

VOLUNTARY HUMAN SHIELDS, DIRECT PARTICIPATION IN HOSTILITIES AND THE INTERNATIONAL HUMANITARIAN LAW OBLIGATIONS OF STATES

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[Voluntary human shields challenge accepted norms that have treated the civilian as a passive subject of, rather than an actor in, armed conflict. Later this year, the International Committee of the Red Cross will deliver a final report on the deliberations of a series of meetings held to discuss the definition of 'direct participation in hostilities' pursuant to Geneva Conventions III and IV and their Additional Protocols I and II. The Summary Reports of the ICRC deliberations of the meeting participants reveal that some experts consider it appropriate to class acting as a voluntary human shield as direct participation in hostilities. Some consider this classification to have altered the status of voluntary human shields in international humanitarian law. Arguably, however, classifying voluntary human shielding as direct participation in hostilities runs counter to international humanitarian legal principles].

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I INTRODUCTION

Weaker parties in asymmetrical conflicts may resort to acts prohibited under international humanitarian law, such as the use of human shields.¹ The use of

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¹ Charles J Dunlap Jr, 'A Virtuous Warrior in a Savage World' (1997–98) 8 *United States Air Force Academy Journal of Legal Studies* 71, 78–9; Charles J Dunlap Jr, 'Law and Military

human shields has been witnessed in Cambodia, Sierra Leone, Chechnya, Somalia, Iraq,² and Serbia.³ Three recent conflicts usefully illustrate the issues arising from the newer phenomenon of *voluntary* human shields: the 1999 NATO bombing campaign against Serbia;⁴ the ongoing conflict between Israel and Palestinians, specifically, the Israeli Defence Forces' 'Early Warning Procedure';⁵ and the second Gulf War.⁶

This paper will first summarise the prohibition on human shields under international humanitarian law. Second, it will consider the perceived challenges posed by voluntary human shields to the distinction between combatants and civilians under international humanitarian law. The characterisation of the conduct of voluntary human shields will then be discussed, with particular attention paid to the term 'direct participation in hostilities'. Next, the article will deal with the consequences for voluntary human shields of their own conduct, before turning to the implications of voluntary human shielding for states' international humanitarian law obligations. Finally, it will consider proposals for the amendment of international humanitarian law principles and laws in response to these challenges. The article is limited to international armed conflict.

II THE PROHIBITION AGAINST HUMAN SHIELDING

The prohibition against human shielding is found in the *Hague Regulations* of 1907;⁷ art 23 of *Geneva Convention III*;⁸ art 28 of *Geneva Convention IV*;⁹ arts

Interventions: Preserving Humanitarian Values in 21st Century Conflicts' (Paper presented at the Humanitarian Challenges in Military Intervention Conference, Washington DC, US, 29 November 2001) 5 <<http://www.duke.edu/~pfeaver/dunlap.pdf>> at 23 September 2008.

² For overviews of each of these cases, see Daniel P Schoenekase, 'Targeting Decisions regarding Human Shields' (2004) 84(5) *Military Review* 26, 26–7.

³ See, eg, 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, 485; Marsha V Mills, 'War Crimes in the 21st Century' (1999) 3 *Hofstra Law and Policy Symposium* 45, 65–6; *Prosecutor v Blaškić (Appeals Chamber)* Case No IT-95-14-A (29 July 2004) (Judgment); *Prosecutor v Bralo (Trial Chamber)* Case No IT-95-17-S (7 December 2005) (Sentencing Judgment).

⁴ See generally, Anna Husarka, 'All Belgrade's a Stage for Protest', *International Herald Tribune* (Neuilly-sur-Seine, France) 28 August 1999, 8.

⁵ Roland Otto, 'Neighbours as Human Shields? The Israel Defense Forces' "Early Warning Procedure" and International Humanitarian Law' (2004) 86 *International Review of the Red Cross* 771.

⁶ Jefferson D Reynolds, 'Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground' (2005) 56 *Air Force Law Review* 1; Richard Cleroux and Roland Watson, 'Canadian Women Enlist in "Army" of Volunteer Human Shields', *The Times* (London, UK) 9 December 2002, 4.

⁷ *Hague Convention (IV) respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, (1910) UKTS 9 (entered into force 26 January 1910) ('*Hague Regulations*').

⁸ *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*').

⁹ *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*').

37(1), 50(3), 51(7) and 51(8) of *Additional Protocol I*;¹⁰ customary international humanitarian law;¹¹ and the *Rome Statute of the International Criminal Court*.¹²

According to the authoritative International Committee of the Red Cross ('ICRC') study on customary international humanitarian law, 'the use of human shields requires an intentional co-location of military objectives and civilians or persons *hors de combat* with the specific intent of trying to prevent the targeting of those military objectives'.¹³ Article 51(7) of *Additional Protocol I* covers both the forcible movement of civilians as well as the placement of military objectives within close proximity of civilians or civilian objects. The suggestion that 'movement' in art 51(7) of *Additional Protocol I* incorporates *voluntary* human shields is debatable. The article states:

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.¹⁴

Unlike the second sentence of art 51(7), which obliges parties not to 'direct the movement of the civilian population', the phrase 'presence or movements of the civilian population or individual civilians' is 'intended to cover cases where the civilian population moves of its own accord'¹⁵ but 'implies that the civilian population or persons concerned have acted under duress or, at minimum, without knowledge of the way in which they are being manipulated to shield a military objective'.¹⁶ This much should be clear from the use of the phrase 'shall not be used' in the relevant sentence, quoted above.

Action taken in Iran in 2006 illustrates this point.¹⁷ The Iranian Government was reported as 'enrolling' the support of approximately 1000 athletes from around the country to form a shield around a nuclear reactor near Isfahan.¹⁸ Arguably, the acceptance by participants of free t-shirts from government representatives handed out for a staged media event, printed with 'Nuclear

¹⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('*Additional Protocol I*').

¹¹ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *International Committee of the Red Cross, Customary International Humanitarian Law – Volume I: Rules* (2005) 337 ('*Volume I: Rules*').

¹² Opened for signature 17 July 1998, 2187 UNTS 3, art 8(2)(b)(xxiii) (entered into force 1 July 2002) ('*Rome Statute*').

¹³ Henckaerts and Doswald-Beck, *Volume I: Rules*, above n 11, 340.

¹⁴ *Additional Protocol I*, above n 10, art 51(7).

¹⁵ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 627.

