

# Targeting decisions involving voluntary human shields in international armed conflicts in light of the notion of direct participation in hostilities

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## ***Abstract***

The ever-changing theatre of war is placing greater demands on commanding officers to make targeting decisions in instances where international humanitarian law (IHL) cannot provide a clear directive. The recent emergence of the voluntary human shield (VHS) as a new actor in international armed conflicts, has highlighted another lacuna in the laws of war, which have to date only considered the plight of the involuntary human shield. Existing IHL does little other than presume that VHSs retain their civilian status until a competent tribunal dictates otherwise. Unlike regular civilians, these VHSs play a role in attempting to frustrate the targeting decisions of the belligerent parties. However, unless their actions amount to direct participation in hostilities, VHSs at any location retain their civilian status, and are not themselves legitimate military targets. The actions of VHSs must satisfy the test for direct participation in hostilities (proposed by the ICRC), before they forfeit their civilian immunity from direct attack, and face potential prosecution upon capture.

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## **INTRODUCTION<sup>1</sup>**

In 1999, during NATO's Kosovo campaign, Serbian citizens positioned themselves as human shields on Belgrade's bridges, in an attempt to prevent the bridges from being targeted and destroyed.<sup>2</sup> In January 2003, activists

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<sup>1</sup> This article is a sequel to Bosch 'Voluntary human shields: status-less in the crosshairs?', which appeared in (2007) 32 *CILSA* 23–49.

<sup>2</sup> 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* 883–906 at 884.

from thirty-two countries<sup>3</sup> warned the then British Prime Minister, Tony Blair, that they intended to shield Iraqi sites.<sup>4</sup> In the same year, Palestinian civilians positioned themselves around Yasser Arafat's headquarters in Ramallah, to forestall an impending Israeli attack.<sup>5</sup> In November 2006, after an appeal broadcast on Hamas radio, Palestinian women entered a mosque in Beit Hanoun, where Palestinian militants had been confined by Israeli forces, disguised the militants as females, and acted as human shields in order to facilitate their escape.<sup>6</sup> These are just some of the anecdotes describing the recent emergence of the voluntary human shield<sup>7</sup>(VHS), which has characterised recent armed conflicts.

While it is universally accepted that the taking of hostages,<sup>8</sup> or the forcible use of protected persons to shield objects from attack, is prohibited under

<sup>3</sup> Peterson 'Human shields in tug-of-war' *Christian Science Monitor* 17 March 2003 1.

<sup>4</sup> 'Human shield protestors visit No 10' *The Guardian* 22 January 2003 available at: [http://www.ccmep.org/2003\\_articles/Iraq/011603\\_us\\_cautions\\_Iraq.htm](http://www.ccmep.org/2003_articles/Iraq/011603_us_cautions_Iraq.htm) (last accessed 15 August 2012); Reynolds 'Collateral damage on the 21<sup>st</sup> 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 1; Cleroux & Watson 'Canadian women enlist in "arm" of volunteer human shields' *The Times* (UK) 9 December 2002 at 4; Lyall 'Voluntary human shields, direct participation in hostilities and the international humanitarian law obligations of states' (2008) 9 *Melbourne Journal of International Law* 313–333 at 314; Fusco 'Legal status of human shields' *Corso in diritto umanitario internazionale Comitato Internazionale della Croce Rossa e dalla Croce Rossa Polacca Varsavia, Pubblicazioni Centro Studi per la Pace* (2003) available at: [www.studiperlapace.it](http://www.studiperlapace.it) (last accessed 15 May 2012) at 7; Bouchié de Belle n 2 above at 885.

<sup>5</sup> Bouchié de Belle n 2 above at 884.

<sup>6</sup> 'Gaza women killed in mosque siege' *BBC News* 3 November 2006 reported at: <http://news.bbc>; Schmitt 'Human shields in international humanitarian law' (2008–2009) 47 *Columbia Journal of Transnational Law* 292–338 315.

<sup>7</sup> The contemporary term VHS refers to 'the practice, usually involves several peace activists, travelling to conflict areas with the aim to shield facilities (mostly civilian) of states under attack' (Fusco n 4 above at 25). Some academics maintain that only those shielding 'civilians and civil properties can enjoy VHS status' (Al-Duaij 'The volunteer human shields in international humanitarian law' (2010) 12 *Oregon Review of International Law* 117–140 at 126). Several other IHL experts, however, including the ICRC, Fenrick and Bouchié de Belle, understand the term VHS to refer to 'civilians attempting to shield a military objective, by deterring the enemy from attacking that objective, ... by their presence as persons entitled to protection against direct attack' (ICRC *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law* (2009) at 56; Fenrick 'ICRC guidance on direct participation in hostilities' 2009 *Yearbook of International Humanitarian Law* 287–300 at 293; Bouchié de Belle n 2 above at 885.

<sup>8</sup> For more on the legal distinction between human shields and VHSs, and the IHL regime applicable to human shields see: Bosch 'Assessing the combatant status of VHSs in international armed conflicts, in light of the notion of direct participation in hostilities' ch 5 PhD dissertation (on file with author).

treaty-based international humanitarian law (IHL),<sup>9</sup> customary IHL,<sup>10</sup> and international criminal law,<sup>11</sup> the legal position regarding VHSs is highly contested.<sup>12</sup> Admittedly, ‘it is unlikely that the shielding norm was originally devised to cover an event where individuals acted knowingly and on their own initiative’.<sup>13</sup> It is also controversial whether the prohibitions against shielding generally, can simply be applied to VHSs.<sup>14</sup> It is the exercise of free will which distinguishes VHSs from those civilians who are taken hostage, and used as involuntary human shields.<sup>15</sup> Lyall expresses it well when he says that VHSs operate ‘as civilian actors in, rather than as passive

<sup>9</sup> 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 ‘Hague regulations HR’ (opened for signature 18 October 1907 1910 *UKTS* 9 entered into force 26 January 1910); Geneva Convention Relative to the Treatment of Prisoners of War, of August 12 1949 (GC III) (opened for signature 12 August 1949) 75 *UNTS* 135 entered into force 21 October 1950) at art 23; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of August 12 1949 (GC IV) (opened for signature 12 August 1949) 75 *UNTS* 287 (entered into force 21 October 1950) at art 28; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) (1979) 1125 *UN Treaty Series* 1391–441 at arts 12(4); 75(2)©; 50(3); 51(7) & (8) & 58.

<sup>10</sup> Henckaerts & Doswald-Beck *Customary international humanitarian law* (vol1: rules) (2005) 340 & 337; Lyall n 4 above at 315; Schmitt n 6 above at 334; Schmitt ‘Humanitarian law and direct participation in hostilities by private contractors or civilian employees’ (2004) 5/2 *Chicago Journal of International Law* 511.

<sup>11</sup> Rome Statute of the International Criminal Court 2187 *UNTS* 3 at art 8(2)(b)(xxiii) (opened for signature 17 July 1998, entered into force 1 July 2002); Bouchié de Belle n 2 above at 885.

<sup>12</sup> Schmitt n 6 above at 334.

