



Exploring the prospect that voluntary human shields can take a direct part in hostilities

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Abstract

This doctrinal thesis centers around the topic of voluntary human shields as a complex phenomenon requiring further scholarly attention. Specifically, this paper acknowledges that the actions of certain voluntary shields renders their classification as civilians strenuous, in which it is explored if the notion of Direct Participation in Hostilities might apply. As such, the research question contemplates: *To what extent, if at all, can voluntary human shields be considered as taking a direct part in hostilities when shielding lawful targets?*

The analyses have concentrated on both a theoretical examination of the ICRC's Interpretive Guidance, and on an empirical investigation into two cases of voluntary human shields: the Serbian citizens in 1999 and the Palestinian women in 2006. Evidently, the findings indicate that voluntary human shields can to some extent take a direct part in hostilities, while the generalizability of our results are appreciated. Ultimately, this thesis provides additional insights into the topic, as increasingly relevant and required within the contradictory and existing research field, while also anticipating avenues for future research.

1. Introduction

In recent times, the majority of armed conflicts, whether of international- or non-international character, have rarely taken place in distant battlefronts as had been done historically.¹ Instead, contemporary conflicts have been fought in heavily populated cities where civilians have accounted for the majority of battle-related deaths, such as during the wars in Iraq and Syria. This phenomenon has been referred to as the 'civilianisation of conflicts', in which civilians increasingly face the risks of becoming collateral damage but also legitimate targets as they are being presented as 'armed actors' into conflicts.² These trends have accentuated the significance of provisions enshrined in International Humanitarian Law (IHL), especially the codifications of the principles of distinction and proportionality as assessments of potential indiscriminate attacks may be rendered even more strenuous in the context of 'civilianised' conflicts.³ Importantly, civilians and civilian objects are protected under IHL and are encompassed in any estimations of proportionality and appraisals of collateral damage, and ought to at all times be distinguished from lawful targets, as in combatants and military objectives.⁴ In fact, the legal protection of persons is conditioned upon their so-called primary status of being either a combatant⁵ or a civilian – the former enjoys the prisoner-of-war status (PoW) in international armed conflicts (IACs) and the latter enjoys 'civilian immunity' from attacks.⁶ As such, that primary status: "(...) determines the legal

¹ World101, 'The Civilian Consequences of Conflict' (*The Council on Foreign Relations*, 10 October 2023) <<https://world101.cfr.org/understanding-international-system/conflict/civilian-consequences-conflict#:~:text=More%20recently%2C%20wars%20in%20Iraq,were%20used%20in%20populated%20areas>> accessed 20 October 2023.

² Damien Van Der Toorn, 'Direct Participation in Hostilities: A Legal and Practical Road Test of the International Committee of the Red Cross's Guidance through Afghanistan' (2010) 17(17) *Australian international law journal* University of Western Sydney School of Law 7 [Hereinafter: Van Der Toorn].

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 07 December 1978) 1125 UNTS 3 (Additional Protocol I), art 48, art 51(4),(5), art 52.

⁴ Yoram Dinstein, 'Direct Participation in Hostilities' (2013) 18 *Tilburg Law Review* 3, 14 [Hereinafter: Dinstein]; Additional Protocol I (n3) art 48, art 50, art 51, art 52.

⁵ Worth mentioning is that the legal status of 'combatant' does not exist in a non-international armed conflict: Emily Crawford and Alison Pert, *International Humanitarian Law* (2nd ed, Cambridge University Press 2020) 105 [Hereinafter: Crawford and Pert].

⁶ Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949) 75 UNTS 135 (Geneva Convention III), art 4, art 12, art 13, art 14, art 15, art 16; Rewi Lyall, 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' (2008) 9 *Melb J Int'L* 313, 316 [Hereinafter: Lyall]: civilian immunity from attacks entail the protection of persons 'taking no active part in the hostilities' from, inter alia, 'violence to life and person'; See also Common Article 3 in Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (adopted 12 August 1949 75 UNTS 31 (Geneva Convention I) art 3; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949) 75 UNTS 85 (Geneva Convention II) art 3; Geneva Convention III art 3; Geneva

consequences which flow from one's actions and the legal obligations imposed by international law upon one's captors".⁷

Correspondingly, actions of certain individuals may challenge the combatant-civilian dichotomy as seen with the growing emergence of the use of human shields in contemporary conflicts – e.g allegations have been made against Russia for using human shields in the Ukrainian war.⁸ In accordance with the International Committee of the Red Cross's (ICRC) definition of the use of human shields, it: "(...) requires an intentional co-location of military objectives and civilians or persons *hors de combat* with specific intent of trying to prevent the targeting of those military objectives".⁹ Seemingly, human shields have civilian status, from which flows their civilian immunity from attack, and which is specifically used in an attempt to shield lawful targets, in terms of persons and military objectives.¹⁰ Notably, the use of human shields is prohibited under various instruments of International Law (IL), namely as codified in the Geneva Conventions of 1949 (Article 23 of Geneva Convention III and Article 28 of Geneva Convention IV¹¹) and extensively in Article 51(7) of Additional Protocol I:

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, favor 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 or to shield military operations.¹²

Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) 75 UNTS 287 (Geneva Convention IV) art 3.

⁷ Shannon Bosch, 'Voluntary human shields: status-less in the crosshairs?' (2007) 40(3) *The Comparative and International Law Journal of Southern Africa* 322, 324 [Hereinafter: Bosch 2007].

⁸ Zoi Lafazani, 'Human shields under IHL: a path towards excessive legalization' (*Humanitarian Law & Policy*, 16 November 2021) <<https://blogs.icrc.org/law-and-policy/2021/11/16/human-shields-ihl/>> accessed 31 October 2023; BBC News, 'Ukraine War: Russian soldiers held us as human shields' (*BBC News*, 7 April 2022) <<https://www.bbc.com/news/world-europe-61020565>> accessed 21 December 2023.

⁹ Michael Newton and Larry May, '9 Human Shields and Risk', in Michael Newton and Larry May, *Proportionality in International Law* (Oxford University Press 2014) 201, 206 [Hereinafter: Newton and May].

¹⁰ Stéphanie Bouchié de Belle, 'Chained to cannons or wearing targets on their T-shirts: human shields in international humanitarian law' (2008) 90(872) *International Review of the Red Cross* 883, 895 [Hereinafter: Bouchié de Belle].; See also Additional Protocol I (n3) art 51, art 52. NB – the term 'persons' as lawful targets is used to provide a broad term, as the combatant-status only exists in IACs. Hence 'persons' include combatants and e.g members of the armed forces which would be rendered as lawful targets in IACs and NIACs in Crawford and Pert (n5) 105.

¹¹ Geneva Convention III (n6) art 23; Geneva Convention IV (n6) art 28.

¹² Additional Protocol I (n3) art 51(7).

Additionally, the use of human shields by either Parties to an armed conflict is a war crime under the Rome Statute and reportedly holds customary status under IL.¹³ Human shields have been the concern of national- and international trials, e.g before the US Military Tribunal at Nuremberg (*The Von Leeb* case of 1948¹⁴) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) (*Karadžić and Mladić* case of 1995¹⁵).¹⁶ Relatedly, the explicit prohibition on using human shields is assumed as consequential to the IHL principle of distinction – the duty to protect civilians and civilian objects by distinguishing them from lawful targets – and to take relevant precautions, since the human shields will by definition be strategically placed to inhibit the targetability of otherwise lawful targets.¹⁷ The phenomenon of human shields also portrays the delicate balance between the primary principles of IHL, namely of military necessity and humanity permeating the legal realm.¹⁸ When facing human shields, a compromise between the principles is considered as e.g military objectives can be targeted while human shields are civilians entitled to protection but face the risks of becoming collateral damage.¹⁹

Noteworthy, human shields in this respect are not acting out of their own willingness, rather they are being forced by a Party to the conflict to e.g place themselves in the proximity of a military objective in an effort to shield it from attacks – these are *involuntary* human shields (IvHS)²⁰.

Considering the comprehensiveness of the law in respect to the prohibition to use IvHSs, it remains of interest to analyze the different types of human shields, specifically on the basis of their volition. As such, I contend two types of shields: IvHSs and *voluntary* human shields

¹³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 art 8(2)(b)(xxiii) [Hereinafter: Rome Statute 1998]; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* International Committee of the Red Cross Vol 1 (Cambridge University Press, 2009) Rule 97 [Hereinafter: ICRC CIHL Rules]; Bouchié de Belle (n10) 890.

¹⁴ *US v. Wilhelm von Leeb, et al.* The High Command Case (United States Military Tribunal Nuremberg) 11 TWC 462 (October 27-28, 1948).

¹⁵ *The Prosecutor of the Tribunal v. Radovan Karadžić and Ratko Mladić* (Indictment) IT-95-5-I D337-D315 (July 24, 1995).

¹⁶ ICRC CIHL Rules (n13) Rule 97.

¹⁷ Additional Protocol I (n3) art 48, art 52, art 57; Bouchié de Belle (n10) 887.

¹⁸ Michael N. Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50(4) *Virginia Journal of International Law* 796, 798-799.

¹⁹ Newton and May (n9) 203.

²⁰ *ibid* 202; See also Additional Protocol I (n3) art 51(7): "The Parties to the conflict shall not direct [emphasis added] the movement of the civilian population (...)" – the reference in the provision to the Parties *directing* the civilian population (or other) is substantiating their involuntariness.

(VHSs²¹). The phenomena of VHSs has recently gained scholarly- and public interest as prominent early examples from 2003 include the British citizens during the 'invasion' of Iraq and Palestinian civilians shielding Yasser Arafat's headquarters.²² Seeing that VHSs have acted in various armed conflicts since then, in conjunction with the lack of its incorporation in the law, I argue for the relevance of this as a research topic. It is also pertinent to distinguish between IvHSs and VHSs, as supported by Dinstein, while recognizing the practical difficulties in doing so.²³ Besides, the distinction is neither reflected in the law, as the focus primarily lies with IvHSs.²⁴ As such, I regard this as a lacunae in the law, promoting additional research into the unresolved issues of VHSs, as IHL necessarily ought to develop simultaneously with the changing essence of conflicts.²⁵

Taking into account that the volition, or lack thereof, in the context of human shields is used to distinguish the IvHSs from the VHSs, it is arguably foreseeable that this subjective element also affects the legal status and hence the legal protection of those individuals under IHL.²⁶ Following this, a key delimitation is the fact that human shields, whether involuntary or voluntary, are civilians within the meaning of the law, according to for instance Article 51(7) of Additional Protocol I.²⁷ As such, the consideration that a civilian taking a voluntary part or action in the armed conflict affects his/her legal protection goes hand-in-hand with the notion of a civilian taking a direct part in hostilities (DPH).²⁸ Accordingly, the terminology of DPH renders understandable the fact that civilians may be at risk of hostilities as a consequence of their own discretion.²⁹ While this will be elaborated further in the thesis, we will at this stage contend that a civilian may lose his/her civilian immunity from attack as a result of his/her actions during an armed conflict – a consequence of that civilian taking a DPH.³⁰ This arguably raises the question of whether a civilian volunteering to act as a human

²¹ See definition of voluntary human shields in Section §2.