¹⁶ Jean-François Quéguiner, 'Precautions under the Law Governing the Conduct of Hostilities' (2006) 88 *International Review of the Red Cross* 793, 815.

¹⁷ See Anne Penketh, 'The New Battlefield: Tensions Are Rising over Tehran's Alleged Nuclear Weapons Programme as the Pentagon Considers Its Military Options', *The Independent* (London, UK) 10 April 2006, 24.

¹⁸ News24.com, 'Athletes Form Human Shield' (South Africa) 22 January 2006 <http://www.news24.com/News24/World/News/0,,2-10-1462_1867346,00.html> at 23 September 2008.

Technology is our Legitimate Right', suggests that their vigorous 'death to America, death to Britain' chants were less a spontaneous or even independent protest than a knowing participation in state-sponsored shielding conduct.¹⁹ Certainly, the notion of 'enrolling' and the style of the event itself point to the population being 'used' by the state.

The strict liability for state actors resulting from the 'use' of human shields by a state cannot be avoided even where the shield consented to being used²⁰ and 'also applies to military authorities' passive indifference' to such use.²¹ The intention of the state is relevant in determining whether it is 'using' the human shield and determinative of individual criminal liability under art 51(7) of the *Rome Statute*.²² By contrast, liability does not attach to a breach of art 58 amounting to a failure by a defending state to fulfil its responsibility to take adequate precautions to remove and protect civilians from attack.²³ It would appear that, at a minimum, to avoid strict liability for the movement of truly voluntary human shields, a state should express disquiet at such movements, because knowledge without such disavowal may be construed as passive indifference.

III THE CIVILIAN ACTOR

Under international humanitarian law, civilians are defined negatively and passively: civilians are 'not members of the armed forces'.²⁴ They are recognisable because of the obligation on *combatants* to distinguish themselves unless 'the nature of the hostilities' is such that the combatant 'cannot' meet this obligation.²⁵ Voluntary human shields challenge this definition through operating as civilian actors in, rather than as passive subjects of, armed conflict.

A *Protections and Rights*

The civilian immunity from direct attack is found in common art 3 of the *Geneva Conventions* (the minimum standard of protection for civilians in non-international conflict) which protects 'persons taking no active part in the hostilities' from 'violence to life and person, in particular murder of all kinds,

¹⁹ Ibid.

²⁰ *Adalah — The Legal Centre for Arab Minority Rights in Israel v GOC Central Command, IDF* (2006) HCJ 3799/02, 21 (Barak P) (Israel), available in English from <<http://elyon1.court.gov.il/eng/home/index.html>> at 23 September 2008.

²¹ Quéguiner, above n 16, 815–16. See especially 816 (fn 73), discussing the first element of the crime in art 8(2)(b)(xxiii) of the *Rome Statute*, above n 12, which states: 'The perpetrator moved or otherwise took advantage of the location of one or more civilians'.

²² Quéguiner, above n 16, 815–16 (see especially at 816, fn 74, citing the second element of the crime in art 8(2)(b)(xxiii) of the *Rome Statute*, above n 12, which states 'the perpetrator intended to shield a military objective').

²³ Quéguiner, above n 16, 816.

²⁴ Henckaerts and Doswald-Beck, *Volume I: Rules*, above n 11, 17.

²⁵ *Additional Protocol I*, above n 10, art 44(3).

mutilation, cruel treatment and torture',²⁶ and in the provisions of *Additional Protocol I* (which pertains to international conflict). Parties to a conflict are obliged to apply the principle of distinction differentiating combatants from civilians, and 'direct their operations only against military objectives',²⁷ not civilian objects.²⁸ Reprisals against civilians and the civilian population and spreading terror through acts or threats are prohibited.²⁹ Civilians lose their immunity from direct attack, however, when and 'for such time as they take a direct part in hostilities'.³⁰

B *Status of Voluntary Human Shields*

A relative standard of civilian status appears to be developing with consequences for civilian protections under international humanitarian law. The issue is highlighted by Ben-Naftali and Michaeli in their analysis of *PCATI v Government of Israel*:³¹

The Palestinian militants fail to meet the qualifying conditions set in the Hague Regulations and in the Geneva Conventions for combatants. Consequently, they are civilians. They are not, however, entitled to the full protection granted to civilians who do not take a direct part in the hostilities.³²

This formulation forms the kernel of the definition of 'unlawful combatant'.

The ICRC has stated:

[international humanitarian law] treaties contain no explicit reference to 'unlawful combatants.' This designation is shorthand for persons — civilians — who have directly participated in hostilities *in an international armed conflict* without being members of the armed forces as defined by [international humanitarian law] and who have fallen into enemy hands.³³

Participants at the first ICRC meeting on the issue of 'direct participation' diverged on the issue of distinguishing between classes of civilian on both

²⁶ *Geneva Conventions*, common art 3: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31, art 3 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85, art 3 (entered into force 21 October 1950); *Geneva Convention III*, above n 8, art 3; *Geneva Convention IV*, above n 9, art 3 (collectively, 'Geneva Conventions').

²⁷ *Additional Protocol I*, above n 10, art 48.

²⁸ *Ibid* art 52(1).

²⁹ *Ibid* arts 51(2), (6).

³⁰ *Additional Protocol I*, above n 10, art 51(3); Henckaerts and Doswald-Beck, *Volume I: Rules*, above n 11, 19.

³¹ *Public Committee against Torture in Israel v Government of Israel* (2006) HCJ 769/02 (Israel) ('*PCATI*'), available in English from <<http://elyon1.court.gov.il/eng/home/index.html>> at 23 September 2008.

³² Orna 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 *PCATI*.

³³ ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2007) 867 *International Review of the Red Cross* 719, 727 (emphasis in original).

practical and jurisprudential grounds.³⁴ Voluntary human shields were included in the ‘unclear situations’ that the first ICRC meeting could not categorise.³⁵

Dinstein has argued for the preservation of a ‘sharp dichotomy’ between civilians and combatants as ‘the main bulwark against methods of barbarism in modern warfare’.³⁶ The ‘deliberate intermingling’ of civilians and combatants undermines this dichotomy, particularly where human shields are used.³⁷ Dinstein applies the term ‘unlawful combatant’ widely, incorporating all those who directly take part in hostilities, which in his view includes voluntary human shields.³⁸ Schmitt subtly qualifies this approach, regarding voluntary human shields as having ‘a status similar to that of illegal combatant’.³⁹ Parrish has argued that though ‘neither lawful nor unlawful belligerents’,⁴⁰ voluntary human shields are not ‘traditional civilians’.⁴¹ This opens the door to multitudinous categories of intermediary ‘unlawful civilians’ defined by conduct.