<sup>13</sup> *Id* at 316.

<sup>14</sup> Lyall n 4 n 3 above at 315.

<sup>15</sup> Haas ‘Voluntary human shields: status and protection under international humanitarian law’ in Arnold & Hildbrand (eds) *International humanitarian law and the 21<sup>st</sup> Century’s conflicts: changes and challenges* (2005) 191–213 196. Haas cites the following as examples of the hostage use of human shields: ‘UN observers used ... in Sarajevo to stop Western air strikes, civilian hostages used by Saddam Hussein during the Gulf war ..., and those used later by Slobodan Milosevic in Kosovo in 1999’ (*ibid*). Sometimes VHSs act without the explicit permission of the party on whose behalf they act, as was the case of the civilians who located themselves on bridges in Belgrade, Grdelica and Novi Sad during Operation Allied Force (‘Serb Media: NATO lies over rapes’ *BBC* online 10 April 1999 available at: <http://news.bbc.co.uk/1/hi/world/monitoring/316147.stm> (last accessed 12 May 2012); Schmitt n 6 above at 322; Fenrick n 7 above at 293; Lyall n 4 above at 325. However, as Melzer correctly points out, aside from the ‘obvious cases on both ends of the scale, such as civilian activists publicly declaring their desire and intent to serve as human shields, or civilian hostages forcibly being chained to military objectives’, for the most part there is a large grey area which human shields occupy (Melzer ‘Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC’s interpretive guidance on the notion of direct participation in hostilities’ (2010) 42 *International Law and Politics* at 871).

subjects of, armed conflict'.<sup>16</sup> There may be many reasons for civilians to stay in close proximity to a military objective.<sup>17</sup> For example when they intentionally remain in the theatre of conflict with the aim of frustrating the enemies targeting decisions, they become VHS.<sup>18</sup> It is this subjective intent element, implicit in the act of being a VHS, which in the end complicates the application of existing IHL to VHSs.<sup>19</sup> As a consequence, the legal obligations for a belligerent faced with VHSs, are complicated, subject to controversy, and to date, remain a 'subject unaddressed in *lex scripta*'.<sup>20</sup>

In this article, I go out from the premise that the actions of VHSs are, by definition, un-coerced, and that VHSs enjoy civilian status under IHL<sup>21</sup> in accordance with Additional Protocol I (AP I) article 50(1)'s presumption of protected civilian status. That said, as with any presumption, there is always the possibility of rebuttal. For VHSs, the most likely basis for rebutting the civilian presumption, lies in the IHL notion of direct participation in hostilities.<sup>22</sup> In this paper, I explore the question whether the actions of

<sup>16</sup> Lyall n 4 above at 316.

<sup>17</sup> They may be too elderly, unwell, too scared or wanting to 'safeguard their property and possessions' (*ibid*).

<sup>18</sup> *Ibid*; Schmitt n 6 above at 316.

<sup>19</sup> *Id* at 334.

<sup>20</sup> *Id* at 295; Haas n 15 above at 192.

<sup>21</sup> For a more comprehensive discussion of this position see Bosch n 1 above at 322–349. Different academics locate VHSs in different IHL categories: according to Schmitt, Dinstein labels VHSs 'unlawful combatants' on account of what he perceives to be their direct participation in hostilities (Schmitt (2002) '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 (7 January) available at: <http://www.cceia.org/resources/transcripts/98.html> (last accessed 12 May 2012). Schmitt agrees to a degree, concluding that VHSs have 'a status similar to that of illegal combatant' (*ibid*). Parrish concedes that VHSs are not 'traditional civilians' but concludes that they are also 'neither lawful nor unlawful belligerents' (*ibid*). Even at the first ICRC meeting of legal experts gathered to settle on a definition of what actions amount to direct participation in hostilities, VHSs 'were included in the 'unclear situations' that ... could not [be] categorised' (ICRC 'Summary report: first expert meeting on direct participation in hostilities under international humanitarian law' (September 2003) available at: <http://www.icrc.org/Web/eng/siteengO.nsf/htmlall/participation-hostilities-ihl-311205> (last accessed 12 May 2012) at 2). Ross maintains that 'human shields, even if they were volunteers, maintained their civilian status. They were not combatants' (Ross 'International humanitarian law and human rights: how relevant are they in today's wars?' Statement at the conference of the Swiss Foundation for World Affairs (19 March 2003) available at: <http://www.sais-jhu.edu/swissfoundation/march192003event.htm> (last accessed 24 May 2012)). This is also the view favoured by Haas (Haas n 15 above at 200).

<sup>22</sup> To date, the question of whether VHSs can be said to be participating directly in hostilities is highly contested ('Direct participation in hostilities under international humanitarian law' ICRC Expert Meetings 2 June 2003 (The Hague); 25–26 October 2004

VHSs amount to direct participation in hostilities. I begin by unpacking the concept of direct participation in hostilities, and apply this analysis to the factual scenario posed by VHSs. I explore the legal consequences which result from a conclusion that VHSs are found to be participating in hostilities, and those resulting from a conclusion that they are not direct participants. I also explore whether the nature of the site (military, dual-use, or civilian) impacts upon these findings.

### THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES

The phrase ‘direct participation in hostilities’<sup>23</sup> has a long history in many treaty provisions regulating IHL.<sup>24</sup> It is most often cited in reference to the fact that civilians forfeit their IHL protection against targeting in times of armed conflict, for so long as they take a direct part in hostilities.<sup>25</sup> In short, the phrase refers to ‘combat-related activities that would normally be undertaken only by members of the armed forces’.<sup>26</sup> Early legal commentaries<sup>27</sup> explain that the phrase refers to war-like actions, intended

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(The Hague); 23–25 October 2005 (Geneva) available at: <http://www.icrc.org/eng/resources/documents/feature/2009/direct-participation-ihl-feature-020609.htm> (last accessed 18 May 2012).

<sup>23</sup> This phrase is sometimes used interchangeably with the phrases ‘taking a direct part’ and ‘taking an active part’ in hostilities (ICRC n 7 above at 43). Both the commentary on AP I and the jurisprudence of the International Criminal Tribunal for the Rwanda (*The Prosecutor v Jean-Paul Akayesu* Case ICTR-96-4-T (2 September 1998) at 629) considered these various legal formulations to be synonymous.

<sup>24</sup> ICRC n 7 above at 12. Initially, the treaties used the phrase ‘active part in the hostilities’ (GC I–IV common article 3), but more recently the phrase has evolved into ‘direct participation in hostilities’, as is evidenced by the text AP I art 51(3).

<sup>25</sup> Henckaerts & Doswald-Beck n 10 above at 23. There were no reservations made to this provision, when states signed up to AP I, and ‘at the Diplomatic Conference leading to the adoption of the Additional Protocols, Mexico stated that Article 51 of AP I was so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”’ (Henckaerts & Doswald-Beck n 10 above at 23). As the commentary on AP I art 51(3) explains: ‘a civilian who takes part in an armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he “takes part in hostilities”’ (Jensen ‘Direct participation in hostilities’ in Banks (ed) *New battlefields old laws: critical debates on asymmetric warfare* (2011) at 1996–2004 (ebook version).