²² Bosch 2007 (n7) 322-23; Bouchié de Belle (n10) 883-884.

²³ Dinstein (n4) 14.

²⁴ For instance through its prohibition as a war crime: Rome Statute 1998 (n13) art 8(2)(b)(xxiii).

²⁵ Nada Al-Duaij, 'The Volunteer Human Shields in International Humanitarian Law' (2010) 12 Or Rev Int'l L 117, 120 [Hereinafter: Al-Duaij].

²⁶ Bosch 2007 (n7) 324; See (n6).

²⁷ Additional Protocol I (n3) art 51(7).

²⁸ Bosch 2007 (n7) 337.

²⁹ *ibid.*

³⁰ International Committee of the Red Cross (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (ICRC 2009) 9, 43 [Hereinafter: ICRC Guidance].

shield (VHS) may cause a similar loss protection. As such, the research question this thesis will seek to examine is:

To what extent, if at all, can voluntary human shields be considered as taking a direct part in hostilities when shielding lawful targets?

The thesis is introduced by a conceptualization of VHSs and DPH in *Section 2* and *3*, followed by the analytical consideration that VHSs can take a DPH and the legal consequences of such in *Section 4*, which opens up for the empirical analysis of cases in *Section 5*, culminating into a discussion of the findings in *Section 6* and conclusions in *Section 7*.

2. The Concept of Voluntary Human Shields

By virtue of rendering the analyses throughout this thesis coherent, while facilitating the provision of comparable findings, it is important to delimit a definition of a VHS for research purposes. Seemingly, I maintain that much like IvHSs, VHSs have a nearly identical purpose – to shield lawful targets, in terms of persons and military objectives, from attacks.³¹ While reiterating the introductory section, the distinguishing factor transpires as the extent of volition, on the part of the individual, to act as a human shield. In fact, scholars have highlighted that the VHS's act of shielding ought to be without coercion nor interference from either Parties to the conflict.³² Others, such as Bargu, consider that VHSs ought to have "(...) the knowledge of the potential risks involved [with his or her actions]".³³ While relevant, this knowledge-requirement, as additional to the subjective element of volition, will remain outside the scope of this thesis since it is difficult to discern an individual's ambit of knowledge and risks narrowing the scope of this thesis unfavorably. Thus, the definition of a VHS used throughout this thesis considers the following: *a civilian*³⁴ *who voluntarily and*

³¹ Bouchié de Belle (n10) 895; Additional Protocol I (n3) art 51, art 51(7), art 52.

³² Shannon Bosch, 'Targeting decisions involving voluntary human shields in international armed conflicts in light of the notion of direct participation in hostilities' (2013) 46(3) *The Comparative and International Law Journal of Southern Africa* 447, 449 [Hereinafter: Bosch 2013]; Al-Duaij (n25) 128.

³³ Banu Bargu, 'Bodies against war: Voluntary human shielding as a practice of resistance' (2016) 110 *Cambridge University Press* 299, 301.

³⁴ As delineated above, a human shield whether involuntary or voluntary is a civilian: Additional Protocol I (n3) art 51(7).

*without outside interference uses his/her civilian status to shield lawful targets, in terms of persons and military objectives, from attacks.*³⁵

Before proceeding further, I wish to acknowledge two separate but important matters. The first is that children are disregarded within our definition of VHSs as we uphold that their absence of 'legal capacity' invalidates their volition to act as human shields.³⁶ The second remark regards the degree of certainty one can expect to have concerning the voluntariness of human shields. It appears difficult to determine, with absolute conviction, that any volitional act occurred without outside interference, e.g in the form of coercion.³⁷ As a matter of fact, evidence shows that VHSs have at times been affected by State propaganda whereas the extent of their volition might be questionable.

Such issues are highly relevant to the complex topic of VHSs and hence acknowledged as part of the thesis.

3. The Notion of Direct Participation in Hostilities

To begin with, the notion of DPH embraces various IHL principles such as the principle of distinction which has been proclaimed as 'cardinal' by the International Court of Justice³⁸, the principle of proportionality, as well as the prerequisite duty to take precautions.³⁹ Accordingly, the concept stems from Common Article 3 of the Geneva Conventions: "(...) persons taking no active part in the hostilities (...)" ought to be, as a minimum, "(...) treated humanely (...)".⁴⁰ It is also incorporated in IHL codifications, particularly in Additional Protocols I and II – Articles 51(3) and 13(3) respectively – while specifying the so-called 'temporal caveat' that civilians are protected "(...) unless and for such time as they take a

³⁵ This definition is based upon the definition of involuntary human shields with the key difference being the extent of volition: Additional Protocol I (n3) art 51(7).

³⁶ Michael N. Schmitt, 'Human Shields in International Humanitarian Law' (2009) *Israel Yearbook on Human Rights* 17, 57 [Hereinafter: Schmitt 2009]; Bouchié de Belle (n10) 902.

³⁷ Newton and May (n9) 213.

³⁸ *Case Concerning Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 ICJ. Rep. 226 para 78.

³⁹ Michael N. Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 *New York University Journal of International Law and Politics* 697, 700-02 [Hereinafter: Schmitt 2010 DPH].

⁴⁰ Van Der Toorn (n2) 8; Common Article 3 (n6) in Geneva Convention I art 3; Geneva Convention II art 3; Geneva Convention III art 3 and Geneva Convention IV art 3.

direct part in hostilities”.⁴¹ Furthermore, the ICRC has proposed that the DPH-notion has customary status under IHL, while no accordant definition is provided.⁴² However, attempts at defining the concept have been made, as per the Commentary to Additional Protocol I: “Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place”.⁴³ It has also been alleged, by the Inter-American Commission on Human Rights, that the term of DPH corresponds to: “(...) acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and *matériel*”.⁴⁴ Relatedly, States have not defined the notion while relying on ‘case-by-case’ appraisals.⁴⁵ Likewise, evidence from case-law also supports fact-based evaluations:

It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time.⁴⁶

Within the scholarly field, a controversy regarding the meaning of DPH has emerged, with differing narrow and broad interpretations.⁴⁷ This is also perceived in the Commentary to Additional Protocol I as it discusses the ‘margin of judgment’ in relation to the narrow

⁴¹ Additional Protocol I (n3) art 51(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 07 December 1978) 1125 UNTS 609 (Additional Protocol II) art 13(3); Newton and May (n9) 206. Since the notion is included in both Additional Protocols, DPH is relevant within IACs (Additional Protocol I), as well as in non-international armed conflicts (NIACs; Additional Protocol II).

⁴² ICRC CIHL Rules (n13) Rule 6; Van Der Toorn (n2) 8.

⁴³ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *The Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) 516 paras 1679 [Hereinafter: Commentary on Additional Protocols].

⁴⁴ ICRC CIHL Rules (n13) Rule 6.

⁴⁵ Schmitt 2010 DPH (n39) 705-06; U.S. Navy, U.S. Marine Corps & U.S. Coast Guard, Doc. NWP 1-14M/MCWP 5-12.1/ COMDTPUB P5600.7.A, *The Commander's Handbook on The Law of Naval Operations* ch. 8.2.2 (July 2007) [Hereinafter: NWP 1-14]; See also United Kingdom Ministry of Defence, *The Manual On The Law Of Armed Conflict* ch. 5.3.2 (2004).

⁴⁶ *Prosecutor v. Dusko Tadić* (Judgment) IT-94-1-T (May 7, 1997) para 616; See also *Prosecutor v. Pavle Strugar* (Appeals Chamber Judgment) IT-01-42-A (July 17, 2008) paras 176-79 “Conduct amounting to direct or active participation in hostilities is not, however, limited to combat activities as such Moreover, to hold all activities in support of military operations as amounting to direct participation in hostilities would in practice render the principle of distinction meaningless”.

⁴⁷ Schmitt 2010 DPH (n39) 709.

perception, as only incorporating acts within 'active military operations' and to the broader perception, as including acts within 'the entire war effort'.⁴⁸

Ultimately, an agreeing definition cannot be retrieved from IHL codifications, State practice, judicial bodies and nor from academics, hence we will rely on another prominent source as follows.

3.1 The ICRC Interpretive Guidance on Direct Participation in Hostilities

The ICRC and the Asser Institute commenced an inquiry into the concept of DPH in 2003, attempting to provide a legal understanding.⁴⁹ During that process, a number of expert meetings were held including various legal counselors. The inquiry generated the final product in 2009 when the Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (henceforth the Guidance) was issued.⁵⁰ Importantly, the ICRC – appreciated attendant of IHL – explains that it did not undertake to modify any pre-existing rules of IHL, whether customary or treaty, but rather to clarify its position on the notion of DPH.⁵¹ As such, the document represents the ICRC's understanding and is not portraying a unified view.⁵² Scholars have also argued that the Guidance can, and perhaps should, be recognized as a subsidiary source of the law, in accordance with Article 38 of the Statute of the International Court of Justice as portraying a source under subparagraph d) citing e.g. "(...) the most highly qualified publicists (...)".⁵³ Seemingly, I profess that the document and its content are an important clarification into the concept of DPH, providing a greater understanding. Thus, the Guidance will be used as a basis for this thesis, undertaking to evaluate the actions of VHSs as taking a DPH.

Further, the Guidance emphasizes that its purpose lies in determining "(...) whether and, if so, for how long a particular conduct amounts to direct participation in hostilities".⁵⁴ It also highlights that DPH refers to specific act(s) by individuals⁵⁵ during an armed conflict –

⁴⁸ Commentary on Additional Protocols (n43) paras 1945

⁴⁹ Van Der Toorn (n2) 8-9.