If we reflect on Otto’s analysis of the ‘Early Warning Procedure’, a further problem becomes apparent. The circumstances of the ‘Early Warning Procedure’ differ from those pertaining to the NATO campaign in Kosovo and the conflicts in Iraq in that the civilians acting as shields were protected persons under art 4 of *Geneva Convention IV* in the hands of an occupying power who, under art 8 of the same treaty, ‘may not renounce the rights secured to them’.⁴² Contrasting this with voluntary human shields *not* in the hands of a party would seem to result in two classes of voluntarism: state-sanctioned (protected) and independent (not protected). Consequently, should such a classification gain currency, individuals intending to affect the decision-making of an attacking commander might be better protected by international humanitarian law by simply moving to the prospective target without declaring themselves a voluntary human shield.

Ultimately, these attempts at reclassifying combatant and civilian status are flawed. Under international humanitarian law, breaches of the law do not strip individuals of their status but affect the nature of the rights and protections that individuals can rely on. Haas has forcefully argued that when civilians directly

³⁴ ICRC, *Direct Participation in Hostilities under International Humanitarian Law* (ICRC Summary Report, September 2003) 2, available from <<http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205>> at 23 September 2008.

³⁵ *Ibid* 3.

³⁶ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) 256.

³⁷ *Ibid*.

³⁸ *Ibid* 130.

³⁹ Michael N Schmitt, ‘Ethics and Military Force: The Jus in Bello’ (Speech delivered at the Carnegie Council Workshop on European and North American Perspectives on Ethics and the Use of Force, Cambridge, UK, 7 January 2002) <<http://www.cceia.org/resources/transcripts/98.html>> at 23 September 2008.

⁴⁰ Richard Parrish, ‘The International Legal Status of Voluntary Human Shields’ (Paper presented at the annual meeting of the International Studies Association, Montreal, Canada, 17 March 2004) 7, 9 <http://www.allacademic.com/meta/p74057_index.html> at 23 September 2008, citing the possession of and intent to use firearms definition of ‘illegal belligerency’ in *Ex parte Quirin*, 317 US 1 (1942).

⁴¹ Parrish, above n 40, 7.

⁴² Otto, above n 5, 776.

participate, they retain their status but lose their immunity from direct attack.⁴³ Voluntary human shields are not combatants, nor do they ‘acquire’ combatant status.⁴⁴

IV THE CONDUCT

The next issue to address is whether voluntary human shielding constitutes ‘direct participation’ which would cause individuals to lose their immunity from direct attack.

A *Direct Participation*

‘Direct participation’ remains undefined,⁴⁵ but has been the subject of both general⁴⁶ and specific⁴⁷ attempts at definition. General formulations have been criticised for not providing sufficient clarity useful to commanders making operational decisions, leading most recently to the series of expert meetings hosted by the ICRC on the specific issue of direct participation in hostilities. The first ICRC meeting considered ‘preliminary elements’ of ‘direct participation’ proposed by the ICRC, but the elements were considered problematic, and no consensus was achieved.⁴⁸

The Report on the Practice of Israel, in language similar to that cited with approval by the Israeli High Court of Justice in *PCATI*, highlights the complications attendant on the ‘undefined “grey area”’ of activities which defy easy classification as either direct or indirect participation.⁴⁹ The Court’s position on direct participation in hostilities has been usefully paraphrased in these terms:

⁴³ Josiane Haas, ‘Voluntary Human Shields: Status and Protection under International Humanitarian Law’ in Roberta Arnold and Pierre-Antoine Hildbrand (eds), *International Humanitarian Law and the 21st Century’s Conflicts: Changes and Challenges* (2005) 191, 200.

⁴⁴ *Ibid.*

⁴⁵ Henckaerts and Doswald-Beck, *Volume I: Rules*, above n 11, 21. A final document on the issue of ‘direct participation’ is due to be published late 2008, reflecting deliberations among experts who attended a series of conferences held jointly by the ICRC and the TMC Asser Institute: see ICRC, ‘IHL and the Challenges of Contemporary Armed Conflicts’, above n 33, 736–7.

⁴⁶ Sandoz, Swinarski and Zimmermann, above n 15, 619. See, eg, Henckaerts and Doswald-Beck, *Volume I: Rules*, above n 11, 22.

⁴⁷ Samuel Vincent Jones, ‘Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence between Contract Theory and the Scope of Civilian Immunity during Armed Conflict’ (2006) 16 *Duke Journal of Comparative and International Law* 249, 261, citing Frits Kalshoven, *The Law of Warfare: A Summary of its Recent History and Trends in Development* (1973) 49–50; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *International Committee of the Red Cross Customary International Humanitarian Law — Volume II: Practice* (2005) 113 (‘*Volume II: Practice*’) (citing the *Report on US Practice* (1997) ch 1.2), 117 (citing the *US Air Force Commander’s Handbook* (1980) §§ 2–8), 120–1 (citing the *Report on the Practice of Israel* (1997) ch 1.2); *PCATI* (2006) HCJ 769/02 [37] (Israel), available in English from <<http://elyon1.court.gov.il/eng/home/index.html>> at 23 September 2008.

⁴⁸ ICRC, *Direct Participation in Hostilities under International Humanitarian Law*, above n 34, 10.

⁴⁹ Henckaerts and Doswald-Beck, *Volume II: Practice*, above n 47, 120–1 (citing the *Report on the Practice of Israel*).

A civilian takes a 'direct part' in hostilities when he is physically engaged in them 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.⁵⁰

On the issue of human shields, the Court said:

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.⁵¹

Schmitt has conceived 'direct participation' as constituting a continuum of acts 'profitably dissected' by W Hays Park as 'war effort' (protected by both treaty and customary international humanitarian law), 'military effort such as military research by civilians' (only protected by treaty), and 'military operations' (not protected).⁵² For Schmitt, voluntary human shielding is 'unquestionably direct participation',⁵³ resulting in loss of immunity from direct attack in the application of the proportionality principle, 'except if voluntary shields qualified as protected civilians'.⁵⁴ Voluntary human shields are 'deliberately attempting to preserve a valid military objective for use by the enemy' and 'are no different from point air defenses'.⁵⁵ The exemption thus granted to an attacker is apparently unqualified, for '[it] would be absurdly incongruous to suggest that they can be directly targeted, but also count in proportionality calculations'.⁵⁶

Dunlap characterised the problem faced by NATO regarding Serbian voluntary human shields as

politically complex, but not ... legally difficult [because in] attempting to defend an otherwise legitimate target from attack — albeit by creating a psychological conundrum for NATO — the bridge occupiers lost their noncombatant immunity. In essence, they made themselves part of the bridges' defense system. As such,

⁵⁰ Ben-Naftali and Michaeli, above n 32, 461.