<sup>26</sup> Rogers cites the following examples of actions that amount to ‘direct participation in hostilities’: ‘attacks with roadside bombs on military patrols, sabotage of military communications installations, electronic interference with weapons systems or capturing members of the armed forces’ (Rogers ‘Unequal combat and the law of war’ (2004) 7 *Yearbook of International Humanitarian Law* 3–34 at 19). These activities must be distinguished from ‘support activities, such as provision of supplies and services ... which do not amount to taking a direct part in hostilities’ (*id* at 19).

<sup>27</sup> Sandoz, Swinarski & Zimmermann (eds) *Commentary on the additional protocols of 8 June 1977 to the Geneva conventions of 12 August 1949* (1987) at par 1679; 1942 & 4787). In the final analysis, the commentary to AP I ‘suggests a narrow interpretation of

to threaten,<sup>28</sup> incapacitate, or otherwise harm the enemies personnel or equipment.<sup>29</sup> It is clear that there are two aspects to this concept: the first is that only certain specific actions<sup>30</sup> will result in civilians forfeiting their immunity from attack, and secondly, that their loss of protection is limited to the period<sup>31</sup> during which they persist in their direct participation.<sup>32</sup>

According to the ICRC, the notion that civilians lack authorisation to participate directly in hostilities, enjoys customary IHL status.<sup>33</sup> Not only is the principle expressed in several national military manuals,<sup>34</sup> instruments of regional human rights bodies,<sup>35</sup> reported state practice, and judicial

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direct participation in hostilities', albeit without a definition or a list of examples of actions which 'might amount to "direct participation in hostilities"' (Ricou Heaton 'Civilians at war: re-examining the status of civilians accompanying the armed forces' (2005) 57 *Air Force Law Review* 155–208 at 177; ICRC n 7 above at 12 & 41.

<sup>28</sup> Bothe, Partsch & Solf 'New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva conventions of 1949' (1982) 301 par 2.4.1. These early legal commentaries are at pains to point out that 'direct participation' is to be distinguished from general 'war effort' (Sandoz, Swinarski & Zimmermann n 27 above at par 1679). Consequently, the notion of direct participation does not extend to every act that might result eventually in a threat to the enemy. Civilians employed in industries which support the war effort (like those working in an armaments factory) are not considered to be engaging in a 'military activity', although the ammunitions factory itself would still constitute a military objective (Gasser 'Protection of the civilian population' in Fleck (ed) *The handbook of humanitarian law in armed conflict* (1995) at 211 & 233).

<sup>29</sup> Schmitt 'Deconstructing direct participation in hostilities: the constitutive elements' (2010) 42 *International Law and Politics* 697–739 at 711.

<sup>30</sup> The ICRC's commentary on AP I art 51(3) 'takes a narrow interpretation of the phrase "direct participation in hostilities", requiring an act that causes "actual harm" to the equipment or personnel of the opposing military forces' (Jensen n 25 above at 2006–2004).

<sup>31</sup> The commentary on AP I art 51(3) concedes 'that this would include "preparation for combat and the return from combat", but then adds "once he ceases to participate, the civilian regains his right to the protection under this section ... and he may no longer be attacked"' (*id* at 2006–2004)

<sup>32</sup> *Id* at 2004–13.

<sup>33</sup> This was the expressed opinion of the United Kingdom (Henckaerts & Doswald-Beck n 10 above at 23).

<sup>34</sup> See for example the military manuals of: Australia; Belgium; Ecuador; El Salvador; India; the Netherlands; the United States; and Yugoslavia (*id* at 22).

<sup>35</sup> The Inter-American Commission on Human Rights understand the term 'direct participation in hostilities' as being 'generally understood to mean "acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and material"' (*id* at 22–23). Moreover, the Commission points out that activities which only indirectly serve to support the armed forces, and do not 'pose an immediate threat of actual harm to the adverse party', cannot amount to direct participation in hostilities (*id* at 22–23).

decisions,<sup>36</sup> but it is adopted without any evidence of state practice to the contrary,<sup>37</sup> even by states that were not party to AP I.<sup>38</sup>

The phrase ‘direct participation in hostilities’ (in its various forms), has been bandied about in IHL treaties and customary law for many years. Yet, as Fenrick points out, ‘neither the Geneva conventions nor their additional protocols<sup>39</sup> provide a definition of what activities amount to “direct participation in hostilities”’.<sup>40</sup> Moreover, when one looks at state practice, it is clear that there is no agreed interpretation of what amounts to direct participation in hostilities.<sup>41</sup> As Henckaerts points out, ‘despite the references made to the fact that civilian use of weapons or other means to commit acts of violence against human or material enemy forces is prohibited ... a clear and uniform definition of direct participation in hostilities has not been developed in State practice’.<sup>42</sup> Even the ICRC’s study into customary international law confirms that there is no definitive definition for the term in current international humanitarian treaty law.<sup>43</sup> This leaves judicial bodies no choice but to interpret ‘the notion of direct participation in hostilities...in good faith in accordance with the ordinary meaning to be given to its constituent terms in their context and in light of the object and purpose of IHL’<sup>44</sup> – on a case-by-case basis.<sup>45</sup>

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<sup>36</sup> In *The Public Committee against Torture in Israel et al (PCATI) v The government of Israel et al* Supreme Court of Israel (14 December 2006) available at: [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf) (last accessed 27 May 2012) s 37, the Israeli Supreme Court concluded that: the ‘direct’ character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take ‘a direct part’. The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities. Their contribution is direct (and active).

<sup>37</sup> Henckaerts & Doswald-Beck n 10 above at 23.

<sup>38</sup> *Ibid.*

<sup>39</sup> Fenrick n 7 above at 292.

<sup>40</sup> ICRC n 7 above at 12.

<sup>41</sup> *Id* at 41.

<sup>42</sup> Henckaerts & Doswald-Beck n 10 above at 23.

<sup>43</sup> *Id* at 22.

<sup>44</sup> ICRC n 7 above at 41.

<sup>45</sup> Bouchié de Belle n 2 above at 895; ICTY *The Prosecutor v Dusko Tadić* judgment Case No IT-94-1-T (7 May 1997) at par 616.

### THE ICRC'S INTERPRETIVE GUIDE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES

In 2009, the ICRC published an Interpretive Guide<sup>46</sup> on the notion of direct participation in hostilities. The guide was intended to express the ICRC's interpretation of the existing<sup>47</sup> IHL position on direct participation in hostilities, in light of the realities surrounding recent armed conflicts.<sup>48</sup> The ICRC hoped that their recommendations would have 'substantial persuasive effect'<sup>49</sup> for a myriad of stakeholders including states, non-state actors, legal practitioners, and legal academics.<sup>50</sup> Some argue that the guidance can be seen as a secondary source of international law, much in the way that the judicial writings of the most esteemed legal academics are recognised as a source of law by the Statute of the International Court of Justice.<sup>51</sup>

According to the ICRC Interpretive Guide, in order to qualify as direct participation in hostilities, a specific act must meet three cumulative criteria:<sup>52</sup>

- The act must be likely adversely to 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*);
- 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
- The act must be specifically designed directly to cause the required threshold of harm in support of a party to the conflict, and to the detriment of another (*belligerent nexus*).<sup>53</sup>

<sup>46</sup> The Interpretive Guide is not legally binding, as 'a legally binding interpretation of IHL can only be formulated by a competent judicial organ or, collectively, by the states themselves' (ICRC n 7 above at 9 & 10).