⁵⁰ ICRC Guidance (n30)

⁵¹ ICRC Guidance (n30) 9; Van Der Toorn (n2) 17.

⁵² Van Der Toorn (n2) 9; Schmitt 2010 DPH (n39) 698.

⁵³ Van Der Toorn (n2)17; Statute of the International Court of Justice (adopted 24 October 1945, published 18 April 1946) 33 UNTS 993 art 38(d). See also the especial role of the ICRC in International Committee of the Red Cross (ICRC) Statutes of the International Red Cross and Red Crescent Movement (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995, and 2006) art 5.

⁵⁴ ICRC Guidance (n30) 41.

⁵⁵ The term 'individual' refers to "(...) the circle of persons who are protected against direct attack unless and for such time as they directly participate in hostilities" – The Guidance clarifies that such persons are civilians which loses their immunity from attack and may be lawfully targeted 'for as long as they' take a DPH in ICRC

underscoring that it does not relate to a “(...) person’s status, function, or affiliation, but to his or her engagement in specific [emphasis added] hostile acts”.⁵⁶ Moreover, the Guidance accentuates the intricate multiplicities of armed conflicts as having a diverse set of circumstances, in which the primary principles of IHL ought to be reflected within the understanding of DPH.⁵⁷ Similarly, it also recognizes the complexity in understanding the notion of DPH itself, as portrayed by its general lack of definition while attempting to address such by putting forth its constitutive elements.

3.1.1 The Three Constitutive Elements

The Guidance introduces three elements, which during the Fourth Expert Meeting on the Notion of DPH in 2006 were described as conceptual and are to be understood as cumulative.⁵⁸ The ensuing criterias must be met, for the specific act(s) of an individual to amount to DPH:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).⁵⁹

In relation to these requirements, the ICRC argues that the coexistence of the three facilitates the discernment of acts which would constitute a DPH and acts which would not.⁶⁰ Scholars, such as Schmitt, have also found that the fulfillment of these elements are intrinsically

Guidance (n30) 13, 20-36; “(...) the Guidance implies that ‘direct participation in hostilities’ is primarily relevant to the targeting of two types of actors within armed conflict: civilians who directly participate in hostilities on a spontaneous, sporadic or unorganized basis, and members of organized armed groups whose functions involve directly participating in hostilities on a continuous basis” in Van Der Toorn (n2) 10.

⁵⁶ ICRC Guidance (n30) 43-44.

⁵⁷ Van Der Toorn (n2) 11; ICRC Guidance (n30) 41-42.

⁵⁸ International Committee of the Red Cross (ICRC), *Fourth Expert Meeting on the Notion of Direct Participation in Hostilities* (ICRC 2006) 5, 39 [Hereinafter: Report DPH 2006]; ICRC Guidance (n30) 46.

⁵⁹ ICRC Guidance (n30) 46.

⁶⁰ *ibid* 64.

relevant within any analysis of the notion of DPH.⁶¹ However, they are not unimpeachable, as scholars have also discussed its potential criticisms.⁶² For instance, Van Der Toorn raises that it is arguably undeniable that the Guidance provides an attempt at a crucial and meticulous document discussing a highly complex notion, while recognizing that it ought to be contingent on remarks.⁶³

On the whole, the three requirements have manifested as being contentious, with scholars directing the main critique towards their inability to grasp the intricacies of contemporary armed conflicts.⁶⁴ This expressed dissatisfaction with the Guidance's elements will be tested in application to VHSs as a rather recently emerged phenomenon – part of the changing nature of conflicts.

3.2 The ICRC Guidance and Voluntary Human Shields

Essentially, whether VHSs can take a DPH will depend on, according to the Guidance, the three constitutive elements, as with any other specific act(s).⁶⁵ This approach will be abided by and is arguably the most fruitful respecting our research purposes, as even though every situation involving VHSs will have contextual differences, it remains practically important to evaluate the different acts to the same criterias.

Intriguingly, during the DPH Meeting in 2006, two of the involved experts concluded that the case of VHSs was highly debatable and as such were not able to agree on a position.⁶⁶ Nonetheless, the majority of the experts agreed that the question of VHSs was, and arguably remains, a particularly relevant challenge to IHL, where some argued that it thus should be included in the Guidance while others promoted its exclusion. Notably, and as incorporated in the finalized Guidance, the ICRC concludes that VHSs are a 'legal impediment' rather than a 'physical obstacle' – VHSs located in the proximity of military objectives may obscure any

⁶¹ Schmitt 2010 DPH (n39) 739.

⁶² Van Der Toorn (n2) 17; Bosch 2013 (n32) 462.

⁶³ Van Der Toorn (n2) 17-18: "On the one hand, this approach gives as wide as possible legal protection to the civilian population, which may reduce the risk of innocent civilians being erroneously killed or injured. On the other hand, it significantly limits the scope of targeting by state militaries of irregular forces and individuals who alternate between civilian life and engagement in hostilities".

⁶⁴ Schmitt 2010 DPH (n39) 698-99.

⁶⁵ Report DPH 2006 (n58) 45.

⁶⁶ *ibid* 44.

lex lata jus in bello proportionality assessments⁶⁷ disadvantaging the attacking Party.⁶⁸ In fact, the ICRC argues that since VHSs are a 'legal impediment', they cannot take a DPH and hence are immune from direct attacks (the legal-impediment argument). They have also argued that if VHSs can be considered as taking a DPH and hence be lawfully targeted, their shielding presence would be rendered 'void' in some sorts (the self-defeating argument). Finally, the practical difficulties in distinguishing between IvHSs and VHSs have also been raised in support of not considering VHSs as taking a DPH (the impractical argument).⁶⁹ However, the ICRC gathers that the classification of VHSs is contested and that *some* consider them as taking a DPH while *others* do not. Such unattainable consensus opens up for our following analysis tending to the application of the ICRC's elements to actions of VHSs.

3.2.1 Threshold of Harm

Initially, the threshold of harm requirement embodies the notional substratum of DPH and relies on the identification of *likely* harm⁷⁰ ensuing from specific acts.⁷¹ The Guidance has formulated this element 'in the alternative' – the qualitative threshold of "(...) adversely affect[ing] the military operations or military capacity of a party to an armed conflict (...)" *or* the quantitative threshold of "(...) inflicting[ing] death, injury, or destruction on persons or objects protected against direct attack" must be reached.⁷² Seemingly, if we consider the quantitative threshold, it appears doubtful that VHSs cause physical harm, at least within our understanding as portrayed in the definition – we only include acts of physical shielding.⁷³ Alternatively, the qualitative threshold, arguably balancing out the strict quantitative counterpart, consists of *any* act which might unfavorably impact the military abilities of a

⁶⁷ NB – Proportionality assessments relate to the fundamental IHL principle of proportionality referring to the fact that attacks may not be launched "(...) which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" – also relating to the duty to take precautions in attack i.e. refraining from launching such unproportionate or indiscriminate attacks in Additional Protocol I (n3) art 51(5)(b), art 57(2)(a)(iii).

⁶⁸ Report DPH 2006 (n58) 45-46; ICRC Guidance (n30) 57.

⁶⁹ International Committee of the Red Cross, 'Conduct of hostilities' (*Casebook ICRC*) <https://casebook.icrc.org/law/conduct-hostilities#footnote29_7b4e1q7> accessed 14 November, para 8 [Hereinafter: Casebook ICRC].

⁷⁰ In other words, the requirement relies on identifying so-called harmful acts: "As the commentary to the provision on medical units notes, 'the definition of *harmful* is very broad. It refers not only to direct harm inflicted on the enemy, for example, by firing at him, but also to any attempts at deliberately hindering his military operations in any way whatsoever'. (...) the ICRC had proposed a definition of harmful act as '[a]cts the purpose of effect of which is to harm the adverse Party, by facilitating or impeding military operations (...)' in Schmitt 2010 DPH (n39) 715.

⁷¹ *ibid* 713-15; ICRC Guidance (n30) 47.

⁷² Report DPH 2006 (n58) 39; ICRC Guidance (n30) 47.

⁷³ See Section §2.

Party, even if considered as insignificant to those affected.⁷⁴ Notably, the Guidance exemplifies the act of hindering a Party's military use of material and areas as reaching the necessary threshold of harm.⁷⁵ Additionally, certain experts during the Fourth meeting in 2006 appeared to have supported that the presence of VHSs could pose a physical obstacle to the opponent's military operations, by creating a hindrance between enemy forces and the military objective they seek to target.⁷⁶ In line with this, I argue for the possibility that VHSs can negatively condition a Party's operations, since they purposely aim at using their civilian status to shield military objectives, hence enemy attacks might be impeded, by virtue of e.g. proportionality assessments.⁷⁷ Seemingly, certain specific acts amounting to the threshold of harm have been presented as rather uncontroversial in debates, for instance the 'unarmed' undertaking of restraining the military 'deployments, logistics and communications' of a Party.⁷⁸ Such maneuvers can arguably be ascribed to the actions of VHSs, e.g. if we consider that they shield the military airfields of a Party, I argue that it hampers with the military stationing onto such airfields.⁷⁹

However, the Guidance challenges the idea that the acts of VHSs can reach the necessary harm.⁸⁰ In fact, the ICRC has argued that the contentious issue lies in the fact that they rarely hinder military operations in physical terms.⁸¹ Nevertheless, the element of harm has been critiqued for being flawed in that its proper application could preclude acts which constitute a DPH – i.e. an exclusionary requirement.⁸² Hence, I argue that the physical presence of VHSs in the vicinity of military objectives can, in fact, hinder the military operations or capacity of a Party since they can affect the use of certain military equipment or pose as an obstacle between the enemy forces and military objectives by virtue of their

⁷⁴ ICRC Guidance (n30) 47; Report DPH 2006 (n58) 39; Van Der Toorn (n2) 22

⁷⁵ ICRC Guidance (n30) 47-8; See also Schmitt 2010 DPH (n39) 716-17: "To amount to an adverse effect, *military* operations or capacity must be affected. This requirement comports with Additional Protocol I's definition of military objectives, which reflects customary international law", "Universal acceptance of the military objective definition supports restricting the notion of direct participation to harm which is military in nature".