⁵¹ *PCATI* (2006) HCJ 769/02, [36] (Israel), available in English from <<http://elyon1.court.gov.il/eng/home/index.html>> at 23 September 2008 (emphasis added).

⁵² Michael N Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors and Civilian Employees' (2004) 5 *Chicago Journal of International Law* 511, 533.

⁵³ *Ibid* 541.

⁵⁴ Michael N Schmitt, 'Precision Attack and International Humanitarian Law' (2005) 87 *International Review of the Red Cross* 445, 459.

⁵⁵ Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees', above n 52, 541.

⁵⁶ *Ibid* 459. Cf Schmitt, 'Ethics and Military Force', above n 39, for a milder statement of this perspective.

they were subject to attack to the same degree as any other combatant so long as they remained on the spans.⁵⁷

Parrish has stated the position in similar terms:

Although they do not carry weapons themselves, when a volunteer places him — or her — self at a target of potential military significance he or she is directly contributing to the perpetration of hostile acts by one party against another party. Voluntary human shields who seek to exploit their presumed civilian status to enhance the survivability of belligerents, their weapons systems, command and control facilities, and infrastructure that directly supports a belligerent state's war effort, have clearly become involved in combat, albeit not in any traditionally recognized way.⁵⁸

The view that voluntary human shielding constitutes direct participation in hostilities is not universally held. Quéguiner argues that direct participation in hostilities constitutes 'posing a direct and immediate threat to the adverse party'.⁵⁹ For Human Rights Watch, voluntary human shields only 'contribute indirectly to the war capability of a state'.⁶⁰ As such, voluntary human shields would retain their immunity from direct attack and may not be entirely discounted in applying the proportionality principle.⁶¹ However, as the conduct of voluntary human shields may be characterised as 'deliberately imprudent', an attacking commander may apply a limited discount to their relative value in the application of proportionality.⁶²

Perhaps the strongest opposition to considering voluntary human shielding as direct participation in hostilities has come from Haas, who cites with approval the positions of Human Rights Watch and Laurent Colassis, a legal advisor to the ICRC, that voluntary human shields should not be considered as directly participating.⁶³ Having rejected recasting the status of voluntary human shields as non-civilians, Haas concludes that 'the only relevant question is: do the activities of [voluntary human shields] amount to a direct participation in hostilities? The answer is simply no'.⁶⁴

The second ICRC meeting considered voluntary human shields at greater length. While the divergence between experts on whether voluntary human shielding constitutes direct participation in hostilities persisted, useful 'compromise' positions were suggested.⁶⁵ In the case of an aerial attack, voluntary human shields posed 'much more of a legal obstacle for the attacker than an actual physical defence', whereas in the case of a land attack, a voluntary

⁵⁷ Dunlap, 'Law and Military Interventions', above n 1, 9.

⁵⁸ Parrish, above n 40, 8.

⁵⁹ Quéguiner, above n 16, 817.

⁶⁰ Human Rights Watch, *International Humanitarian Law Issues in a Potential War in Iraq* (Human Rights Watch Briefing Paper, 20 February 2003) ch I <<http://www.hrw.org/backgrounder/arms/iraq0202003.htm>> at 23 September 2008.

⁶¹ *Ibid.*

⁶² Quéguiner, above n 16, 817.

⁶³ Haas, above n 43, 203, 205.

⁶⁴ *Ibid.* 211.

⁶⁵ ICRC, *Second Expert Meeting: Direct Participation in Hostilities under International Humanitarian Law* (ICRC Summary Report, October 2004) 7, available from <<http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205>> at 23 September 2008.

human shield could constitute a ‘physical obstacle’ and thus a ‘defensive measure’.⁶⁶ Another view was that conduct which shields combatants, such as the behaviour observed in Somalia, should be considered archetypal direct participation in hostilities by a voluntary human shield.⁶⁷

B Hostilities

If ‘direct participation’ can take different forms, we should distinguish the conduct of peace activists from those human shields whose conduct constitutes direct participation in hostilities. Whether or not the individuals consider themselves to be voluntary human shields — the subjective intent issue dealt with below — is relevant, but appears counter to (if not contradicted by) their voluntary use of weapons.

The ICRC’s *Commentary on the Additional Protocols* stated that ‘hostile acts’ are ‘acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces’.⁶⁸ Further:

It seems that the word ‘hostilities’ covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon.⁶⁹

Parrish has interpreted ‘without using a weapon’ to cover voluntary human shielding as analogous to military-employed contractors ‘due to their attempts to protect, and thus increase the effectiveness of, war-waging equipment’.⁷⁰ Haas has strongly criticised this view on the basis that the analogy is with individuals who are correctly legally classified as civilians.⁷¹

At the third ICRC meeting, experts diverged on whether a narrow or broad definition of ‘hostilities’ was appropriate.⁷² The meeting heard three proposals for a definition:

- 1 all acts that adversely affect or aim to adversely affect the enemy’s pursuance of its military objective or goal ...;
- 2 all military activities directed against the enemy in an armed conflict ...; and
- 3 an approach which would combine a narrow interpretation of ‘hostilities’ with a geographical element to form a ‘zone of hostilities’.⁷³

The second proposal appears to have met the most resistance.⁷⁴ However, it is the first proposal that has the greatest potential to affect the position of voluntary human shields. ‘Adversely affect’ is a very broad phrase, which may be read to

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Sandoz, Swinarski and Zimmermann, above n 15, 618.

⁶⁹ Ibid 618–19.

⁷⁰ Parrish, above n 40, 13.

⁷¹ Haas, above n 43, 199.

⁷² ICRC, *Third Expert Meeting on the Notion of Direct Participation in Hostilities* (ICRC Summary Report, October 2005) 19–20, available from <<http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205>> at 23 September 2008.

⁷³ Ibid 22–4.