<sup>47</sup> The Guide expressly stated that it was not intended to change the existing and 'binding rules of customary or treaty IHL' (ICRC n 7 above at 9).

<sup>48</sup> ICRC n 7 above at 9.

<sup>49</sup> Fenrick n 7 above at 300.

<sup>50</sup> ICRC n 7 above at 10.

<sup>51</sup> Article 38, Van der Toorn "Direct participation in hostilities": a legal and practical evaluation of the ICRC guidance' available at:

[http://works.bepress.com/damien\\_van\\_der\\_toorn/1](http://works.bepress.com/damien_van_der_toorn/1) (last accessed 27 May 2012) at 22.

<sup>52</sup> ICRC n 7 above at 46.

<sup>53</sup> *Id* at 47.



The first criterion, which is referred to as the *threshold of harm* determination, requires that harm<sup>54</sup> of a specifically military nature, or<sup>55</sup> harm (by causing injury, death, or destruction<sup>56</sup>) of a protected person or object, must be reasonably expected to result from a civilian's actions, before the civilian can be said to be participating directly in hostilities.<sup>57</sup>

The Interpretive Guide expressly recognises the need for the concept of direct participation in hostilities to be interpreted to include not only the obvious individual armed activities, but also those unarmed activities which have an adverse effect on the enemy.<sup>58</sup> Moreover, all that is required is the 'objective likelihood<sup>59</sup> that the act will result in such harm', and not necessarily that the harm has actually materialised,<sup>60</sup> or that it causes a minimum degree of harm to the enemy. In short, the *threshold of harm* criterion<sup>61</sup> can be met without the actual materialisation of the harm, and even in instances where the degree of harm is relatively minor.

The second requirement of the three criteria for a finding of 'direct participation in hostilities', is termed the *direct causation* test, and its purpose is to ensure a relatively close link between the act and the consequences felt by the belligerents.<sup>62</sup> According to the ICRC's Interpretive Guide, an action is only able to satisfy the direct causation requirement when the harm resulting from the action is brought about in a single 'causal step'.<sup>63</sup>

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<sup>54</sup> The degree of harm includes 'not only the infliction of death, injury, or destruction on military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict' (*id* at 47).

<sup>55</sup> The test is framed in the alternative 'that is, the harm contemplated may either adversely affect the enemy or harm protected persons or objects' (Schmitt n 29 above at 713).

<sup>56</sup> ICRC n 7 above at 47.

<sup>57</sup> *Ibid.*

<sup>58</sup> Melzer n 15 above at 882.

<sup>59</sup> In other words 'harm which may reasonably be expected to result from an act in the prevailing circumstances' (ICRC n 7 above at 47). As was discussed at the Expert discussions, 'wherever a civilian had a subjective "intent" to cause harm that was objectively identifiable, there would also be an objective "likelihood" that he or she would cause such harm' (Schmitt n 29 above at 724).

<sup>60</sup> ICRC n 7 above at 33. Schmitt concedes that this is a sensible requirement, since it would be 'absurd to suggest that a civilian shooting at a combatant, but missing, would not be directly participating because no harm resulted' (Schmitt n 29 above at 724).

<sup>61</sup> Schmitt n 29 above at 716.

<sup>62</sup> *Id* at 725.

<sup>63</sup> The act must not only be causally linked to the harm, but it must also cause the harm directly. In short, where an 'individual's conduct ... merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, is excluded from the concept of direct participation in hostilities' (ICRC n 7 above at 53–54).

Clearly excluded are activities that only indirectly cause harm. Therefore, mere temporal or geographic proximity cannot on their own, without direct causation, amount to a finding of direct participation in hostilities.<sup>64</sup>

The third and final requirement for an act to amount to direct participation in hostilities is the requirement termed the *belligerent nexus*. In short, this leg of the test requires that the action (which fulfils the threshold of harm requirement) must cause the harm (in accordance with the direct causation conditions) with the intention of supporting a specific party to the conflict, and in so doing be to the detriment of another belligerent party.<sup>65</sup> So, for example, if civilians are found ‘causing harm in individual self-defence or defence of others ... [this] lacks the *belligerent nexus* required for a qualification as direct participation’,<sup>66</sup> and must be dealt with by means of the regular law-enforcement mechanisms.<sup>67</sup>

Once an individual is classified as a civilian, his direct participation in hostilities does not result in the loss of his primary civilian status.<sup>68</sup> The temporary nature of the suspension of a civilian’s immunity from attack, is only afforded civilians who participate in hostilities on a ‘spontaneous, unorganized or sporadic basis’,<sup>69</sup> and only for so long as they participate in hostilities. Where no prior deployment is required, the loss of civilian immunity will be limited to the time during which the act is carried out, together with the immediate preparations for the execution of the act.<sup>70</sup> However, where the specific act requires ‘prior geographic deployment’, that preparatory deployment would already constitute a part of the act of participation, and results in the loss of civilian immunity.<sup>71</sup>

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<sup>64</sup> *Id* at 53.

<sup>65</sup> Melzer n 15 above at 872.

<sup>66</sup> ICRC n 7 above at 64. ‘For example, although the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers may cause the required threshold of harm, its purpose clearly is not to support a party to the conflict against another’ (*id* at 61).

<sup>67</sup> Melzer n 15 above at 873.

<sup>68</sup> ICRC n 7 above at 70.

<sup>69</sup> *Id* at 71.

<sup>70</sup> *Id* at 68.

<sup>71</sup> *Id* at 67.

While there has been much academic critique<sup>72</sup> levelled at the Interpretive Guide, Melzer (the ICRC's appointed author of the guide) maintains that the Guide adopted a neutral, impartial, and balanced approach, resisting proposals coming from both extremes, whilst ensuring that the final interpretation would still be commensurate with the foundational principles of IHL.<sup>73</sup> He argues that much of the critique comes from a position which weights military necessity, without showing adequate deference to the principle of humanity.<sup>74</sup> Probably the most common criticism levelled at the Interpretive Guide, is that each of the elements (of the three-pronged definition), are potentially under-inclusive in their formulation.<sup>75</sup> The Interpretive Guide's pro-humanitarian treatment of the concept of direct participation reflects, in Schmitt's view, 'a troubling ignorance of the realities of 21st century battlefield combat'.<sup>76</sup>

## **VHSs AND THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES**

### **The case of VHSs prior to the publication of the ICRC's Interpretive guide**

Already at the second ICRC Expert Meeting, which was convened to draft the Interpretive Guide, the issue of VHSs found its way into the discussions.<sup>77</sup> Experts were divided on the issue around whether the actions of VHS amounted to direct participation in hostilities.<sup>78</sup> Those in the 'yes' camp argue that VHSs, much like anti-aircraft defence systems,<sup>79</sup> are 'deliberately trying to ward off an attack on a military objective', which they claim is tantamount to participating directly in hostilities.<sup>80</sup> Proponents of

<sup>72</sup> For more on this issue see Schmitt n 29 above 697–739; Boothby "And for such time as": the time dimensions to direct participation in hostilities' (2010) 42 *International Law and Politics* 741–768; Watkin 'Opportunity lost: organised armed groups and the ICRC "direct participation in hostilities" interpretive guide' (2010) 42 *International Law and Politics* 641–695.