⁷⁶ Report DPH 2006 (n58) 44-5.

⁷⁷ See (n67).

⁷⁸ Bosch 2013 (n32) 461; ICRC Guidance (n30) 48.

⁷⁹ Military airfields are by and large considered as military objectives: Canada Office of the Judge Advocate General, *The Law of Armed Conflict at the Operational and Tactical Levels* (13 August 2001) § 407.1-2; International Committee of the Red Cross, 'Practice relating to Rule 8. Definition of Military Objectives' (*IHL Databases ICRC*) <<https://ihl-databases.icrc.org/en/customary-ihl/v2/rule8#:~:text=Objects%20that%20are%20normally%20of,taget%20for%20the%20attackers>> accessed 15 November, para III; See also Additional Protocol I (n3) art 52(2).

⁸⁰ ICRC Guidance (n30) 57.

⁸¹ Bosch 2013 (n32) 461.

⁸² Schmitt 2010 DPH (n39) 714.

presence.⁸³ Moreover, the threshold of harm would arguably be reached, irrespective of whether the shielding is contemplated as a physical or legal impediment, as argued by the ICRC.⁸⁴ I consider that whether opposing forces decide to reconsider launching an attack based upon VHSs impeding the materialization of the attack (physical obstacle) or due to the presence of VHSs potentially rendering the attack unlawful under IHL (legal obstacle), it would not matter for the purpose of the threshold.⁸⁵

Even so, if the specific acts of VHSs can reach the threshold of harm, all three elements have to be considered as they are cumulative.⁸⁶

3.2.2 Direct Causation

During the experts meetings, a consensus was reached on the importance of a near relationship joining the specific act and its ramifications on either Party to the conflict.⁸⁷ While it was also proven to be difficult to agree on the required level of causation, whether 'direct' or 'indirect', the finalized Guidance holds the requirement of direct causation.⁸⁸ Notably, one of the experts acknowledged that it entails: "(...) without other relevant circumstances intervening in the chain of causation" – translated into the Guidance's requisite of *one causal step*^{89,90}. The requirement is therefore reached when there is an uninterrupted causal relationship between the specific act(s) and the resulting harm reaching the threshold.⁹¹ To note, the Guidance's criteria of forming an 'integral part' is confined to larger and joint operations, arguably excepted from our definition of VHSs.⁹²

Furthermore, the Guidance exemplifies that a specific act perpetuating the military abilities of a Party to the detriment of another does not constitute an act of direct causation.⁹³

⁸³ Bosch 2013 (n32) 461; ICRC Guidance (n30) 48.

⁸⁴ ICRC Guidance (n30) 57.

⁸⁵ *ibid* 56-7.

⁸⁶ Schmitt 2010 DPH (n39) 720.

⁸⁷ *ibid* 725.

⁸⁸ Report DPH 2006 (n58) 46; Schmitt 2010 DPH (n39) 727: "(...) as with the first constitutive element, an exclusive focus solely on harm, without consideration of benefit, permeates the notion of directness".

⁸⁹ Noteworthy is that even though the Guidance requires 'one causal step', it also: "(...) notes that the direct causation standard does not require that the act be indispensable to the causation of harm, a proviso seemingly inconsistent with a literal application of the ostensible one causal step criterion" in Schmitt 2010 DPH (n39) 728; See also ICRC Guidance (n30) 54-5: "More precisely, where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm".

⁹⁰ Report DPH 2006 (n58) 47; ICRC Guidance (n30) 53.

⁹¹ ICRC Guidance (n30) 51.

⁹² Schmitt 2010 DPH (n39) 729; See Section §2.

⁹³ ICRC Guidance (n30) 53.

Notwithstanding, the ICRC also maintains that a VHS can in a direct manner cause the required threshold of harm by locating him- or herself as an human obstacle:

This scenario may become particularly relevant in ground operations, such as in urban environments, where civilians may attempt to give physical cover to fighting personnel supported by them or to inhibit the movement of opposing infantry troops.⁹⁴

In as much as, it appears that the ICRC does not explicitly exclude the actions of VHSs as amounting to DPH, even though the 'legal-impediment' argument is also revealed.⁹⁵ In fact, the Guidance somewhat implicitly discerns that the harm ought to have been caused by a physical act.⁹⁶ In this respect, it is understood that the ICRC regards the somewhat abstract obstacle that a VHS can pose in terms of a prolonged proportionality assessment on the part of the attacker, as constituting indirect causation. However, and in agreement with Schmitt, it would be senseless to abide by such distinctions.⁹⁷ In fact, no legal foundation is provided for such dissimilitude and it has been criticized as contradicting State practice⁹⁸, and the ICRC's previous reliance on such.⁹⁹ Importantly, it appears that the Guidance recognizes at least two types of actions taken by VHSs – actions accounting for physical and legal obstacles.¹⁰⁰ Even though I agree with the fact that there are a variety of acts taken by VHSs and that it is increasingly difficult to provide a generalization, I also argue that it becomes strenuous to claim that a VHS posing a legal obstacle is not also a physical hurdle.¹⁰¹ In fact, a VHS using his/her civilian status to shield a lawful target from attack will reach the required threshold of harm with one causal step since their physical presence is directly causing the harm – i.e the

⁹⁴ The example that had been used to demonstrate this scenario was of a: "(...) woman who shielded two fighters with her billowing robe, allowing them to shoot at their adversary from behind her" in ICRC Guidance (n30) 56.

⁹⁵ *ibid* 56-7.

⁹⁶ The Guidance: "(...) distinguishes between a civilian who physically shields a military objective, as in blocking passage over a bridge, from one who merely goes to a military objective hoping the enemy will refrain from attacking it because of his presence. (...) the latter, according to the Guidance, does not 'directly' harm the enemy because the action does not physically impede an attack" in Schmitt 2010 DPH (n39) 732; See also Bosch 2013 (n32) 462: "Schmitt is also critical of the Guide's interpretation of direct causation necessarily being linked to a physical act causing harm. He argues that in modern warfare it is entirely possible for an act to benefit a belligerent party, while not necessarily also harming the enemy, and yet still having a marked effect on the belligerent's capacity to win".

⁹⁷ Schmitt 2010 DPH (n39) 733.

⁹⁸ Based upon e.g. military manuals, it has been argued that the statement contradicts State practice: *ibid*.

⁹⁹ "(...) the ICRC's *Customary International Humanitarian Law* study's heavy reliance on manuals (...)" in Schmitt 2010 DPH (n39) 733.

¹⁰⁰ This differentiation is understood by the way that the ICRC exemplifies situations in which VHSs can amount to DPH and situations in which VHSs can pose legal obstacles not amounting to DPH in ICRC Guidance (n30) 56-7.

¹⁰¹ Van Der Toorn (n2) 22-23.

negative consequence on a Party's use of e.g. military equipment – irrespective of whether they are posing a legal and/or physical obstacle.¹⁰² In addition, the Guidance discusses that 'geographical' nearness is a potential indicative factor, but not a sole determinant, of direct causation, arguably conforming with my argument that VHSs can reach the requirement, since the act in question relies on their physical presence.¹⁰³ In support of this, Van Der Toorn considers that a VHS shielding a military objective might "(...) cause the enemy not to attack the target, either as a matter of law or as a matter of choice".¹⁰⁴ He also argues that a VHS's act of shielding forces the opponent to consider for instance the principle of proportionality and the risk that an attack may be indiscriminate, potentially resulting in the suspension of the attack and directly causing the harm.

In contrast, Bosch discerns that the acts of VHSs do not generally reach the causal requirement, while highlighting the controversies of such statements.¹⁰⁵ She describes that a number of experts consider the VHS's *intent* to harm the opponent as the decisive factor in determining a direct causation, while also concurring the 'legal-impediment' argument put forth by the ICRC. However, and by reiterating the above, I argue that the physical presence of VHSs can reach the required causation by refuting the ICRC's distinction between a legal and physical obstacle – also refuted by, *inter alia*, Schmitt.¹⁰⁶ Nonetheless, it remains to consider the final requirement of a belligerent nexus, as the elements are cumulative.¹⁰⁷

3.2.3 Belligerent Nexus

The significance of the belligerent nexus requirement has been less disputed in comparison to the other two elements.¹⁰⁸ It requires that a specific act, directly causing the required harm, be connected to the hostilities while precluding acts unrelated to the conflict. Noteworthy, the act needs to be: "(...) in support of a party to the conflict and [emphasis added] to the detriment of another" – arguably presupposing a 'zero-sum game'.¹⁰⁹ Moreover, during the Fifth Expert Meeting in 2008, the existence of 'tough' cases were acknowledged, in which it

¹⁰² Van Der Toorn (n2) 22-23.

¹⁰³ ICRC Guidance (n30) 55; Schmitt 2010 DPH (n39) 731-32.

¹⁰⁴ Van Der Toorn (n2) 22-23.

¹⁰⁵ Bosch 2013 (n32) 461-462.

¹⁰⁶ Schmitt 2010 DPH (n39) 733.

¹⁰⁷ ICRC Guidance (n30) 46.

¹⁰⁸ Schmitt 2010 DPH (n39) 735.

¹⁰⁹ ICRC Guidance (n30) 58; Schmitt 2010 DPH (n39) 736; See also Bosch 2013 (n32) 463: "(...) Melzer argues that if either of the requirements is relaxed (support of a party to the conflict, and the intention to act to the detriment of another party), the harm caused is not related to the armed conflict".

emerged as difficult to standardize whether specific scenarios always had a belligerent nexus or not.¹¹⁰ To continue, an individual's potential intent is said to be peripheral – the nature of the act of supporting one Party and disadvantaging another are appreciated as the key components, since assessments ought to be objective in determining the relevant conditions.¹¹¹ Such objectivity is recognized as strenuous in certain situations, thus any deliberations ought to be based on accessible and well founded intelligence.¹¹²

Scholars, inter alia Lyall, appear reluctant in claiming that acts of VHSs has a belligerent nexus by exemplifying that if they 'merely' act with the purpose of resisting the ongoing hostilities, it would not conform with the requirement.¹¹³ However, acts of VHSs can vary and taking the example of the Guidance¹¹⁴; if a VHS shields combatants and enables them to target the enemy forces, those acts are arguably supporting the combatants (a Party to the conflict) while also disadvantaging the enemy forces (another Party to the conflict) – the shielding of the combatants renders the enemy forces vulnerable to potential attacks. Further, when VHSs shield a military objective in support of a Party, it will also harm the opponent since that Party's anticipated military advantage of an attack will be hindered.¹¹⁵

On the whole, I find evidentiary support for the possibility that VHSs can fulfill all three requirements. However, case-based analyses are necessary since it is unfeasible to provide assertions regarding whether VHSs invariably DPH or not.¹¹⁶ These elaborations must be conducted '*in concreto*' on the basis of empirical facts (see *Section 5*).