⁷⁴ See *ibid* 23.

include any conduct that interferes with the capacity of an enemy to conduct an attack. The potential impact is increased when we consider that some experts proposed that ‘any activity amounting to “hostilities”’⁷⁵ — that is, ‘adversely [affecting] the enemy’s pursuance of its military objective or goal’⁷⁶ — would constitute ‘direct participation in hostilities’ without requiring any evaluation of fact linking ‘a specific civilian act to that objective situation of “hostilities”’.⁷⁷

C *Subjective Intent*

Schmitt has suggested a ‘but for’ test of causation, causal proximity to the foreseeable consequences of an act, and mens rea of intent as appropriate criteria for assessing whether conduct constitutes ‘direct participation’:

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.⁷⁸

The Court used the phrase ‘out of support for’ in *PCATI* and put the issue of the intention of the individual voluntary human shield at the core of direct participation in hostilities.⁷⁹ Cassese has paraphrased the Court’s judgment as embracing all ‘civilians deliberately serving as a human shield to terrorists’.⁸⁰ Yet voluntary human shields may be ‘deliberately serving as a human shield’ without the necessary intention to ‘support’ the combatants who are thereby shielded. The voluntary human shields in Iraq serve to illustrate the point. Teninbaum has argued that even though, for the purposes of domestic treason laws, their acts would probably be held to have consequently ‘provided aid and comfort to the Iraqis’,⁸¹ their intent was ‘simply to protest the war’ and not ‘to actually bear arms against the United States or otherwise resist its troops’.⁸²

Contrary to the Israeli High Court of Justice’s construction, experts considering direct participation in hostilities have argued that subjective intent should not be a consideration for military commanders. The second ICRC meeting specifically considered ‘subjective intent’ as a means by which to

⁷⁵ Ibid 30.

⁷⁶ Ibid 22.

⁷⁷ Ibid 30.

⁷⁸ Schmitt, ‘Humanitarian Law and Direct Participation in Hostilities by Private Contractors and Civilian Employees’, above n 52, 533.

⁷⁹ *PCATI* (2006) HCJ 769/02, [36] (Israel), available in English from <<http://elyon1.court.gov.il/eng/home/index.html>> at 23 September 2008.

⁸⁰ Antonio Cassese, ‘On Some Merits of the Israeli Judgment on Targeted Killings’ (2007) 5 *Journal of International Criminal Justice* 339, 343.

⁸¹ Gabriel H Teninbaum, ‘American Volunteer Human Shields in Iraq: Free Speech or Treason?’ (2004) 28 *Suffolk Transnational Law Review* 139, 157–8.

⁸² Ibid 158.

circumvent the difficulties involved in creating an objective list of conduct:

reasonable belief in the existence of subjective intent based on the concrete circumstances should be sufficient. Subjective intent could also be inferred when the objective aim of an act was to diminish the military capacity of the adversary. One expert emphasized that, in practice, the effort that could reasonably be dedicated to the determination of subjective intent depended on the available time.⁸³

At the third ICRC meeting, further concerns were raised about the operability of a 'subjective intent' criterion.⁸⁴ The 'prevailing opinion'⁸⁵ was that there is no subjective element in 'direct participation':

Thus, whenever an act amounted to 'hostilities', namely to a 'military activity directed against the enemy' or an 'act adversely affecting the military aim pursued by the enemy', there was a case of direct participation in hostilities, regardless of whether it was carried out intentionally or unintentionally. Any introduction of subjective elements would make it impossible to provide armed forces with clear and operable rules.⁸⁶

The issue of operability, though, is of greatest import in circumstances where there is doubt about the intention of the civilian. With clearly declared voluntary human shields, no such ambiguity exists. A better view is that subjective intent may generally be presumed not to be a factor in determining whether conduct constitutes direct participation in hostilities, except where that intention is unambiguously not to act in support of a party to a conflict.

V CONSEQUENCES FOR THE CIVILIAN ACTOR IF VOLUNTARY HUMAN SHIELDING CONSTITUTES DIRECT PARTICIPATION IN HOSTILITIES

If their conduct is held to constitute direct participation in hostilities, voluntary human shields lose their immunity from direct attack, effectively relieving attacking commanders of the obligation to apply the principle of distinction.⁸⁷ 'Harming such civilians, even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate'.⁸⁸ Whether commanders carrying out attacks need to consider voluntary human shields in applying the principles of proportionality and precaution⁸⁹ (see below Part VI) is a subject of ongoing debate.

As voluntary human shields are not combatants, if captured they will not be considered prisoners of war and therefore would not enjoy immunity from legal proceedings under domestic law for acts committed during hostilities.⁹⁰ Indeed, US citizens who acted as voluntary human shields in Iraq in 2003 were the

⁸³ ICRC, *Second Expert Meeting*, above n 65, 3.

⁸⁴ ICRC, *Third Expert Meeting*, above n 72, 26.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* 34.

⁸⁷ Quéguiner, above n 16, 813.

⁸⁸ *PCATI* (2006) HCJ 769/02, [60] (Israel), available in English from <<http://elyon1.court.gov.il/eng/home/index.html>> at 23 September 2008.

⁸⁹ Quéguiner, above n 16, 814.

⁹⁰ *Additional Protocol I*, above n 10, art 43(2).

subject of civil proceedings⁹¹ and serious consideration was given to the question of whether they might be charged with treason.⁹²

However, even if voluntary human shielding is direct participation in hostilities, should they be captured, voluntary human shields would be covered at a minimum by common art 3 of the *Geneva Conventions* and possibly art 75 of *Additional Protocol I*.⁹³ The ICRC has argued that direct participants who fulfil the nationality criteria under art 4 of *Geneva Convention IV* retain their protections under that Convention.⁹⁴ At the first ICRC meeting, however, some participants argued that civilians directly participating in hostilities ‘constituted a *de facto* “intermediate” category’ unprotected by either *Geneva Convention III* or *Geneva Convention IV*.⁹⁵ These participants accepted that art 75 of *Additional Protocol I* would apply as a minimum standard.⁹⁶ Some recalled the presumption of prisoner of war status in case of doubt over the status of an individual. Indeed, Parrish has separately argued that captured, authorised, voluntary human shields should be treated as prisoners of war.⁹⁷

For the voluntary human shields whose stated intention is to oppose violations of international law, problems emerge when they are co-opted into the defence of a state which is the prospective object of attack. This was an issue that confronted the human shields in Iraq.⁹⁸ It appears reasonable to conclude that a person acting as a voluntary human shield should be cognisant that certain acts of shielding at the behest of a defending state cross the line of being ‘used by’ that state. Knowing acceptance of that ‘use’ to protect legitimate military objectives is arguably distinct from the circumstances of voluntary human shields in Serbia and Iraq who sought to protect infrastructure that, at worst, may have been dual-use. In such circumstances, voluntary human shields might, as did many in Iraq, consider their intended purpose to be compromised. They might consider their presence at a site selected by the defending state as reasonably considered to constitute support for the government and military of that state or, in the case of Iraq, as ‘working in the service of the Iraqi government’.⁹⁹

⁹¹ Quéguiner, above n 16, 817 (see especially fn 77). See, eg, *Karpova v Snow*, 402 F Supp 2d 459 (2nd Cir, 2005) discussed in Jamie H Kim, ‘Legal Summaries’ (2006) 26 *Journal of the National Association of Administrative Law Judges* 351. See also Alfred J Sciarrino and Kenneth L Deutsch, ‘Conscientious Objection to War: Heroes to Human Shields’ (2003–04) 18 *Brigham Young University Journal of Public Law* 59.

