Bargu *op cit* note 17 at 8).

³⁴ Ezzo, *op cit.* note 2 at 10.

³⁵ Bargu, *op cit.* note 17 at 8.

³⁶ ICRC, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 12 August 1949, 75 UNTS 287, art 8.*

³⁷ Bargu, *op cit.* note 17 at 6-7.

³⁸ *Ibid.* Citing 'International humanitarian law issues in a potential war in Iraq', *Human Rights Watch (Human Rights Watch Briefing Paper 20 February 2003)*, and De Belle, *op cit.* note 7 at 883).

civilians, absent decisive reason to believe that they are neither involuntary shields nor passersby. Since decisive evidence of voluntary presence and intent to shield is hard to come by in armed conflict, it is seldom epistemically permissible to target or discount collateral harm to voluntary shields.³⁹

We would argue that VHSs cannot automatically be considered direct participants in hostilities unless they are shielding military objectives and are effectively participating directly in the hostilities, and even then, they only lose their protected status only for the duration of such direct participation.

Those in favour of military pragmatism argue that if VHSs are not considered direct participants, then their presence at least should be discounted during the proportionality assessment. Alternatively, they should be given a distinct status under IHL 'so that they benefit neither from civilian immunity nor from combatant privileges'.⁴⁰ Others adopt a moderate humanitarian approach, and posit that VHSs should lose *de facto* protection on account of their close proximity to a military objective.⁴¹ This would of course require an adjustment during the proportionality assessment and resonates with Schmitt and Dinstein of the pragmatic military school,⁴² who point out that VHSs choose to remain in the vicinity of a military objective despite attempts by the shielded state to remove these civilians in terms of Article 58 of AP I. They argue that by their express conduct, they absolve the belligerent parties of some measure of liability where they are injured as a result of collateral damage. This is in line with general principles of criminal law, where the voluntary nature of a person's conduct is sufficient to invoke blameworthiness as a consequence of their action.⁴³

In asymmetric warfare, states are increasingly utilizing civilians and civilians objects 'to make an effective contribution to military action',⁴⁴ and there is no more effective tool than the use of women and children as human shields. Their presence often completely immunizes a target from attack. At the very least their presence complicates the targeting decisions of an attacking force through application of the precautions in attack and the principle of proportionality - which in turn constitutes an unfair operational advantage to the shielded party.

We are weary of arguments that propose treating VHSs as invisible or stripped of the civilian protections they enjoy under IHL, or discounting their value in a proportionality assessment. This is because of the risk that this might legitimize the harming of civilians and contradict Article 8 of Geneva Conventions IV regarding the inalienability of the rights afforded through IHL. Therefore, a suitable regulatory regime needs to recognize that VHSs remain 'protected persons', address what actions are permissible, determine which locations they as a 'protected persons' can legitimately shield, and determine which actions amount to unlawful direct participation in hostilities. Such regulation must impose limitations on the activities of VHSs in a way that will not erode the protections afforded to regular civilians under IHL.⁴⁵

³⁹ A Haque, 'Human shields' in H Frowe & S Lazar (eds), *The Oxford Handbook of the Ethics of War*, 2015, 13.

⁴⁰ Bargu, *op cit.* note 17 at 8.

⁴¹ *Ibid.* J Haas, 'Voluntary human shields: Status and protection under international humanitarian law' in R Arnold & PA Hild brand (eds): *Changes International Humanitarian Law and the 21st Century's Conflicts and Challenges*, 2005, 210.

⁴² *Ibid.*

⁴³ Geiss & Siegrist, *op cit.* note 24 at 27.

⁴⁴ *Ibid* at 26.

⁴⁵ *Ibid* at 23.

When VHSs shield a civilian objective, there is no legal imbalance between considerations of humanity and military necessity. The presence of a VHS before a civilian object merely bolsters the already protected status of the civilian object.⁴⁶ International humanitarian law defines civilian objects in the negative,⁴⁷ and they could be a school, hospital, national monument, a water tower or another object important to the civilian population in general. That said, all objects are potentially useful to the military, as Geiss and Siegrist point out:

Generally speaking, it is not disputed that power grids, industrial communication facilities, computer and cell-phone networks, transportation systems, and other infrastructure including airports and railways—all of which primarily fulfill civilian functions—can become lawful if they meet the criteria laid out in Article 52(2) of Additional Protocol I, also reflecting customary IHL applicable in non-international armed conflict. In fact, each and every civilian object could theoretically become a military objective, provided that it cumulatively fulfils the respective criteria,⁴⁸