4. Legal Consequences of Voluntary Human Shields taking a Direct Part in Hostilities

In hand with the elaborations above, we also have to delimit certain legal consequences as the classification of DPH brings about important implications for the individual(s) in question and for the attacker(s).¹¹⁷ Hence the questions guiding the ensuing sections consider: what does it legally entail for the VHSs if found to have taken a DPH? When elaborating upon the

¹¹⁰ International Committee of the Red Cross (ICRC), *Fifth Expert Meeting on the Notion of Direct Participation in Hostilities* (ICRC 2008) 5, 67.

¹¹¹ Van Der Toorn (n2) 13; Schmitt 2010 DPH (n39) 735-36.

¹¹² Van Der Toorn (n2) 14.

¹¹³ Lyall (n6) 332.

¹¹⁴ See (n94).

¹¹⁵ An attack may be postponed by virtue of e.g proportionality assessments: See (n67).

¹¹⁶ Bosch 2013 (n32) 463.

¹¹⁷ Bosch 2007 (n7) 337.

status of VHSs, what legal presumption(s) has to be respected? What consequences does a classification of DPH have on the individual's targetability?

4.1 Beginning and End of Direct Participation in Hostilities

To begin with, when VHSs are taking a DPH which I argue is possible, they are de facto deprived of their civilian immunity from attack¹¹⁸ as long as they are taking a DPH.¹¹⁹ The Guidance also considers other deeds, i.e not the specific acts of DPH, as also being inherent in the loss of protection. By this, the ICRC refers to certain courses of actions in preparation to the specific act(s) amounting to DPH.¹²⁰ Notably, in the context of VHSs it may be difficult to distinguish those measures, while it is illustrated that e.g the assembly of information are examples of such.¹²¹ Seemingly, VHSs deciding to shield a lawful target are certainly in need of specific intelligence regarding for instance its location – rendering such information gathering a 'preparatory measure', part of the DPH. However, I sustain that it is rather difficult to delimit which measures, taken by VHSs, are relevant in this respect since the Guidance raises concerns regarding whether they can take a DPH at all.¹²²

To continue, a civilian's movement towards- and retreat from a specific geographical location is also observed as part of their DPH.¹²³ While recognizing the difficulty in assessing whether displacements are taken as part of the DPH or not, the Guidance requires that it forms an essential part of the specific acts.¹²⁴ Relatedly, since the ICRC does not conclude that VHSs are taking a DPH at all times, it becomes strenuous trying to delimit potential movements relevant to the beginning and end of their DPH.¹²⁵ Worth mentioning is that scholars, in favor of classifying VHSs as taking a DPH, have tended to certain delineations – e.g Dinstein argues that for the time as they are present within reach of the lawful targets, they forfeit their immunity from attacks.¹²⁶

¹¹⁸ Lyall (n6) 316: civilian immunity from attacks entail the protection of persons 'taking no active part in the hostilities' from, inter alia, 'violence to life and person'.

¹¹⁹ ICRC Guidance (n30) 65; Van Der Toorn (n2) 8.

¹²⁰ ICRC Guidance (n30) 65.

¹²¹ *ibid* 66.

¹²² *ibid* 57.

¹²³ *ibid* 67-8.

¹²⁴ *ibid*.

¹²⁵ ICRC Guidance (n30) 56-7.

¹²⁶ Dinstein (n4) 14.

4.2 Presumption of *Involuntariness* and Precautions

The fundamental ‘presumption of civilian status in case of doubt’ enshrined in Article 50(1) of Additional Protocol I refers to a general presumption of civilian immunity from attack.¹²⁷ Seemingly, the presumption may also analogously be applied to situations of doubt whether a human shield is acting voluntarily or not – i.e a presumption of civilian status would arguably entail a presumption of involuntariness since IvHSs retain their civilian protection.¹²⁸ In fact, this goes hand-in-hand with the precautionary obligation of corroborating the status of a target as lawful, which according to the ICRC is reflective of customary law.¹²⁹ Moreover, the Guidance presupposes an overall presumption of protection from attack – that is of not finding DPH – while others disagree:

Gray areas should be interpreted liberally, i.e., in favor of finding direct participation. One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants. Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by combatants endangered by their activities (...).¹³⁰

In point of fact, the said ‘liberal approach’ presuming a DPH may incentivize civilians to dissociate from the hostilities in an attempt to avoid losing their protection. Nonetheless, I contend that the presumption of civilian status, along with the overall presumption of protection from attack, can be analogously applied to situations of human shields, i.e the presumption should remain of involuntariness – in an effort to promote the protection of the civilian population.¹³¹ Relatedly, the extent of uncertainty in regards to the degree of volition of a human shield is arguably accounted for in such presumption. However, and as argued by

¹²⁷ Additional Protocol I (n3) art 50(1); See also Schmitt 2010 DPH (n39) 737: “(...) Article 50(1), arguably reflective of a customary norm (...)”. See also Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (4th ed, Cambridge University Press 2022) 160: “In its 2004 *Blaškić* Judgement [para 110], the ICTY Appeals Chamber declared that ‘Article 50 of Additional Protocol I (...) contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law’”.

¹²⁸ Schmitt 2009 (n36) 56.

¹²⁹ Additional Protocol I (n3) art 57(2)(a)(i): “(...) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects (...) but are military objectives (...)”; Schmitt 2010 DPH (n39) 736; ICRC CIHL Rules (n13) Rule 16.

¹³⁰ Schmitt 2010 DPH (n39) 738; *The Public Committee against Torture in Israel et al. v. The Government of Israel* Targeted Killings case (Supreme Court of Israel) HCJ 769/02 (December 13, 2006) para 34 [Hereinafter: Targeted Killings case].

¹³¹ Schmitt 2009 (n36) 56.

Schmitt, it is doubtful that States facing VHSs would rule in favor of their civilian status or involuntariness, demonstrating the arduousness of joining theoretical considerations and practice.¹³²

4.3 The Targetability of Voluntary Human Shields

An important part in the discussion of whether VHSs are taking a DPH or not, is in fact how either affects his/her protection and targetability under IHL. As such, I proclaim that the principle of proportionality, in conjunction with the principle of distinction, lies at the core of these considerations.¹³³ Evidently, depending on the classification of taking a DPH or not, VHSs ought to either be considered in potential proportionality assessments or can be disregarded.¹³⁴

If we then consider that VHSs are not taking a DPH, e.g by proving that they acted involuntarily or did not fulfill the three requirements, they would retain their civilian protection and immunity from attacks.¹³⁵ These human shields may however face the risks of becoming collateral damage, even though their presence ought to be counted into proportionality appraisals – is the potential injury to those civilians excessive contra the military advantage of an attack?¹³⁶ In point of fact, depending on the number of human shields (civilians) that has to be taken into the proportionality assessments, it may result in the potential attack being deemed indiscriminate and unlawful as the injury might exceed the expected military advantage.¹³⁷

In contrast, I have argued that VHSs can be considered as civilians DPH, and if proven they would lose their protection from direct attack for that time as they DPH, and can hence be targeted.¹³⁸ Thus, those VHSs may arguably be precluded from proportionality estimations as only civilians and civilian objects are assessed. As noted by Schmitt and Bouchié De Belle: “(...) the only practical impact of their [the VHS's] willingness to serve as

¹³² Schmitt 2010 DPH (n39) 739.

¹³³ Additional Protocol I (n3) art 48, art 51(5)(b), art 57(2)(a)(iii).

¹³⁴ The principle of proportionality contends that civilians and civilian objects are to be considered in proportionality assessments, when determining whether the loss or damage of such is excessive vis-à-vis the military advantage of potential attacks: Additional Protocol I (n3) art 51(5)(b), art 57(2)(a)(iii).

¹³⁵ Newton and May (n9) 203; ICRC Guidance (n30) 57.

¹³⁶ Al-Duaij (n25) 123.

¹³⁷ Schmitt 2009 (n36) 48; Schmitt 2010 DPH (n39) 732; See also *Prosecutor v. Kupreškić* (Trial Chamber) IT-95-16-T (January 14, 2000) para 526: “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 (...)” – noting the general difficulties in assessing proportionality.

¹³⁸ Bouchié de Belle (n10) 901-02.

shields is that they need not be included in proportionality calculations".¹³⁹ This arguably relates to the ICRC's self-defeating logic¹⁴⁰ seeing that VHSs purposefully use their civilian status to shield lawful targets, hence if they themselves become susceptible to attacks they would not be able to shield in that sense.¹⁴¹ This has been upheld by, inter alia, Dinstein raising the unfeasibility of VHSs to shield lawful targets when disregarded in proportionality assessments.¹⁴² Even though the ICRC's self-defeating suggestion is used to argue against the prospect that VHSs can take a DPH, I argue for the contrary. In fact, I maintain that if one contends that VHSs are taking a DPH and hence can be lawfully targeted, rendering their acts of shielding ineffective, it could in itself disincentivize other civilians in becoming VHSs.¹⁴³ Seemingly, if civilians are abstaining from becoming VHSs at risk of hostilities, it would promote the protection of the civilian population as a whole.¹⁴⁴

Related to the aforesaid, the importance of encouraging further research into the topic of VHSs has been highlighted, seeing that military commanders facing them will have to take into account their presence and whether they are VHSs or IvHSs, when considering proportionality calculations and precautionary measures.¹⁴⁵ Accordingly, discussions about VHS's classification as DPH are increasingly important since it affects their legal protection and targetability.¹⁴⁶

5. Empirical analysis of Voluntary Human Shields

In terms of analyzing whether VHSs can take a DPH or not, it appears difficult to provide a definitive conclusion, without being able to rely on concrete circumstances.¹⁴⁷ Therefore, we will now consider actual cases of VHSs, trying to discern if they can be considered as civilians DPH, by scrutinizing the empirics with respect to the ICRC's three requirements.¹⁴⁸ Notably, the case selection has hinged upon choosing two different empirical examples, in

¹³⁹ Bouchié de Belle (n10) 901-02.