⁹² Teninbaum, above n 81, 139; Sciarrino and Deutsch, above n 91, 105.

⁹³ ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, above n 33, 727.

⁹⁴ *Ibid.*

⁹⁵ ICRC, *Direct Participation in Hostilities*, above n 34, 7.

⁹⁶ *Ibid.* 8.

⁹⁷ Parrish, above n 40, 14.

⁹⁸ Reynolds, above n 6, 53.

⁹⁹ Richard Byrne, ‘Rules of Engagement’, *The Boston Phoenix* (Boston, US) 27 March 2003, available from <<http://thephoenix.com>> at 23 September 2008.

VI CONSEQUENCES FOR THE PARTIES TO THE CONFLICT IF VOLUNTARY HUMAN SHIELDING DOES NOT CONSTITUTE DIRECT PARTICIPATION IN HOSTILITIES

A *Precautions*

Parties to a conflict are obliged to do ‘everything feasible’ to: ‘verify that the objectives to be attacked are neither civilians nor civilian objects’;¹⁰⁰ ‘remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives’;¹⁰¹ ‘avoid locating military objectives within or near densely populated areas’;¹⁰² ‘take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations’;¹⁰³ and ‘avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects’.¹⁰⁴

The general obligation on states in art 57(1) to take ‘constant care ... to spare the civilian population, civilians and civilian objects’ during the course of a conflict should be read as having ‘independent legal effect’, and not as a preface to the subsequent specific measures outlined in art 57.¹⁰⁵ The obligation in art 57(2)(a)(i) to verify that objectives are neither civilians nor civilian objects, but are in fact military objects, is ‘high but not absolute’,¹⁰⁶ so that what is ‘feasible’ will be judged according to the circumstances of a particular conflict. Article 58 can be read as applying to human shielding to the extent that it reinforces the prohibition on ‘using’ human shields by imposing a positive obligation on a defending state to remove civilians as a ‘feasible precaution’.¹⁰⁷ Gardam has recorded that art 58 was a new development in *Additional Protocol I*.¹⁰⁸ In addition, art 51(8) of *Additional Protocol I* directly reinforces the obligations on parties to take precautions with regard to the prohibitions against the use of human shields contained in art 51(7).¹⁰⁹

The customary international humanitarian law rule that parties to a conflict must minimise harm to civilians and civilian objects was highlighted in the Court’s judgment in *PCATI*.¹¹⁰ The Court’s conclusion that ‘armies must always resort to less-injurious alternatives in all cases involving civilians taking a direct part in hostilities’ has been criticised as, ‘at best, unsubstantiated and probably

¹⁰⁰ *Additional Protocol I*, above n 10, art 57(2)(a)(i).

¹⁰¹ *Ibid* art 58(a).

¹⁰² *Ibid* art 58(b).

¹⁰³ *Ibid* art 58(c).

¹⁰⁴ Henckaerts and Doswald-Beck, *Volume I: Rules*, above n 11, 51.

¹⁰⁵ Quéguiner, above n 16, 796–7.

¹⁰⁶ International Criminal Tribunal for the Former Yugoslavia (‘ICTY’), *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia* (ICTY Report, 13 June 2000) [29] <<http://www.un.org/icty/pressreal/nato061300.htm>> at 23 September 2008.

¹⁰⁷ Quéguiner, above n 16, 811.

¹⁰⁸ Judith Gail Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law* (1993) 156.

¹⁰⁹ Sandoz, Swinarski and Zimmermann, above n 15, 626–7.

¹¹⁰ *PCATI* (2006) HCJ 769/02, [26] (Israel), available in English from <<http://elyon1.court.gov.il/eng/home/index.html>> at 23 September 2008.

also inaccurate'.¹¹¹ A suggestion that an attacking commander might have an obligation to 'exhaust all lawful means of persuading an enemy commander to withdraw shields' has been dismissed as having no basis in international humanitarian law.¹¹²

B *Proportionality*

Gross has addressed the moral and legal problems attendant on the killing of innocent persons in military operations.¹¹³ So long as we accept that there is no absolutist moral prohibition on war per se, the deaths of innocent civilians may be morally and legally justified where it is 'a by-product which, by virtue of our recognition of the right to life, we act to limit to the greatest extent possible'.¹¹⁴ We can see in this formulation the moral basis for the principle of proportionality.

Proportionality and necessity may be seen as two sides of the same coin; the degree of necessity or military advantage potentially gained is partly determinative of what is an allowable amount of anticipated incidental civilian harm. The principles of distinction (discussed in Part III(A) above) and humanity are applied in order to minimise the sometimes unavoidable impact of military attacks on civilians and civilian objects. The principle of military necessity acts as a counterpoint: recognition that in some instances the military advantage clearly outweighs the anticipated harm to civilians and civilian objects that would be caused by the attack.¹¹⁵ Articles 51(5)(b) and 57(2)(a)(iii) of *Additional Protocol I* place the onus on attacking commanders to determine whether or not 'incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof' would be 'excessive in relation to the concrete and direct military advantage anticipated'.¹¹⁶ If it is, commanders must 'refrain from deciding to launch' any such attack.¹¹⁷ Under art 85(3)(b), launching an attack in breach of these provisions is a grave breach of international humanitarian law.¹¹⁸ These provisions effectively form the codification of the principles of military necessity, distinction, humanity and proportionality.¹¹⁹

¹¹¹ Amichai Cohen and Yuval Shany, 'A Development of Modest Proportions: The Application of the Principle of Proportionality in the *Targeted Killings Case*' (2007) 5 *Journal of International Criminal Justice* 310, 315.