When a single object is used simultaneously for both civilian and military purposes, giving rise to the colloquial term 'dual-use' objects,⁴⁹ combatants are required to assess 'under what circumstances (and for how long) an attacker may conclude that dual-use site is a legitimately military objective',⁵⁰ The ICRC Commentary favours an approach that categorizes an object on the basis of its 'intended future use', as opposed to the intrinsic purpose for which it is naturally used.⁵¹ However, controversy surrounds the determination of exactly when 'it becomes sufficiently clear or sufficiently reasonable to assume that an object's purpose is to contribute effectively to military action'⁵² The ICRC, at its 28th International Conference, provided the following guidelines to combatants making targeting decisions:

It should be stressed that 'dual-use' is not a legal term. In the ICRC's view, the nature of any object must be assessed under the definition of military objectives provided for in Additional Protocol I. Thus, it may be held that even a secondary military use may turn such an object into a military objective. However, an attack on such an object may nevertheless be unlawful if the effects on the civilian use of the object in question violate the principle of proportionality, i.e, if it may be expected to cause excessive civilian damages or casualties, or if the methods or means of the attack are not chosen with a

⁴⁶ AP I art 52(1).

⁴⁷ AP I art 52:

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is used to make an effective contribution to military action, it shall be presumed not to be so used.'

⁴⁸ Geiss & Siegrist, *op cit.* note 24 at 27.

⁴⁹ 28th International Conference of the Red Cross and Red Crescent, Geneva, December 2003, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', *Report prepared by International Committee of the Red Cross, Geneva, September 2003*, available at <https://www.icrc.org/eng/assets/files/other/ihl_contemp_armedconflicts_final_ang.pdf> (accessed on 10 August, 2024) 11.

⁵⁰ Geiss & Siegrist, *op cit.* note 24 at 27.

⁵¹ *Ibid* at 27-28.

⁵² *Ibid.*

view to avoiding or at least minimizing incidental civilian casualties or damage.⁵³

Thus, although an object is considered to have a secondary military function, an attack on such a dual-use object will need to be proportional.⁵⁴ In short, combatants will have to ascertain whether the military advantage anticipated from the destruction of such an object will outweigh the incidental harm caused to civilians and civilian objects within the vicinity - as per AP I Article 57. If civilian VHS were to shield such objectives, the likelihood of the proposed attack being found disproportionate would be much higher. An effective regulatory regime which is consistent with the existing IHL would restrict the presence of a VHS before a purely military objective, and would need to endorse the application of AP I Articles 57 and 58 in cases where VHSs shield a dual-use site. When a VHS shields a military or dual-use objective, this act does not alter the protected status of the civilian VHS under IHL. Neither do their action amount to direct participation in hostilities, although VHS inadvertently provide a legal obstacle to a directed attack on the shielded sites, and thereby influence the outcome of armed conflict to a significant degree. Where VHSs fail to comply with these directives, they, and the state benefitting from their activities be held criminally liable. Anything less would contradict the spirit and purport of IHL and complicate the application of the general legal framework meant to protect the innocent civilian.

Voluntary human shields have been predominantly nationals of the local state, but are becoming increasingly organized and resourceful, and international organizations are being established to recruit and deploy more VHSs. This trend is giving rise to more instances of international foreign nationals acting as VHSs in situations of armed conflict. This trend raises another aspect which any proposed regulation of VHSs will have to address: who owes these individuals a duty of protection? Are the receiving states duty-bound to remove VHSs (as protected persons) from the theatre of hostilities? Are the states from which these foreign VHSs come, obligated to protect them during this endeavour in a foreign conflict zone? The US has debated whether the actions of their citizens jetting off to support enemy states through voluntary human shielding amounts to treason.⁵⁵ A regulatory regime will need to address the questions of state responsibility for the actions of belligerents towards foreign VHSs and the actions of foreign nationals outside their nation state.

An appropriate regulatory regime will need to ensure and promote the critical IHL project of limiting and minimizing civilian casualties. Current unregulated situation makes it appealing to states, and not strictly in contravention of AP I Articles 51(7) or 58,⁵⁶ to either move the conflict closer to the civilian population or call upon the civilian population to shield certain military objectives. If we start from the premise that VHSs are and remain classified as civilians, then a regulatory regime would need to address what would constitute an adequate warning to the shielded state and VHSs before an attack is launched in the vicinity of VHSs from military sites, and provisions dictating how attacking parties are to issue warnings in such instances.

⁵³ ICRC report, *op cit.* note 49 at 11.