¹⁴⁰ Worth mentioning is that the ICRC uses this argument when arguing that VHSs should *not* be considered as civilians DPH: Casebook ICRC (n69).

¹⁴¹ Casebook ICRC (n69); William H. Boothby, 'Direct Participation in Hostilities - A Discussion of the ICRC Interpretive Guidance' (2010) 1 J Int'l Human Legal Stud 143, 160 [Hereinafter: Boothby].

¹⁴² Dinstein (n4) 14.

¹⁴³ A similar argument was laid out by Schmitt, however in the context of the presumption of civilian status: "Although it might seem counter-intuitive to broadly interpret the activities that subject civilians to attack, in fact, doing so is likely to enhance the protection of the civilian population as a whole" in Schmitt 2010 DPH (n39) 738.

¹⁴⁴ Inter alia Additional Protocol I (n3) art 51.

¹⁴⁵ Schmitt 2009 (n36) 56; See also Additional Protocol I (n3) art 57(2)(a)(i),(iii); Lyall (n6) 324.

¹⁴⁶ Boothby (n141) 160.

¹⁴⁷ Bouchié de Belle (n10) 896.

¹⁴⁸ ICRC Guidance (n30) 46.

which I intend to demonstrate the range of different acts taken by VHSs and their applicability to the same criterias.

For the first part of the analysis, I have selected the case of the Serbian citizens in 1999, as one of the earliest instances of VHSs before the legal argument of DPH and the Guidance had transpired.¹⁴⁹ This case exhibits the practical difficulties in classifying VHSs in situations where intelligence is lacking – arguably manifesting the challenges of gathering relevant information in times of conflict. For the second part of the analysis, I have chosen the case of the Palestinian women in 2006, in which information is available to a greater extent, rendering the analysis factual and arguably conclusive.¹⁵⁰

5.1 Serbian Citizens 1999

In the midst of the 1999 Kosovo War and NATO's *Operation Allied Force*, reports claim that Serbian citizens acted as human shields.¹⁵¹ Sources affirm that citizens positioned themselves on bridges in Belgrade, in an effort to shield them from NATO's bombings.¹⁵² Notably, there is a restricted amount of information about this incident, thus any interpretations will be made while acknowledging alternative scenarios.

Henceforth, whether the Serbian shields could be considered as VHSs will depend on their conformity with our thesis definition.¹⁵³ As such, the Serbs were ordinary citizens and there is no indication that they were anything other than civilians per Article 50 of Additional Protocol I.¹⁵⁴ These civilians were attempting to shield bridges in Belgrade, which in principle are considered as 'dual-use' objects, used for both military and civilian purposes.¹⁵⁵ These are not defined in the law, whereas solely military and civilian objects are.¹⁵⁶ However the ICRC states that bridges can be considered as military objectives when used for military purposes, and hence be lawfully targeted.¹⁵⁷ Essentially, it is difficult to discern the extent to

¹⁴⁹ Bouchié de Belle (n10) 884.

¹⁵⁰ Al-Duaij (n25) 127.

¹⁵¹ Mary Elizabeth Walters, 'A Tantalizing Success: The 1999 Kosovo War' (*The Strategy Bridge*, 9 July 2021) <<https://thestrategybridge.org/the-bridge/2021/7/9/a-tantalizing-success-the-1999-kosovo-war>> accessed 4 December 2023 [Hereinafter: Walters]; Bosch 2013 (n32) 447.

¹⁵² Bouchié de Belle (n10) 884.

¹⁵³ See Section §2.

¹⁵⁴ Jean-François Quéguiner, 'Precautions under the law governing the conduct of hostilities' (2006) 88(864) *International Review of the Red Cross* 793, 815 [Hereinafter: Quéguiner]; Additional Protocol I (n3) art 50.

¹⁵⁵ International Committee of the Red Cross, 'Lesson 3: Common Features Of The Law Applicable To All Operations' *The Conduct Of Operations/Part A 2, 7* [Hereinafter: ICRC Lesson 3].

¹⁵⁶ Additional Protocol I (n3) art 52; ICRC CIHL Rules (n13) Rule 8.

¹⁵⁷ ICRC Lesson 3 (n155) 7; Michael N. Schmitt and John J. Merriam, 'The Tyranny of Context: Israeli Targeting Practices in Legal Perspective' (2015) 37(1) *U. Pa. J. Int'l L.* 55, 119.

which the bridges were used for military purposes, as the available information does not specify which bridges in Belgrade were shielded nor how these were used in the armed conflict.¹⁵⁸ However, and for the purpose of this thesis we will assume that some military advantage was anticipated with attacking these bridges, since the NATO campaign would not have targeted them unless so, nor unless their “(...) nature, location, purpose or use (...)” might have made a “(...) contribution to military action (...)”.¹⁵⁹ Notably, and as a matter of law, only military objectives are to be targeted, in which we assume the bridges' susceptibility to attacks.¹⁶⁰ Consequently, we consider that the Serbian citizens voluntarily¹⁶¹ attempted to shield the bridges, as military objectives, from the NATO bombings – rendering them VHSs.

5.1.1 Threshold of Harm

In the case of the Serbian citizens, the likely harm is arguably of a qualitative nature, rather than quantitative, as there is no evidence that they physically harmed any person or object when shielding the bridges.¹⁶² Outwardly, it is assumed that NATO targeted the bridges for a potential and anticipated military advantage, which coincides with the fact that the act of shielding affected NATO's operations.¹⁶³ By virtue of the shielding, I argue that the Serbian citizens negatively conditioned NATO's military capacity, since attacks on the bridges were plausibly impeded¹⁶⁴ – hindering potential military advantage in targeting them. However, we cannot be certain of the specific motives for why the bridges were not attacked, due to the lack of information, while if the reasoning would have been the VHSs, one could argue that the shielding had a negative impact on NATO's operations.¹⁶⁵ Importantly, the threshold requirement is based upon the likelihood of quantitative and/or qualitative harm resulting from the specific act(s), with which I argue that the civilians' shielding of the bridges was

¹⁵⁸ Bouchié de Belle (n10) 884.

¹⁵⁹ *ibid*; Additional Protocol I (n3) art 52(2); ICRC CIHL Rules (n13) Rule 8.

¹⁶⁰ Additional Protocol I (n3) art 52(2).

¹⁶¹ The Serbian citizens have been used as an empirical example of voluntary human shields in other journal articles, hence we are assuming that they were in fact acting voluntarily: Bouchié de Belle (n10) 884-5.

¹⁶² Schmitt 2010 DPH (n39) 713-15; Bouchié de Belle (n10) 884.

¹⁶³ Walters (n151).

¹⁶⁴ Based upon the available information, there are no reports on whether attacks were launched towards the bridges or not, nor whether attacks were launched before or after the shielding. Therefore, we cannot be certain if the act of shielding per se obstructed their targeting, while we consider that possibility: Bouchié de Belle (n10) 884.

¹⁶⁵ ICRC Guidance (n30) 47.

likely to negatively affect NATO's military operations, as it would arguably hinder them from targeting the bridges.¹⁶⁶

Worth acknowledging is that this discussion is inevitably based upon presumptive scenarios seeing that the gathered information is limited. Even though I suggest that the VHSs could have indicatively reached the threshold, others may argue for the contrary, especially depending upon the available evidence used and how it is interpreted.

5.1.2 Direct Causation

In regards to the Guidance's causal element, it remains that the Serbian citizens would have had to directly cause the negative effects on NATO's operations by shielding the bridges.¹⁶⁷ Specifically, whether: "(...) other relevant circumstances interve[ned] in the chain of causation" is difficult to determine in this case, since we cannot in absolute terms conclude that the bridges were not attacked (causing the harm on NATO's operations) as a sole result of the shielding.¹⁶⁸ If one were able to determine that the shielding specifically impeded the attacks on the bridges, it would arguably indicate that a direct causation had been reached.¹⁶⁹ However, if other factors might have played a part in obstructing the attacks on the bridges, for instance that a NATO attack was launched elsewhere hindering the use of the bridges in any case¹⁷⁰, it would rather indicate an indirect causation, i.e not reaching the requirement.¹⁷¹

Ultimately, it remains difficult to ascertain the specific facts of this case, which would have proven relevant in this analysis, hence potential deductions are inconclusive. Nonetheless, certain factors such as the VHSs' geographical nearness to the bridges might be used to argue in support of the requirement having been reached, while the Guidance explicitly mentions that it would not, in itself, tend to a satisfactory fulfillment of direct causation.¹⁷²

¹⁶⁶ Van Der Toorn (n2) 12; ICRC Guidance (n30) 47.

¹⁶⁷ ICRC Guidance (n30) 51.

¹⁶⁸ Report DPH 2006 (n58) 47; ICRC Guidance (n30) 53.

¹⁶⁹ ICRC Guidance (n30) 51; Schmitt 2010 DPH (n39) 726.

¹⁷⁰ Here we are presupposing that NATO targeted the bridges with the purpose to obstruct their use by e.g Serb forces as *Operation Allied Force* sought "(...) to halt the humanitarian catastrophe that was then unfolding in Kosovo" in NATO, 'Kosovo Air Campaign (March-June 1999)' (*North Atlantic Treaty Organization*, 17 May 2022) <https://www.nato.int/cps/en/natohq/topics_49602.htm> accessed 4 December 2023 [Hereinafter: NATO 1999].

¹⁷¹ ICRC Guidance (n30) 52-4.

¹⁷² *ibid* 55.