¹¹² Quéguiner, above n 16, 815.

¹¹³ Emanuel Gross, 'Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State against Terrorism?' (2002) 16 *Emory International Law Review* 445, 474–5.

¹¹⁴ *Ibid* 488.

¹¹⁵ See, eg, Fischer, above n 3, 490.

¹¹⁶ *Additional Protocol I*, above n 10, art 51(5)(b).

¹¹⁷ *Ibid* art 57(2)(a)(iii).

¹¹⁸ *Ibid* art 85(3)(b).

¹¹⁹ Schoenekase, above n 2, 29.

The ICTY has said of proportionality that

it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.¹²⁰

The committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia argued that this formulation should not apply simply to the cumulative effects of a series of lawful attacks, but to ‘an *overall* assessment’ of the total civilian losses for an entire campaign.¹²¹

Quite aside from the inherent difficulties posed by the balancing act involved in applying the principle of proportionality,¹²² human shielding — particularly voluntary human shielding — presents military planners with specific problems. As a result, the principle has come under sustained criticism. For example, in response to censure over the bombing of the al-Amariyah bunker in the first Gulf War, the Pentagon has been reported as denouncing ‘the lack of realism’ of art 51 of *Additional Protocol I* because it ‘placed primary legal responsibility on the Coalition, despite the fact that it was Iraq that deployed noncombatants as a shield’.¹²³ Fischer objects to critics of the NATO bombing campaign who ‘amazingly ... focused on the Allied forces’ targeting decisions’.¹²⁴

[T]his incident illustrates that current interpretations of international law by some members of the international community scrutinize the actor forced to make that difficult decision just as much as (if not more than) the actor who created the scenario by actions that were, in themselves, violations of international law.¹²⁵

Fischer argues that responsibility for the deaths of human shields should be shifted ‘away from states compelled to exercise their right of self-defense, and towards actors who initially create the danger to civilians’.¹²⁶ By contrast, Sandoz has stated that:

it seems clear that the right of self-defence does not include the use of measures which would be contrary to international humanitarian law, even in a case where aggression has been established and recognized as such by the Security Council. The Geneva Conventions of 1949 and this Protocol must be applied in accordance with their Article 1 ‘in all circumstances’; the Preamble of the Protocol reaffirms that their application must be ‘without any adverse distinction based on the nature

¹²⁰ ICTY, above n 106, [52], discussing *Prosecutor v Kupreškić (Trial Chamber) Case No IT-95-16-T* (14 January 2000) [526] (Judgment).

¹²¹ *Ibid* [52] (emphasis in original).

¹²² Schmitt, ‘Precision Attack and International Humanitarian Law’, above n 54, 457.

¹²³ Matthew Lippman, ‘Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan’ (2002) 33 *California Western International Law Journal* 1, 45.

¹²⁴ Fischer, above n 3, 486.

¹²⁵ *Ibid*.

¹²⁶ *Ibid* 498.

or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict'.¹²⁷

Harrison takes criticism of the principle of proportionality even further. He argues that 'the proportionality standard effectively increases the risk to civilians during armed conflict rather than affording additional protection', by absolving defenders of responsibility for such casualties while simultaneously legitimising them.¹²⁸

The current state of the law, in the face of criticism highlighted above, has been outlined by Dinstein. He notes that customary international humanitarian law is 'more rigorous' than *Additional Protocol I*, requiring a stricter adherence to the concomitant obligations of both attacker and defender with respect to civilian casualties — including assessments of proportionality affected by the presence of human shields.¹²⁹ Dinstein's view is that, although 'the principle of proportionality remains prevalent',¹³⁰

the actual test of excessive injury to civilians must be relaxed. That is to say, the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that — if an attempt is made to shield military objectives with civilians — civilian casualties will be higher than usual.¹³¹

A similar proposition was criticised by one expert at the second ICRC meeting on the basis that:

In concrete operational reality, it was already very difficult to determine what was proportionate and disproportionate. Introducing additional differentiations and categories based on various criteria into a decision-making process, which is already taking place in a grey area would only further complicate this determination.¹³²

There is evidence, however, that operational decision-makers factored voluntary human shields into proportionality evaluations in both Serbia¹³³ and Iraq.¹³⁴ Knox quotes a statement by Michael McGinty of Britain's Royal United

¹²⁷ Sandoz, Swinarski and Zimmermann, above n 15, 615–16.

¹²⁸ Joshua C Harrison, 'Attracting the World's Policeman to Protocol I Additional to the 1949 Geneva Conventions' (2003) 12 *US Air Force Academy Journal of Legal Studies* 103, 112.

¹²⁹ Dinstein, above n 36, 131.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² ICRC, *Second Expert Meeting*, above n 65, 7.

¹³³ Kathleen Knox, 'Iraq: "Human Shields" Hunker Down In Baghdad', *Radio Free Europe/Radio Liberty* (Czech Republic) 28 February 2003 <<http://www.rferl.org/content/Article/1102379.html>> at 23 September 2008.

¹³⁴ Reynolds, above n 6, 53–4.

Services Institute:

[It] is a straightforward battle between military necessity and noncombatant immunity, but there is this third factor of voluntarism. So if you're fighting a war which claims in some way to be moral or such as in Kosovo — where if you recall the bridges with voluntary shields on weren't bombed — you'd perhaps be more restrained. If it's perhaps a more unrestrained war overall then the voluntary human shields might find themselves swept aside and killed anyway. [But] the prejudice has to be against going into action against them.¹³⁵

Schoenekase suggests that a similar approach was taken in Iraq, because despite some reports of voluntary human shields being redirected to military objects, 'Iraq largely used voluntary human shields to immunize targets that were part of its infrastructure'¹³⁶ and therefore arguably dual-use. Ultimately, international humanitarian legal principles may only have been one element considered by operational decision-makers, with public relations constituting another significant factor:

Given the political risk involved in doing so, the United States is unlikely to apply the principles of targeting to preclude considering the presence of voluntary human shields. The news media attention given to peace activists, their lack of military importance, and US policy makes this unlikely.¹³⁷

VII PROPOSALS FOR CHANGES IN INTERNATIONAL HUMANITARIAN LAW PERTAINING TO VOLUNTARY HUMAN SHIELDS

Geiß has suggested that an adversary faced with illegal conduct 'could feel compelled gradually to lower the proportionality barrier'.¹³⁸ The response to the increased use of human shields and prevalence of voluntary human shields has involved two linked questions. First, what — if any — further disincentives should be created to reduce such conduct; and second, what — if any — changes to international humanitarian law should be made to relieve attacking commanders from factoring voluntary human shields into application of the principle of proportionality?