⁵⁴ An example of this might be the house with the rocket-launcher on its roof. Accordingly, the presence of civilians would need to be factored into the proportionality assessment, in order to ascertain whether an attack would be permissible.

⁵⁵ 'Senator wants human shields punished' *Fox News* (5 March 2003), available at <<http://www.foxnews.com/story/2003/03/05/senator-wants-human-shields-punished.html>> (accessed on 10 August 2024).

⁵⁶ AP I art 58 does not demand their removal from the vicinity of a military objective; it merely requires that the shielded state do all that is feasible in the circumstances.

Given that one party to the conflict often stands to gain a 'tangible military advantage'⁵⁷ from the presence of VHSs and another stands to lose by restrictions placed upon its 'counter-strategies',⁵⁸ reinforces the dire need for appropriate regulation of a VHS's presence in armed-conflict situations. This regulation needs to disincentivise the manipulation of VHSs for tactical advantage and their misuse to shielding legitimate military targets. Without proper regulation regarding which sites VHSs can shield, and where they can move around in the theatre of conflict, the perception will remain that IHL is not adequately balancing military necessity and humanitarian considerations. Continued unregulated misuse of civilian human shields will increase the overall incidental risk to the general civilian population, which, in turn, will undermine the fundamental principle upon which IHL is based.

Without legal intervention, VHSs and their presence in the theatre of hostilities will test the principle of reciprocity. International humanitarian law has always 'unanimously accepted non-application of the *tu quoque* principle' otherwise known as the 'principle of reciprocity'⁵⁹ - as codified in Article 51(8) of AP I:

Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take precautionary measures provided for in Article 57.⁶⁰

The observance of IHL and the protection of the civilian population is not premised on a mutual adherence to IHL. Even if one party violates IHL, the other parties are still required to observe it. A regulatory regime is needed to encourage states to approach VHSs in a uniform manner that complements existing IHL - without prejudicing belligerents who observe the principle of reciprocity.

To further ensure the upholding of the prohibition against taking reciprocal action, contraventions of the agreed regulation should be met with the necessary and suitable sanction. The shielded states should be held accountable for war crimes (viewed with more severity than that which currently relates to a violation of AP I Article 58), due to their failure to remove VHSs from the vicinity of military objectives.

A Proposal for Suitable Future Regulation

Our proposal for VHS regulation requires either a free-standing treaty or an annexure to Geneva Conventions.⁶¹ We propose that delegates invited to participate in the formulation of the treaty document- to codify an express regulation of the presence of VHSs in conflict situations that will harmonize the interests of humanity with issues of military necessity, and give effect to the spirit and purport of IHL.⁶² We would like to see the ICRC driving such a treaty-drafting project, and delegating the responsibility to finalize the drafting of the resultant treaty text. We further propose the establishment of an international non-government organization mandated with the registration, deployment, education and general organization of VHSs, much like that envisaged by Al-Duaij.⁶³

⁵⁷ Geiss & Siegrist, *op cit.* note 24 at 19-20.

⁵⁸ *Ibid.*

⁵⁹ De Belle, *op cit.* note 7 at 899.

⁶⁰ *Ibid.*

⁶¹ N. Al-Duaij, 'The volunteer human shields in international humanitarian law', (2010), *Oregon Review of International Law*, 137-140.

⁶² *Ibid.*

⁶³ *Ibid.*

The treaty provisions should address the following aspects:

i. Definition of a VHS

The legal definition of a 'voluntary human shield', including legal assurances of the voluntariness of their actions and criteria for determining their legal capacity to act as proposed by Al-Duaij, might follow these lines:

a civilian, registered with the VHS NGO, who voluntarily and impartially, seeks to protect civilians and civilian objects, through using his or her body as a human shield, and who at all times retains the unconditional freedom to abrogate from such shielding position at any time he or she wishes.⁶⁴

To this definition we would only add the caveat that the individual must possess legal capacity (as determined by general practice across national states) - having regard to their age, mental capacity and ability to appreciate the dangers inherent to conflict zones. The moment a civilian on a shielding campaign wishes to abrogate from their shielding activities, they are to be taken to a place of safety - a base camp in a peaceful territory, as soon as it is reasonably possible and safe to do so. The ability of a VHS to cease their shielding activities is the distinguishing factor between voluntary and involuntary human shields, the latter being expressly prohibited under AP I Article 51(7).

ii. Establishment of an international VHS organization tasked with the deployment, credentialing and distinguishing identification of VHSs