<sup>73</sup> Melzer n 15 above at 914.

<sup>74</sup> *Ibid.*

<sup>75</sup> Schmitt n 29 above at 739.

<sup>76</sup> *Ibid.*

<sup>77</sup> ICRC 'Summary report: second expert meeting on direct participation in hostilities under international humanitarian law' 25–26 October 2004 (The Hague) available at: <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ih1-311205> (last accessed 27 May 2012) at 23; Lyall n 4 above at 321.

<sup>78</sup> Bouchié de Belle n 2 above at 893; ICRC n 77 above at 6; Fenrick n 7 above at 293.

<sup>79</sup> According to Schmitt, VHSs are 'deliberately attempting to preserve a valid military objective for use by the enemy' and 'are no different from point air defenses' (Schmitt n 10 above at 541).

<sup>80</sup> Bouchié de Belle n 2 above at 893; Schmitt 'Targeting and humanitarian law: current issues' (2004) 34 *Israel Yearbook on Human Rights* at 95; Dinstein *The conduct of*

this liberal interpretation,<sup>81</sup> argue that since IHL understands the term ‘attack’ to include both offensive and defensive acts,<sup>82</sup> and since hostile acts do not require the use of weapons,<sup>83</sup> that unarmed VHSs who position themselves in the vicinity of military objectives, with the goal of shielding these objectives from direct targeting, are participating directly in hostilities.<sup>84</sup> In short they argue that by his intentional actions, VHS plays a causal part in the military action, such that his behaviour must amount to direct participation in the hostilities.<sup>85</sup> As Lyall explains VHSs make targeting decisions ‘politically complex, but not legally difficult [because in] attempting to defend an otherwise legitimate target from attack, VHSs make themselves part of the defence system of the objective they seek to shield’.<sup>86</sup> Consequently, those in this school of thought conclude that VHSs ‘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’.<sup>87</sup> As far as judicial opinion are concerned, the High Court of Justice of Israel, in the Targeted Killing case (PCATI), concluded that if VHSs act with the intention<sup>88</sup> of supporting the cause of a terrorist organization, their actions amount to direct part in the hostilities.<sup>89</sup>

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*hostilities under the law of international armed conflict* (2ed 2010) at 130.

<sup>81</sup> See for example: Schmitt “‘Direct participation in hostilities’” and 21st century armed conflict’ in *Crisis management and humanitarian protection: Festschrift für Dieter Fleck* (2004) 505–529, available at: <http://www.michaelschmitt.org/images/Schmittfinal.pdf> (last accessed 15 May 2012); Ricou Heaton n 27 above at 155–208.

<sup>82</sup> Bouchié de Belle n 2 above at 894; AP I article 49.

<sup>83</sup> *Ibid*; Sandoz, Swinarski & Zimmermann n 27 above at par 1943.

<sup>84</sup> Bouchié de Belle n 2 above at 894. Parrish suggests that VHSs are analogous to military-employed contractors ‘due to their attempts to protect, and thus increase the effectiveness of, war-waging equipment’ (Parrish (2004) ‘The international legal status of voluntary human shields’ paper presented at the annual meeting of the International Studies Association, Montreal (17 March 2004) available at: <http://www.polisci.wisc.edu> (last accessed 12 May 2012) at 13.

<sup>85</sup> Schmitt n 6 above at 318.

<sup>86</sup> Lyall n 4 above at 320.

<sup>87</sup> Parrish n 84 above at 8.

<sup>88</sup> Schmitt n 10 above at 533; Melzer *Targeted killings in international law* (2008) 25. The difficulty with a definition which relies upon proof of intent is that VHSs may (as was the case in Iraq) be ‘deliberately serving as a human shield without the necessary intention to “support” the combatants who are thereby shielded’; their intent was ‘simply to protest the war’ (Teninbaum ‘American volunteer human shields in Iraq: free speech or treason?’ (2004) 28 *Suffolk Transnational Law Review* 139 at 157–8).

<sup>89</sup> Bouchié de Belle n 2 above at 893; *PCATI v The government of Israel* n 37 above at par 36.

Some even argue that VHSs are more effective in hindering an attack on a legitimate military target than if they actually took up arms against the opposing forces, and once a sufficiently large number of VHSs have surrounded an intended target, their presence can *de facto* preclude any direct targeting of the site in an absolute<sup>90</sup> manner, by what is sometimes referred to as the ‘CNN effect’.<sup>91</sup> As Schmitt explains, in today’s media culture where images of civilian casualties can be broadcast live around the globe, the presence of VHSs at the site of a military objective can prove to be a more effective deterrent than traditional means of defence (including anti-aircraft or surface-to-air missiles).<sup>92</sup>

On the other hand, there are those who consider that the actions of VHSs do not amount to direct participation in hostilities,<sup>93</sup> since the actions of a VHS did not correspond well with the existing understanding of ‘direct participation in hostilities’.<sup>94</sup> They consider that it is incorrect to conclude that persons, who take up a shielding position albeit in front of a legitimate target, are in fact taking a direct part in the hostilities.<sup>95</sup> They draw attention to the fact that the VHS poses no direct threat to the belligerents, rather they simply shield in a passive manner a particular site or objective.<sup>96</sup> Haas argues that ‘VHSs do not take a direct part in hostilities because they do not perpetrate acts “which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”’<sup>97</sup> At most, they concede that VHSs participate indirectly by potentially contributing to a belligerent’s capabilities.<sup>98</sup> Moreover, they point to the very fact that states perceive that the presence of VHSs constitute a legal obstacle to their unfettered targeting of a shielded site, rather than concluding that the actions of these VHSs amount to direct participation in hostilities.<sup>99</sup> Instead, they adopt a more restrained interpretation of the term direct participation

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<sup>90</sup> Schmitt ‘Fault lines in the law of attack’ (ch 9) in Breau & Jachec-Neale (eds) *Testing the boundaries of international humanitarian law* (2010) British Institute of International and Comparative Law, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1610016](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1610016) (last accessed 12 May 2012) at 299.

<sup>91</sup> Schmitt n 6 above at 318.

<sup>92</sup> Schmitt n 80 above at 96.

<sup>93</sup> Including: Haas (n 14 above at 203 & 205), Human Rights Watch, and Laurent Colassis (a legal advisor to the ICRC).

<sup>94</sup> Bouchié de Belle n 2 above at 895; ICRC n 77 above at 6.

<sup>95</sup> Bouchié de Belle n 2 above at 894.