5.1.3 Belligerent Nexus

Eventually, we have to determine whether the VHSs' shielding had a belligerent nexus, disadvantaging one conflict Party while favoring another.¹⁷³ At first, I argue that the VHSs acted against NATO (as a Party to the conflict), seeing that *Operation Allied Force* targeted the bridges, which in hand was allegedly impeded due to the VHSs.¹⁷⁴ However, it is more perplexing to discern whether the Serbs acted in support of a Party or rather if they were opposing the hostilities and the NATO campaign as such. In this respect, acting in opposition to the hostilities, rather than against a Party, would not constitute an act having a belligerent nexus.¹⁷⁵ To continue, the relevance of an armed conflict connected to the act(s) has also been discussed, while related to the commission of war crimes, in the so-called '*Kunarac* criteria' specifying that:

The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.¹⁷⁶

Relatedly, I argue that the ongoing hostilities in Kosovo were an underlying factor to the shielding of the bridges since reports claim that the Serbian citizens wanted to impede NATO bombings.¹⁷⁷ However, this does not suffice in arguing that their acts had a belligerent nexus, in terms of the ICRC's criteria, but merely that the conflict affected the acts of the VHSs.¹⁷⁸ In this respect, and in line with certain experts involved in the process of drafting the Guidance, it might seem appropriate to conceive that an act disadvantaging one Party (in this case NATO) would necessarily favor another and contrariwise – satisfying the nexus requirement.¹⁷⁹ Regardless, we have to remain consistent in our analysis by not 'loosening'¹⁸⁰ the Guidance's formulation of either criteria. Thus we cannot conclude that the Serbian

¹⁷³ ICRC Guidance (n30) 58; Schmitt 2010 DPH (n39) 736.

¹⁷⁴ Walters (n151); NATO 1999 (n170).

¹⁷⁵ Lyall (n6) 332.

¹⁷⁶ *Prosecutor v. Kunarac* (Appeals Chamber Judgment) IT-96-23 & IT-96-23/1-A (June 12, 2002) para 58 – worth mentioning is that I do not argue that the act of shielding is a war crime in this case, by virtue of mentioning the '*Kunarac* criteria', as this is not in the scope of this thesis. In fact, 'only' the use of IvHSs are prohibited as a war crime: Rome Statute 1998 (n13) art 8(2)(b)(xxiii).

¹⁷⁷ Bouchié de Belle (n10) 884.

¹⁷⁸ ICRC Guidance (n30) 58.

¹⁷⁹ Report DPH 2006 (n58) 51.

¹⁸⁰ In line with Melzer's understanding: See (n109).

citizens' shielding of the bridges supported a Party while disadvantaging another, hence and in strict conformity with the ICRC's requirement the acts did not have a belligerent nexus.¹⁸¹

5.1.4 Summary

With respect to the ICRC's three requirements, the case of the Serbian citizens reveals inconclusive findings, since the evidence was unable to confirm that the acts had satisfied the three elements. Even though I have argued that the threshold of harm had been fulfilled, owing to the negative impact on NATO's operations, it was proven challenging to find support for whether the VHSs had directly caused the required harm and whether they had acted in favor of a Party to the conflict.¹⁸² Conjointly, the presumption of civilian status as delineated in *Section §4.2* is relevant as the case at hand presents a situation where the status of the VHSs, as taking a DPH or not, remains in doubt.¹⁸³ As such, I contend that the citizens ought to be presumed as not taking a DPH, per the ICRC's requirements. Interestingly, this case plausibly conforms with the Guidance's example of VHSs not being able to take a DPH when involved in conflicts including e.g air campaigns or other high-powered arms, as the opponent will arguably and irrespectively still be able to target the military objectives.¹⁸⁴ Notwithstanding, I argue that the inconclusive findings owe to the indefinite information and not to the type of conflict that is taking place. As a matter of fact, if we would have had more information about the bridges as military objectives, about the circumstances at hand potentially interrupting the chain of causation, and about the nature of the shielding in terms of supporting any Party, the findings would have been conclusive, irrespective of the type of conflict. Henceforth, the Serbian citizens retained their civilian immunity from attack as we were not able to infer that they had taken a DPH.¹⁸⁵

5.2 Palestinian Women 2006

In November 2006, Palestinian militants were confined in a mosque in Beit Hanoun and surrounded by the Israeli Defence Forces (IDF).¹⁸⁶ Pursuant to the entrapment, Hamas – an 'Islamist militant movement'¹⁸⁷ – discharged a plea for Palestinian women to advance to the

¹⁸¹ ICRC Guidance (n30) 58.

¹⁸² *ibid* 46.

¹⁸³ Additional Protocol I (n3) art 50(1); Schmitt 2009 (n36) 56.

¹⁸⁴ ICRC Guidance (n30) 57.

¹⁸⁵ *Inter alia*: Additional Protocol I (n3) art 51(3).

¹⁸⁶ Al-Duaij (n25) 127.

¹⁸⁷ Kali Robinson, 'What is Hamas?' (*The Council on Foreign Relations*, 31 October 2023) <<https://www.cfr.org/backgrounder/what-hamas>> accessed 29 November 2023.

mosque.¹⁸⁸ Noteworthy, the specific contents of the appeal are unknown¹⁸⁹, while a statement from one of the women claims that: “All the women headed to the mosque to get the Palestinian resistance men...”, potentially inciting that the appeal specifically mentioned the provision of aid to the militants.¹⁹⁰ Regardless, up to 200 women went on to enter the mosque and disguised the entrapped militants by clothing them and facilitating their escape from the IDF.¹⁹¹ As a result, specific reports have claimed that the women acted as human shields.¹⁹² And Hamas later on announced that all militants managed to escape, while news reports claim that some of the women had been killed.¹⁹³

Before delving into the ICRC's requirements, we will begin by establishing whether the women were VHSs or not, based upon our outlined definition.¹⁹⁴ At first, we can determine that the women were civilians, per Article 50 of Additional Protocol I, as they were not ‘members of the armed forces’ or other movements nor part of a *levée en masse*.¹⁹⁵ We can also delimit that the Palestinian militants were lawful targets under IHL, seeing that they were arguably members of an armed group or movement (IAC), while also indicating a continuous-combat function per the ICRC's clarification (NIAC).¹⁹⁶ As such, the women as civilians were shielding lawful targets, i.e. the Palestinian militants.¹⁹⁷ Further, it is also worth noting that the voluntariness of the women might be put into question, as we do not know whether Hamas' appeal included forms of coercion or any of the sort. This is acknowledged, while we presumably contend for the purpose of this thesis, that the women were acting as VHSs.

¹⁸⁸ BBC News, ‘Gaza women killed in mosque siege’ (*BBC News*, 3 November 2006)

<http://news.bbc.co.uk/2/hi/middle_east/6112386.stm> accessed 20 November 2023 [Hereinafter: BBC 2006].

¹⁸⁹ The specific contents of the appeal might be of use in determining the voluntariness of the women, in acting as shields to the Palestinian militants.

¹⁹⁰ BBC 2006 (n188).

¹⁹¹ *ibid.*

¹⁹² Bosch 2013 (n32) 448.

¹⁹³ BBC 2006 (n188).

¹⁹⁴ See Section §2.

¹⁹⁵ Additional Protocol I (n3) art 43, art 50; Geneva Convention III (n6) art 4(A)(1), (2), (3), (6); ICRC CIHL Rules (n13) Rule 5 and Diakonia, ‘The Principle Of Distinction’ (*Diakonia International Humanitarian Law Centre*)<<https://www.diakonia.se/ihl/resources/international-humanitarian-law/principle-of-distinction-protection-of-people-and-objects/>> accessed 29 November 2023 [Hereinafter: Diakonia].

¹⁹⁶ Geneva Convention III (n6) art 4(A); ICRC Guidance (n30) 35; Diakonia (n195). In this respect, I have assumed that the Palestinian militants are lawful targets under IHL, without delving into the classification of the conflict as either an IAC or a NIAC as this remains outside the scope of this thesis.

¹⁹⁷ Bosch 2013 (n32) 448.

5.2.1 Threshold of Harm

Regarding the first requirement, I argue that the qualitative threshold is the likely harm in the case of the Palestinian women, as no evidence can be found that they caused any sort of injury (quantitative threshold).¹⁹⁸ The women were unarmed and aided the militants to escape from the IDF, which hindered the Israeli operations and obstructed potential military advantage hinging upon those attacks.¹⁹⁹ Moreover, I would also argue that it seems unlikely that the large number of women posing as shields did *not* obstruct the enemy operations, as it became difficult for the IDF to locate the militants in the crowd, and even less so as they were disguised. Perhaps, the extent of military advantage that the IDF foresaw with targeting the militants in the mosque is also important to consider, as the shielding of that operation could have caused a greater disadvantage than other acts. Tending to the facts at hand, the Israeli offensive into Beit Hanoun, where the mosque was located, was the largest offensive of late, implying that the operation was contemplated as paramount in attaining the overarching goal of “(...) stopping militants [from] firing rockets into Israel”.²⁰⁰ As such, the shielding of the militants impeded IDF's attacks and could be considered as having caused significant adverse effects on their military operations as a whole – with which I argue that it reached the threshold of harm.

5.2.2 Direct Causation

Concerning the second of the Guidance's elements, the women's act of shielding need to have been the direct cause of the required harm.²⁰¹ In fact, the women directly caused the harm, since the IDF were unable to identify the disguised militants amongst the crowd.²⁰² Whether the women were seen as a legal or physical obstacle, owing to the ICRC's distinction, the result of the specific act was the same: the physical presence of the women and their disguise of the militants had a causal relationship with the negative effects on the Israeli operations.²⁰³ Based upon the available information, there are no other pertinent circumstances, except from the shielding, having caused the harm.²⁰⁴ Notably, the Guidance actually exemplifies that VHSs could directly cause the required harm by acting as a concrete hurdle to a Party's

¹⁹⁸ ICRC Guidance (n30) 47; Report DPH 2006 (n58) 39; BBC 2006 (n188).

¹⁹⁹ BBC 2006 (n188); ICRC Guidance (n30) 47-8.

²⁰⁰ BBC 2006 (n188).

²⁰¹ ICRC Guidance (n30) 51.

²⁰² BBC 2006 (n188).

²⁰³ ICRC Guidance (n30) 52-3.

²⁰⁴ Report DPH 2006 (n58) 47.

military operations, especially in situations of field-based campaigns in citified territories – the case at hand arguably pertains to that exemplification.²⁰⁵ Consequently, the women's shielding arguably reached the causational requirement.