We further propose a set of provisions establishing an international organization tasked with credentialing and regulating the actions of VHSs, including the provision of distinctive clothing branded with a recognizable emblem. This would lessen the burden on combatants in terms of verifying the VHS status of individuals encountered on the battlefield. Those wearing the distinctive clothing would be categorized as lawful VHSs, and any other civilians in the theatre of hostilities would either be categorized as ordinary civilians or as involuntary human shields (as there is no difference in protections according to each). Under IHL, a VHS's presence in a combat zone is lawful only if it is sanctioned by the VHS organization. A civilian from anywhere in the world may apply to civilian from the VHS organization to partake in humanitarian shielding missions in conflict zones. A lawful VHS seeks interests of humanity and therefore only shields civilians and civilian objectives - without any intention of supporting any particular side to the conflict. A screening process would be conducted by the VHSs organization to prevent a situation where a civilian gains access to a conflict zone, with the intention to use his or her protections to unlawfully shield military objectives.

The VHS organization would look into their backgrounds, and decide whether the civilian is of a certain character and that he or she would strictly adhere to the directives provided by the organization. Should the organization approve the application, they would then be required to educate the aspirant VHS of the general principles of IHL, emphasize the dangers associated with conflict zones, and stipulate appropriate protocols to follow in the event of an emergency situation on the battlefield. After the successful completion of such a registration, the VHS organization would deploy the civilian for a specified mission of the organization's choice, in order to negate any partiality on the part of the shielding civilian. The limits of a civilian's authorization to shield a specific civilian site, should be clearly stipulated on the identification card provided to them, before embarking on their mission. Each aspirant VHS would also be required to sign an indemnity form, releasing the

⁶⁴ *Ibid* at 124-133.

organization from liability with regard to any injuries sustained as a result of the shielding campaign.

We envisage the VHS organization issuing each authorized VHS with distinctive emblems to wear while deployed, much like medical or religious personnel. All distinctive emblems would need to be returned to the organization upon completion of the shielding campaign, in order to prevent their misuse. The organization would bear the responsibility to accompany and monitor their authorized VHSs and would need the backing of the belligerent parties, expressed by being signatory to the treaty, and should be able to call on the territorial state to assist with safe passage to their shielded civilian objectives, and to assist the organization in extracting VHSs who have violated the terms of the organization's conditions.

iii. Provisions for the security of VHSs

Lawful VHSs would have to conduct themselves within the limits of the primary civilian status they are afforded under IHL, in order to maintain their protected status. Accordingly, we propose that the regulatory treaty stipulate that VHSs would be prohibited from carrying any arms with them on their shielding mission. Only trained private security operatives hired by the VHS organization, and who accompany the civilians on their shielding campaign, would be authorized to carry firearms – and this strictly for self-defence and the defence of the civilians they accompany. These trained operatives would be hired from reputable private security companies vetted by the United Nations for compliance with the Montreux documents,⁶⁵ and they would be tasked to provide adequate protection to the group of VHSs they accompany.

iv. Provisions limiting the sites at which VHSs can act as shields, given their civilian status

The only purpose VHSs can serve by shielding civilian sites in conflict situations is to bolster, through their physical presence, the protections that IHL already affords to civilians and civilian objectives. Their presence would act as an active reminder to combatants of the general protection afforded to civilians and civilian objectives.

To this end, we would suggest a clear set of provisions clarifying where VHSs are permitted to place themselves - with express reference to the shielding of civilian sites. Voluntary human shielding of military objectives should be expressly prohibited in the treaty regulation, by the VHS organization; and this position should be supported by the belligerent parties. The treaty should oblige the removal of shields from such sites. Voluntary human shields who shield military sites should have their identification and authorization revoked, and the territorial state should face state responsibility for their failure to remove such shields from these lawful military targets.

We also recommend some clear guidance on the assessment of possible shielding of dual-use sites, and the steps to take when a civilian site becomes dual-use in character.

v. Provisions detailing state and individual responsibility, in instances where VHSs are involved

We recommend the inclusion of a set of provisions setting out the appropriate protocol for combatants to follow during the planning stages of an attack, and where VHSs are located in

⁶⁵ ICRC, available at <<http://www.icrc.org/web/eng/siteeng0.nsf/html/montreux-document-170908>> (accessed on 14 August 2016) 37

the vicinity. Linked to this must be clear directives on the legal responsibility borne by the nation state from which the VHS comes, and the territorial states in which the VHSs are located.