<sup>96</sup> *Ibid.*

<sup>97</sup> Haas n 15 above at 205.

<sup>98</sup> Bouchié de Belle n 2 above at 895.

<sup>99</sup> Melzer n 88 above at 872; Bouchié de Belle n 2 above at 895; ICRC n 77 above at 6.

in hostilities,<sup>100</sup> one which aligns actual combat activities with direct participation in hostilities.<sup>101</sup>

Admittedly, as Melzer points out, to date there is no evidence of state practice suggesting that states are inclined to target VHS separately from the shielded site,<sup>102</sup> suggesting that for states anyway, the idea that VHSs are participating directly in hostilities is not settled. This led Melzer to note that the liberal approach ‘stands in contradiction not only to the prevailing opinion in the doctrine, but also to state practice. State practice does in fact support a distinction being drawn between “direct participation in hostilities”, on the one hand, and “activities in support of military operations”, on the other hand.’<sup>103</sup>

### **The advent of the ICRC’s Interpretive Guide and the case of the VHS**

According to the ICRC’s Interpretive Guide, determining whether the shielding actions of a VHS amount to direct participation in hostilities, requires that those actions be tested against the same criteria as would apply to any other activity.<sup>104</sup> Consequently, we need to turn our attention to the three-pronged test to ascertain whether their actions compromise<sup>105</sup> their civilian immunity from direct targeting.<sup>106</sup>

#### *The threshold of harm determination*

While it seems unlikely that VHSs would intentionally injure or kill protected persons<sup>107</sup> and military personnel,<sup>108</sup> or destroy protected<sup>109</sup> objects and military<sup>110</sup> objects, it is entirely possible that their presence at a site

<sup>100</sup> See for example: Ben-Naftali & Michaeli ‘We must not make a scarecrow of the law: a legal analysis of the Israeli policy of targeted killings’ 2003 Spring *Cornell International Law Journal* at 233; Schondorf ‘Are “targeted killings” unlawful? The Israeli supreme court’s response: a preliminary assessment’ 2007 May *Journal of International Criminal Justice* at 301.

<sup>101</sup> Melzer n 88 above at 335.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Id* at 339.

<sup>104</sup> Melzer n 15 above at 869.

<sup>105</sup> Since the ‘loss is temporary’ Melzer suggests that it is ‘better described as a “suspension” of protection’ (Melzer n 88 above at 347).

<sup>106</sup> Schmitt n 29 above at 704.

<sup>107</sup> ICRC n 7 above at 47.

<sup>108</sup> Schmitt argues that ‘it only applies to objects which “contribute militarily” and not to civilian objects’, even if they may sometimes contribute to one belligerent’s success in the conflict (Schmitt n 29 above at 717).

<sup>109</sup> ICRC n 7 above at 47.

<sup>110</sup> Schmitt argues that ‘it only applies to objects which “contribute militarily” and not to civilian objects’, even if they may sometimes contribute to one belligerent’s success in

could adversely affect the belligerent parties' military planning and capacity.<sup>111</sup> Several activities which are generally accepted as satisfying the threshold of harm requirement,<sup>112</sup> might be imputed to the shielding actions of VHSs. For example, damaging or sabotaging military objects or undermining their functional capacity;<sup>113</sup> restricting or disturbing military communication networks;<sup>114</sup> interfering with military logistics;<sup>115</sup> hampering military deployments;<sup>116</sup> exercising any form of control or denying the military use of objects or territory;<sup>117</sup> and engaging in unarmed activities which limit the military capacity of an opposing party.<sup>118</sup> In fact, the Interpretive Guide goes so far as to state that 'where civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cause the threshold of harm required for a qualification as direct participation in hostilities'.<sup>119</sup> The ICRC also concedes that it remains questionable whether the act of shielding a site will rise to the requisite threshold of harm<sup>120</sup> in every instance, since they (VHSs) seldom pose any real or direct threat of physical harm to belligerents, and rarely obstruct military operations in any physically manner.<sup>121</sup>

*The direct causation requirement*

As far as activities that satisfy the direct causation requirement go, although sabotaging a military object,<sup>122</sup> or engaging in an operation which causes the requisite threshold of harm,<sup>123</sup> would satisfy the direct causation test, it is generally felt that the actions of VHSs<sup>124</sup> do not meet the direct causation test.

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the conflict (Schmitt n 29 above at 717).

<sup>111</sup> ICRC n 7 above at 47.

<sup>112</sup> Most of these examples proved uncontroversial (Schmitt n 29 above at 715).

<sup>113</sup> ICRC n 7 above at 47–48.

<sup>114</sup> *Id* at 48.

<sup>115</sup> *Id* at 48.

<sup>116</sup> *Id* at 48.

<sup>117</sup> For example: 'denying the adversary the military use of certain objects, equipment and territory' (ICRC n 7 above at 48).

<sup>118</sup> *Ibid.*

<sup>119</sup> *Id* at 56.

<sup>120</sup> *Id* at 57.

<sup>121</sup> Schmitt n 6 above at 317–318.

<sup>122</sup> Watkin n 74 above at 707.

<sup>123</sup> ICRC n 7 above at 55.

<sup>124</sup> Melzer n 15 above at 865.

This conclusion is not uncontroversial. Some IHL experts have argued that where (as in the case of VHSs) the subjective intent to hamper military operations is discernible, the actions would amount to direct participation in hostilities.<sup>125</sup> However, this interpretation was rejected for fear that it could result in VHSs being equated with persons taking a direct part in hostilities, which would expose them to attack, even in the preparatory stages of assembling before taking up their shielding position at a military objective.<sup>126</sup> 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,<sup>127</sup> and yet still having a marked effect on the belligerent's capacity to win.<sup>128</sup> In this regard, the ICRC's Interpretive Guide cautions that civilians must be careful not to disclose any tactical-targeting information which they might have gathered whilst shielding sites.<sup>129</sup> Van der Toorn opines that voluntary human shielding 'is a ruse of war, solely designed to defend a locality from attack ... [which] seeks to advance a party's military aims to the detriment of the enemy'.<sup>130</sup> Consequently, he concludes that once belligerents can ascertain that individuals are acting as VHSs, they may be deemed to be participating directly in hostilities, and, as such, can be directly targeted.<sup>131</sup> When all is said and done, however, it is nevertheless true that VHSs 'are in practice considered to pose a legal – rather than a physical<sup>132</sup> obstacle to military operations', precisely because they are perceived to enjoy civilian immunity from direct targeting. Furthermore, while the passive actions of VHS may result in a belligerent party suspending an attack, the causal relationship between their behaviour and the consequent harm remains indirect.<sup>133</sup>

*The belligerent nexus requirement*

The *belligerent nexus* requirement is perhaps the greatest hurdle of the three requirements of the test for direct participation in hostilities. As Lyall

<sup>125</sup> Lyall n 4 above at 324.

<sup>126</sup> Bouchié de Belle n 2 above at 895; ICRC n 77 above at 6.

<sup>127</sup> Schmitt n 29 above at 736.

<sup>128</sup> *Id* at 725.