5.2.3 Belligerent Nexus

Ultimately, the belligerent nexus requirement is two-fold as the women would have had to act in favor of one Party while disadvantaging another.²⁰⁶ I argue that the women undoubtedly acted in support of the Palestinian militants, as they helped them escape the IDF – further proven by statements from one of the women claiming that: “We risked our lives to free our sons [the Palestinian militants]”.²⁰⁷ However, it might not be as intelligible if they acted ‘against’ the IDF per se. The act of shielding might have had a ‘clearer’ belligerent nexus if the militants had engaged with the IDF while in disguise, as that would have been acting in identifiable disfavor of the Israeli forces.²⁰⁸ Nonetheless, and as delineated above, the act of shielding deprived the IDF's operations and as such one could arguably claim that they acted in detriment of that Party – reaching the nexus requirement. Relatedly, acts conducted during the hostilities which are said to merely exploit the situation are not considered as having a belligerent nexus, which I argue does not apply to the case of the Palestinian women.²⁰⁹ I suggest that the case at hand does not appear as an act simply benefitting from the hostilities, as the support of the Palestinian militants and the arguable disadvantaging of the IDF indicates the fulfillment of the requirement.²¹⁰ Hence, I argue that the women's act of shielding had a belligerent nexus.

5.2.4 Summary

Finally, through the empirical analysis we have found supporting evidence that all three elements were reached in the case of the Palestinian women. Nonetheless, some doubts have also been raised, in terms of the extent of their volition in relation to Hamas' appeal and in the context of whether their acts were in detriment of the IDF (belligerent nexus). Seemingly, I maintain that the women acting as VHSs were taking a DPH, since their acts reached the

²⁰⁵ ICRC Guidance (n30) 56.

²⁰⁶ *ibid* 58.

²⁰⁷ BBC 2006 (n188).

²⁰⁸ A similar scenario was used as an example of civilians taking a DPH in the Guidance, where a: “(...) woman who shielded two fighters with her billowing robe, allowing them to shoot at their adversary from behind her” in ICRC Guidance (n30) 56.

²⁰⁹ Schmitt 2010 DPH (n39) 735.

²¹⁰ BBC 2006 (n188).

threshold of harm by disadvantaging the IDF's operations, directly caused the required harm by tending to the causation between the acts and the harm, and arguably had a belligerent nexus as they favored the militants and indicatively disfavoured the IDF.²¹¹

By this, the legal implications induce the women's loss of civilian protection and of civilian immunity from attack, for as long as they take a DPH, per inter alia Article 51(3) of Additional Protocol I.²¹² As such, the women are rendered as lawful targets. However, it remains of importance to delimit whether all 200 women can be considered as taking a DPH, or if only the women having disguised the militants are, and if so how can that distinction be facilitated in terms of targeting decisions.²¹³ This arguably tends to the practical difficulties in determining at first whether VHSs can be lawfully targeted or not, and secondly how to distinguish the women taking a DPH from those who are not. Moreover, questions of proportionality have to be considered in this case, by assessing whether the targeting of all women can be considered as proportionate in terms of the military advantage vis-à-vis the injury to those women not taking a DPH, at risk of becoming collateral damage.²¹⁴ To summarize, the Palestinian women can arguably be considered as taking a DPH, while this conclusion brings about important legal consequences, e.g in terms of targeting, for all women involved.

6. Discussion

Considering the above, I insist that whether one contends that VHSs can take a DPH or not, the central idea ought to observe the protection of the civilian population.²¹⁵ Ostensibly, the protection of civilians is an indispensable pillar of IHL, enshrined in various codifications of the law.²¹⁶ While reiterating the thrust of my argument accounting for the possibility that VHSs can take a DPH and rendering them targetable under IHL, risks making civilians vulnerable by undermining their protection.²¹⁷ Nonetheless, I maintain that my argument, joining a civilian's voluntary action as cause for his/her loss of protection, renders such individuals aware of the risks of involving themselves in hostilities, potentially incentivizing

²¹¹ ICRC Guidance (n30) 46; BBC 2006 (n188).

²¹² Additional Protocol I (n3) art 51(3); Al-Duaij (n25) 127.

²¹³ BBC 2006 (n188).

²¹⁴ Inter alia: Additional Protocol I (n3) art 51(5)(b).

²¹⁵ *ibid* art 51.

²¹⁶ Alice Priddy, 'Who is the civilian population? Ensuring IHL is implemented for the protection of the entirety of the civilian population – including persons with disabilities' (2023) 105(922) *International Review of the Red Cross* 242, 243; Additional Protocol I (n3) art 51; Common Article 3 (n6) in Geneva Convention I art 3; Geneva Convention II art 3; Geneva Convention III art 3 and Geneva Convention IV art 3.

²¹⁷ Additional Protocol I (n3) art 51(3).

their alienation.²¹⁸ By virtue of this, if civilians were motivated to refrain from engaging in conflicts, the promotion of their protection is abetted, which similarly has been argued by scholars claiming that not considering VHSs as taking a DPH would prompt such behavior.²¹⁹ To add, I have also argued – replicating the ICRC's self-defeating argument – that if VHSs can be considered as taking a DPH and becoming lawful targets, their presence as shields could be considered 'pointless' since they would not be able to hinder potential attacks because they would be disregarded in proportionality calculations.²²⁰ Seemingly, I assert that this may also discourage civilians in becoming VHSs, if proven that their shielding efforts may be worthless, again promoting the protection of the civilian population.

To continue, the empirical analysis of the two cases demonstrates varying research findings and advances divergent elaborations in regards to my research question. In relation to my case-selection, I argue that it proved fruitful as one can observe the possibility of VHSs taking a DPH in one case, but to a lesser extent in another. In fact, the purpose of my thesis has been to provide considerations for the prospect of such classifications, and not to bring forth a general affirmative nor dissenting conclusion that VHSs always or never take a DPH.

In this respect, I have arguably evidenced that the Palestinian women as VHSs could have been considered as civilians DPH, while a similar deduction was not feasible through the case of the Serbian citizens.²²¹ However, I argue that the findings do not either conclude that the Serbian citizens could definitely not be considered as taking a DPH, referring to the lack of relevant information as rationale. Alternatively, both cases reflect the practical difficulties in establishing the targetability of VHSs and the distinction between VHSs and IvHSs, as well as between DPH:ing and not.²²² This relates to the ICRC's impractical-argument, with which it is argued that VHSs should not be considered as taking a DPH.²²³ Nevertheless, I do not sympathize with the ICRC concerning that line of argument, as I do not observe the impracticality itself as a reason to not examine whether VHSs are taking a DPH. Instead, I argue that recognizing the various difficulties, whether in terms of distinguishing between IvHSs and VHSs or of classifying as DPH, further highlights points of interest in research. Seemingly, and as maintained, any deliberations regarding the

²¹⁸ Bosch 2007 (n7) 337.

²¹⁹ Van Der Toorn (n2) 22.

²²⁰ Casebook ICRC (n69); Boothby (n141) 160; Dinstein (n4) 14.

²²¹ See Sections §5.1.4 and §5.2.4.

²²² Bouchié de Belle (n10) 884.

²²³ Casebook ICRC (n69).

classification of VHSs ought to be based on actual cases, consistent with the assumption that IHL is an applied area of the law.²²⁴ Thus, arguments lacking factual basis and referring to the impracticality of VHSs as taking a DPH are disproved.

Moreover, I reasoned that the application of the ICRC's requirements to cases of VHSs is a favorable approach, inciting the same set of criterias to a diverse set of circumstances – promoting a generalized standard of analysis and comparable findings.²²⁵ Nonetheless, State practice which is as relevant to consider does not appear to contemplate on those criterias when providing their standpoint. In fact, Israel regards the IHL principles of humanity and military necessity as advocating alone for the classification of VHSs as taking a DPH, while the United States with a similar stance does not provide further clarifications.²²⁶ Notably, the Supreme Court of Israel delineated that if civilians are found to be supporting 'terrorists', they become representational of taking a DPH, while falling short of providing reasoning for that finding.²²⁷ Likewise, the United States supports the possibility that a military official can consider VHSs as taking a DPH, without expounding any further.²²⁸ Evidently, my findings are to some extent supported in State practice, while I would argue that other factors such as politics and foreign policies are admitted into national *modus operandi*.²²⁹ Perhaps, it would be difficult to promote the ICRC's criterias within any State deliberations, seeing that underlying motivations for a classification of DPH might prevail.²³⁰ Nonetheless, as part of the scholarly discussion, I sustain that my foundation on the Guidance is relevant, while recognizing the somewhat discrepant application to State practice. This further highlights the intricacies of the chosen research topic, promoting additional clarifications and specified State practice.

²²⁴ Bosch 2013 (n32) 463.

²²⁵ ICRC Guidance (n30) 46. NB – even though this analytical method has been used, I do not consider that the Guidance's three elements are faultless (See Section §3.1.1).

²²⁶ Targeted Killings case (n130) para 36; NWP 1-14 P5800.7.A (n45) ch 8.3.2.

²²⁷ Targeted Killings case (n130) para 36.

²²⁸ United States of America Department of Defense, *Law of War Manual* (December 2016) para 5.12.3.4.

²²⁹ George Dimitriu, 'Clausewitz and the politics of war: A contemporary theory' (2020) 43(5) *The Journal of Strategic Studies* 645, 652.

²³⁰ An example of an underlying motivation is arguably whether the VHSs shields 'terrorists': Targeted Killings case (n130) para 36.

7. Conclusion

In sum, I have argued for the relevance of VHSs as a research topic, part of the evolving nature of contemporary conflicts. I have inquired to examine the lack of its embodiment in the law, while joining the phenomenon with the notion of DPH. Based upon the theoretical and critical analysis of the ICRC Guidance and through the empirical analyses of the selected cases, I have endeavored to provide a thorough reflection of my research question. Moreover, by founding my arguments on evidence stemming from the law as well as from facts, the thesis statement considers that VHSs can to some extent take a DPH within our proposed framework. Correspondingly, the unfeasibility in producing conclusions applicable to a general set of cases has been highlighted, rendering my findings generalizable to the studied empirics, while promoting further investigation beyond the scope of this thesis. By considering the practical difficulties in classifying VHSs, additional research has been promoted related to the individual's degree of volition, the protection of the civilian population in this context and the Guidance's applicability to State practice. At last, an avenue for future research consists in examining to what extent, if at all, the precautionary obligations enshrined in Article 58 of Additional Protocol I are applicable to cases of VHSs.²³¹

²³¹ Quéguiner (n154) 816; Additional Protocol I (n3) art 58.

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