vi. Provisions endorsing the IHL prohibition against reciprocal attacks

Until express regulations are formulated and reduced to treaty form and made available for states to commit to, the civilian population would continue to be abused as shields to protect against attack aimed at strategic targets.⁶⁶ Unless the position of VHSs in armed conflicts is regularized, the risk remains that belligerents may ignore the prohibition against reciprocal attacks - especially where the shielded state is launching attacks from behind a wall of VHSs. In short, there must be a clause emphasizing the IHL prohibition against reciprocal attacks, where one party violates the IHL prohibition against using the civilian population as shields. This must be backed up with legal consequences, and also the prosecution of those ordering such attacks.

vii. Provisions for the prosecution of individuals found violating the terms of the treaty

The practice of voluntary human shielding is not prohibited under AP I Article 51(7), and, at most, the shielded state can be considered to have violated AP I Article 58 - the obligation to remove civilians under its control from the vicinity of a military objective. The prospect of prosecution on this basis in the case of VHSs might prove tricky considering the voluntary nature of VHSs militating against 'control' being exerted over them by the shielded party. As it stands, in very few international law cases has a shielded state been tried for violating its AP I Article 58 duties. Moreover, the AP I Article 58 provision is not absolute, and only concerns that which is feasible in the circumstances. Thus, it does not constitute an effective deterrent against the misuse of VHSs. Explicit treaty provisions would create an environment which is less complex, and reduce the burden on the belligerent in terms of taking the relevant precautions in attack and making targeting decisions. It would also make it easier for international courts and tribunals to adjudicate and prosecute activities which violate the treaty provisions.

Any proposed regulation aimed at preventing the use of VHSs to unlawfully deter attacks against legitimate military objectives will need to authoritatively and unequivocally prohibit such practices, and also exact legal consequences upon those who violate the provisions of the treaty. States failing to remove 'unlawful' VHSs, must be deemed to be in breach of the treaty provisions and must face state responsibility for their inaction. Similarly, the commanding officers overseeing hostilities in territory occupied by VHSs, should be held criminally liable and face prosecution for their actions where they use civilian VHSs to further their own military objectives, or if they fail to take steps to ensure that VHSs do not act in breach of the treaty. The commander of the attacking state should then have further recourse to demand that VHSs positioned or acting in violation of the treaty, be extradited for having contravened IHL.

In the event the shielded state is met with any resistance from the VHSs when it attempts to remove them from the vicinity of a military objective, those individuals can be extradited to a neutral state preferably the one that hosts the VHS organization or an alternative state approved by the VHS organization. They can then be tried for their acts that contravene the treaty provisions. They should also forfeit their VHS status. If there is a consistent

⁶⁶ M Skerker, 'Just war criteria and the new face of war: Human shields, manufactured martyrs, and little boys with stones', (2004), *Journal of Military Ethics*, 28-30.

enforcement of the rule prohibiting VHSs from shielding a military objective, which is backed up with consequences for those found guilty of such practices, then the outcome of the conflict would be rather different. It would serve as an adequate discouragement to both states intent on abusing VHSs and individual VHSs seeking to shield military objectives, through measures complementing the spirit and purport of IHL.

Conclusion

Until there is an acceptable and formalized process, which is monitored and administered by an international organization overseeing the activities of VHSs, uncertainty around their identities and intentions will continue to expose them to abuse and undermine the IHL regime as a whole. Until combatants can identify and distinguish authorized VHSs from civilians being used as proximity shields or involuntary human shields, the enforcement of precautionary measures in attack and the subsequent punishing of the shielded state for a violation of its IHL duties, will remain compromised and problematic. Only a regulatory regime like the one propose here will provide the necessary incentive for both the attacking and shielded parties to adhere to the tenets of IHL. Without clear and specific regulation, it is too easy for the shielded state to manipulate their civilian population into adopting shielding positions around military objectives, in contravention of IHL. Similarly, the failure to regulate the actions of VHSs complicates the attacking state in its application of the proportionality principle, and might lead to notions of discounted proportionality.

Formulated as it is, the suggested proposal strikes a suitable compromise between the concerns of a humanitarian human rights lawyer and the military-necessity concerns of the military commander. Voluntary human shielding is not a novel practice and clearly illustrates how the law, as it stands, has the undesired effect of drawing the theatres of war closer to the civilian population. These shields constitute nothing more than pawns to be disposed of in order to advance the interests of an armed force. Accordingly, change needs to be effected to ensure that IHL maintains its relevance, by enforcing the protections afforded the civilians population. The proposed regulations is a measure that will adequately address the controversial VHSs in a way that aligns with the purport of IHL and the realities of modern armed conflict.