<sup>129</sup> ICRC n 7 above at 49.

<sup>130</sup> Van der Toorn n 52 above at 34.

<sup>131</sup> *Id* at 35.

<sup>132</sup> Van der Toorn argues that 'acting as a voluntary human shield in order to create a physical obstacle to the ground operations of the adversary would constitute direct participation' (*id* at 15).

<sup>133</sup> ICRC n 7 above at 57; Van der Toorn n 52 above at 15.



correctly points out, VHSs ‘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’<sup>134</sup> – for the simple reasons that their actions lack a *belligerent nexus*. In short, none of the examples of activities<sup>135</sup> which satisfy the *belligerent nexus* requirement, rings true for VHSs. Schmitt is in favour of formulating the *belligerent nexus* test in the alternative, so that actions need only either support one of the parties to the conflict, or be to the detriment of the other party, not both.<sup>136</sup> However, 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.<sup>137</sup>

### **Conclusions regarding VHSs and direct participation in hostilities**

What we can glean from the ICRC’s Interpretive Guide, as well as IHL treaty-law commentaries and customary international law, is that it is impossible to conclude that the actions of VHSs either always do, or always do not, constitute taking direct part in hostilities.<sup>138</sup> As Bouchié de Belle correctly points out, ‘this can only be ascertained by an appraisal *in concreto* of the way in which the human shield indeed tries to protect the military objective in question’.<sup>139</sup> So, for example, where VHSs try to shield combatant personnel, or interfere with the movement of the opposing military forces, their actions would amount to direct participation in

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<sup>134</sup> Lyall n 4 above at 332.

<sup>135</sup> Activities which satisfy the threshold of harm requirement include: ‘acts of violence against human and material enemy forces’; causing ‘physical or functional damage to military objects, operations or capacity’; sabotage of military capacity and operations; restricting or disturbing military ‘deployments, logistics and communications’; exercising any form of control or denying the military use of ‘military personnel, objects and territory to the detriment of the adversary. ‘sabotage or other unarmed activities qualify, if they restrict or disturb logistics or communications of an opposing party to the conflict’; clearing mines placed by the opposition, ‘guarding captured military personnel to prevent them being forcibly liberated’; even electronic interference, exploitation or attacks of ‘military computer networks’; ‘wiretapping the adversary’s high command or transmitting tactical targeting information for an attack’; ‘violent acts specifically directed against civilians or civilian objects, such as sniper attacks or the bombardment of civilian residential areas, satisfy this requirement’; ‘building defensive positions at a military base certain to be attacked’; and ‘repairing a battle-damaged runway at a forward airfield so it can be used to launch aircraft’ (ICRC n 7 above at 47–49; Schmitt n 29 above at 715; Solis *The law of armed conflict: international humanitarian law in war* (2010) at 203; Melzer n 15 above at 859).

<sup>136</sup> Schmitt n 29 above at 736.

<sup>137</sup> Melzer n 15 above at 873.

<sup>138</sup> Bouchié de Belle n 2 above at 896.

<sup>139</sup> *Ibid.*

hostilities.<sup>140</sup> On the other hand, where VHSs voluntarily position themselves near a military objective, which might be the target of an attack, this would not constitute direct participation in hostilities,<sup>141</sup> although as Bouchié de Belle correctly points out, a few VHSs positioned near a military objective, would not protect it from an air strike in any material sense.<sup>142</sup>

So, for the most part, VHSs retain their civilian immunity from attack, despite the fact that they contribute indirectly to the war capability of the state,<sup>143</sup> on the ground that their actions do not amount to direct participation in hostilities. Melzer concedes that VHSs might be classified as direct participants where their presence ‘impedes the visibility or accessibility of a legitimate target, but not where it poses an exclusively legal obstacle to an attack’.<sup>144</sup> For those who support this conclusion, the mere fact that the presence of VHSs might cause the attacker a moment of moral hesitation, or force them to conduct a proportionality analysis, is insufficient to render their actions direct participation in hostilities.<sup>145</sup> However, as a contentious case, it must be recalled that there is a presumption in favour of protective civilian status<sup>146</sup> in all assessments as to whether an individual has directly participated in hostilities. In other words, should there be any doubt as to whether specific civilian conduct amounts to direct participation in hostilities, it must be presumed that the conduct does not compromise their civilian immunity from direct targeting.<sup>147</sup> Consequently, any interpretation of what amounts to direct participation in hostilities, which risks compromising a civilian’s immunity from direct attack,<sup>148</sup> will conflict with the fundamental purposes of IHL,<sup>149</sup> and with the presumption of civilian status. Therefore, it is probably safe to conclude that in most instances, the action of VHSs will not amount to direct participation in hostilities, and that they will consequently retain full civilian immunity from direct targeting.<sup>150</sup>

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<sup>140</sup> Fenrick n 7 above at 293.

<sup>141</sup> *Ibid.*

<sup>142</sup> Bouchié de Belle n 2 above at 896.

<sup>143</sup> Haas n 15 above at 203.

<sup>144</sup> Melzer n 15 above at 869.

<sup>145</sup> Schmitt n 6 above at 317; Bouchié de Belle n 2 above at 896.

<sup>146</sup> ‘In case of doubt, the person must be presumed to be protected against direct attack’ (ICRC n 7 above at 74 & 76).

<sup>147</sup> *Id* at 75.

<sup>148</sup> Melzer n 15 above at 886.

<sup>149</sup> *Ibid.*

<sup>150</sup> Bouchié de Belle n 2 above at 896.

### **VHSs AND IMPLICATIONS FOR TARGETING DECISIONS**

The presence of VHSs in the theatre of conflict, does impact on the considerations which inform a decision to attack a target. Any targeting decision in the theatre of armed conflict, must take into the consideration the IHL principles<sup>151</sup> of military necessity,<sup>152</sup> distinction,<sup>153</sup> humanity,<sup>154</sup> and proportionality.<sup>155</sup> In short, these principles oblige an attacker to distinguish between combatants and civilians, to take every feasible precaution to verify that a target is a military objective,<sup>156</sup> and to launch an attack only when the potential losses caused to the civilian population are not ‘excessive in relation to the concrete and direct military advantage anticipated’.<sup>157</sup>

While civilians will only compromise their immunity from direct targeting when they elect to participate directly in hostilities,<sup>158</sup> it is a simple reality of war that one’s presence (even as a civilian with full immunity) near military objectives will expose one to increased risk of indirect collateral damage<sup>159</sup> – and the VHS is no exception. Melzer argues that provided VHSs do not physically defend a military objective, or intentionally act so as to

<sup>151</sup> Henckaerts & Doswald-Beck n 10 above at rule 15; AP I art 57.

<sup>152</sup> The principle of military necessity would demand that attacks are only directed at ‘those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage’ (AP I article 52(2)).

<sup>153</sup> Distinction demands that commanding officers distinguish between civilians and combatants, and then direct their attacks only at specific military targets (AP I art 51(4) & (5)).