The ICRC has argued strongly against the creation of new disincentives, stating 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

¹³⁵ Knox, above n 133.

¹³⁶ Schoenekase, above n 2, 26.

¹³⁷ Ibid 27.

¹³⁸ Robin Geiß, 'Asymmetric Conflict Structures' (2006) 88 *International Review of the Red Cross* 757, 766. For examples of this perspective, see Dakota S Rudesill, 'Precision War and Responsibility: Transformational Military Technology and the Duty of Care under the Laws of War' (2007) 32 *Yale Journal of International Law* 517, 537; Christopher B Puckett, 'In this Era of "Smart Weapons," is a State under an International Legal Obligation To Use Precision-Guided Technology in Armed Conflict?' (2004) 18 *Emory International Law Review* 645, 711–12.

personal dignity under [international humanitarian law], such as attempts to relax the absolute prohibition of torture, and cruel and inhuman treatment.¹³⁹

Fischer suggests applying the tort law ‘harm within the risk’ test to ‘help to clarify parties’ responsibilities and culpability in a human shield scenario’.¹⁴⁰ The result would be a greater assignation of responsibility to the party relying on human shields, freeing the attacking party ‘from cumbersome and potentially arbitrary determinations of whether their actions will be accepted by the international community’.¹⁴¹ Because the party relying on human shields has increased the risk to civilians through their acts, the state whose acts may harm the human shields is permitted ‘a higher level of incidental damage (when unavoidable, of course)’.¹⁴² This presents a different rationalisation for a graduated value of acceptable incidental civilian harm, determined by function and/or conduct, in the evaluation of proportionality.

Harrison suggests a range of amendments to *Additional Protocol I* as a means of ameliorating the consequences of the principle of proportionality, which include, inter alia, eliminating the proportionality standard by deleting all clauses containing the ‘direct military advantage’ test.¹⁴³

Abolition of the principle of proportionality would effectively level the field of potential targets for attacking states. Balancing the presence of civilians, as weighed against ‘military advantage’, though, may contribute to the classification of an object as military or otherwise, particularly with respect to dual-use objects. This would relieve commanders of the obligation to make this assessment and could result in the incorporation of a broader range of targets within the auspices of the ‘military object’ category. Attackers would be absolved of all incidental harm to civilians and civilian objects resulting from attacks on this enlarged range of targets.

If one accepts that there is no need to diminish the protections afforded by international humanitarian law to voluntary human shields, it is also true that, as Haas has argued,

nothing requires the protection of [voluntary human shields] to be increased. Indeed, [voluntary human shields] agree to take risks and the law cannot protect them from every danger they freely enter into. In fact, the rules on indiscriminate and proportionate attacks rightly take into account both the need to protect [voluntary human shields] and the limits of this protection, due to the military imperatives in the conduct of hostilities.¹⁴⁴

¹³⁹ ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, above n 33, 728.

¹⁴⁰ Fischer, above n 3, 511. The ‘harm within the risk’ test is a test of causation — ‘actors [are held] liable where the harm inflicted is within the risk posed by a bad action, such as using a hostage as a human shield’: at 494.

¹⁴¹ Ibid 515.

¹⁴² Ibid 516.

¹⁴³ Harrison, above n 128, 116–18, specifically Harrison’s suggested amendments to arts 51(5)(b) and 57(2)(a)(iii).

¹⁴⁴ Haas, above n 43, 211.

VIII CONCLUSION

There is no need to reclassify the status of combatants or civilians; indeed, it may be counterproductive. Introducing new categories such as ‘illegal belligerent’ or ‘unlawful combatant’ perpetuates the conceptualisation of civilians by reference to combatants. The application of such flexible status to voluntary human shields (conceived as the conduct of civilian actors) must lead, by necessary implication, to the creation of further gradations of ‘civilian’. How such a continuum of status and attendant rights is any improvement on the flexible standards inherent in a proportionality assessment is not at all clear. It is an approach that, arguably, significantly undermines the principle of distinction, as an ever growing list emerges of civilians that may be either legitimately targeted or regarded dismissively.

In the light of a foundational, normative principle of international humanitarian law — reducing the harm caused in conflict to civilians and civilian objects — the operational argument that factoring in voluntary human shields further complicates an already difficult proportionality assessment process is unconvincing. The true international humanitarian law position becomes clear if we reflect on the respective consequences of deciding whether voluntary human shielding constitutes direct participation to the disadvantage of, on the one hand, the voluntary human shields and, on the other, the state parties to the conflict. For voluntary human shields, the consequence of their conduct being held in all circumstances to be direct participation in hostilities is a complete loss of value in the considerations of attacking commanders. They may be directly attacked without consideration in an analysis of excessive incidental civilian harm. For states involved in conflicts, the consequence is the continuing inconvenience of having to abide by their obligations to voluntary human shields as civilians.

If we move beyond the general to the specific, however, it is equally clear that acts classified as voluntary human shielding by the individual actors, and even by states, may not truly be voluntary human shielding. Whether or not voluntary human shields engage in conduct which actually constitutes direct participation in hostilities must turn on the facts of a particular circumstance. This article concurs with authoritative expert opinion, limited judicial consideration and even more limited state practice that supports a general proposition that purported voluntary human shields must be presumed to retain their civilian status. However, by knowingly placing themselves in harm’s way voluntary human shields accept some risk of harm and relieve attacking commanders of the full weight of the responsibilities placed upon them under international humanitarian law. The level of risk that they accept will vary depending on the nature of their shielding activities.

The argument here is not that a partial waiver of the responsibilities of an attacker applies in all cases. The subjective intention of the individual voluntary human shield may provide evidence that they should retain their full rights as civilians, but only where certain conditions exist. Voluntary human shields who unambiguously do not support any party to a conflict, but act out of opposition to conflict *per se*, arguably have a strong case for retaining full immunity from direct attack.

Only by expanding the definition of either ‘direct participation’ or ‘hostilities’, or both, in such a way as to encompass a potentially vast field of hitherto accepted civilian activities, could the voluntary movement of an individual proximate to a potential target — including a potential dual-use target — be construed as direct participation in hostilities. Consequently, under the current definitions, voluntary human shields cannot be said to make the transition from civilian to combatant. Thus, the case for removing the immunity from attack enjoyed by civilians from any section of a civilian population has not, to date, been made.