<sup>154</sup> Humanity demands that the means and methods of warfare used are calculated to cause the minimum unnecessary suffering and to ‘minimize civilian losses’ (AP I article 57). This is a corollary of the IHL rule that belligerents are ‘to give effective advance warning of attacks which could affect the civilian population, unless circumstances do not so permit’ (Schmitt n 6 above at 321–322). In short, the IHL obligations to respect the principle of distinction and take precautionary measures in attack, and give advance warning, ‘applies both when the civilians are hostages and when they have volunteered to shield military targets’ (Bouchié de Belle n 2 above at 886).

<sup>155</sup> The principle of proportionality requires commanding officers to weigh up the ‘direct military advantage’ they anticipate from an attack, against the incidental injury or damage caused to civilians. Where the loss caused to civilians would be ‘excessive in relation to the concrete and direct military advantage anticipated’, AP I directs that the attack should be halted, even if the attack has already been initiated (AP I articles 57(2)(a)(iii) & (b)).

<sup>156</sup> AP I article 57(2)(a)(1); Henckaerts & Doswald Beck n 10 above at rule 16 at 55.

<sup>157</sup> Bouchié de Belle n 2 above at 900 and 905; Henckaerts & Doswald-Beck n 10 above at rule 14. ‘This means that the expected civilian losses must be weighed against the size of the concrete military advantage to be anticipated if the military objective is neutralized’ (Bouchié de Belle n 2 above at 900); AP I arts 51(5)(b) & 57(2)(a)(iii).

<sup>158</sup> Schmitt n 90 above at 299.

<sup>159</sup> The Interpretive Guide concedes that ‘such civilians would be incurring an increased risk of incidental death or injury because of their voluntary presence near military objectives’ (ICRC n 7 above at 57).

physically frustrate military operations, they remain protected by their civilian immunity from direct targeting.<sup>160</sup> However, as Haas correctly points out, ‘they may lose *de facto* protection by staying too close to a military target ... like journalists embedded in military units’.<sup>161</sup> So, for example, when military objectives are surrounded by human shields, the objective itself does not cease to be a legitimate military target by virtue of their presence alone.<sup>162</sup> The mere presence of civilians at a legitimate military objective, will have to be factored into any decision to target the site which they shield, because of the risk of civilian collateral damage.<sup>163</sup> In short, VHSs *de facto* risk falling victim as a result of a legitimate attack on the object which they shield,<sup>164</sup> if the proportionality analysis concludes that the collateral damage is acceptable. So, for example, as Bouchié de Belle correctly points out, targeting a strategically located bridge would offer a significant military advantage, which would, in turn, justify a high level of potential civilian casualties, before the collateral damage would be deemed unacceptable.<sup>165</sup> Consequently, ‘in the case of human shields a sufficiently significant military advantage in relation to the danger to which human shields are exposed could render an attack on a military objective legitimate, despite their presence’.<sup>166</sup> Moreover, under IHL, belligerent parties are obliged to cancel or suspend an attack if the attack would be disproportionate<sup>167</sup> – in other words, if it became apparent that the target was surrounded by sufficient VHSs to tip the proportionality analysis in their favour. That said, collateral damage is only acceptable when it can be shown conclusively that the target is a legitimate military objective, and that an attack could be launched in a manner and at a time when the VHSs were not present.<sup>168</sup> If it were to be shown that VHSs were injured as a result of an attack aimed at a site which was not a military objective (for example a civilian objective), this would constitute a prohibited attack on ‘civilians and civilian property’.<sup>169</sup>

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<sup>160</sup> Melzer n 88 above at 346.

<sup>161</sup> Haas n 15 above at 210.

<sup>162</sup> Melzer n 88 above at 346; Gasser n 30 above at 247. Although, as Bouchié de Belle points out, the cost of ‘conducting an attack despite their presence, may have a considerable media and political impact’ (Bouchié de Belle n 2 above at 900).

<sup>163</sup> Sandoz, Swinarski & Zimmermann n 27 above at par 2191.

<sup>164</sup> *Ibid.* Bouchié de Belle n 2 above at 897.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Id* at 903.

<sup>167</sup> AP I art 57(2)(b).

<sup>168</sup> Bouchié de Belle n 2 above at 904.

<sup>169</sup> *Id* at 903.

Consequently, working from the premise that VHSs are to be categorised as civilians, and are not found to be participating directly in hostilities, then harm to a VHS could only be condoned where a concrete and direct military advantage would result from an attack, and the harm caused to the VHSs represent acceptable collateral damage.<sup>170</sup> As civilians, albeit inconveniencing the opposition, VHSs ‘retain their immunity from direct attack and may not be entirely discounted in applying the proportionality principle’.<sup>171</sup> Moreover, as Schmitt concedes, when evaluating the potential for collateral damage, VHSs are treated as any other civilian.<sup>172</sup> In fact, evidence from the Iraq and Serbian theatres of conflict, endorses the conclusion that those making targeting decisions took the presence of VHSs into consideration in their calculations.<sup>173</sup> The US Central Command also concede that the presence of VHSs is factored into their target analysis.<sup>174</sup> Certain academics, however, maintain that VHSs ‘ought to be excluded in the estimation of incidental injury when assessing proportionality’. For example, Dinstein claims the attacking force should not be held liable for the actions of civilians who deliberately put themselves in harm’s way.<sup>175</sup> Others do not push the case so far, but instead argue for a discounted application of the proportionality calculation (ie one that is easier to satisfy) in instances where human shields are involved. VHSs are, after all, a fundamentally different category of civilian than those envisaged in the IHL conventions. They are clearly not wholly innocent civilians going about their daily routine, who are caught in the crossfire. They have deliberately chosen to place themselves in the line of fire in an attempt to have an impact on the outcome of hostilities, in a manner which is ‘deliberately imprudent’.<sup>176</sup> Dinstein argues that this discounting of civilian harm, even applies where belligerents have intentionally made use of human shields – in other words, where the shielding is not wholly voluntary. He says, rather pragmatically, that in assessing whether civilian casualties are considered excessive in relation to the military advantage anticipated, allowances must be made for the fact that greater civilian injuries are to be expected.<sup>177</sup> Dinstein maintains

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<sup>170</sup> Gassern 30 above at 214.

<sup>171</sup> Bouchié de Belle n 2 above at 902.

<sup>172</sup> Schmitt n 6 above at 325.

<sup>173</sup> Lyall n 4 above at 329; Knox ‘Iraq: “human shields” hunker down in Baghdad’ *Radio Free Europe/Radio Liberty* (Czech Republic) 28 February 2003 available at: <http://www.rferl.org/content/article/1102379.html> (last accessed 27 May 2012).

<sup>174</sup> Reynolds n 4 above at 54.

<sup>175</sup> Dinstein n 82 above at 153.

<sup>176</sup> Bouchié de Belle n 2 above at 902

<sup>177</sup> *Id* at 897. At first sight, Dinstein does not appear to share this opinion: ‘These civilians enjoy no immunity while at work’ (Dinstein n 82 above at 124–5).

that this relaxation of the proportionality analysis, is actually borne out in practice. In the words of Doswald Beck, ‘the Israeli bombardment of Beirut ... resulted in high civilian casualties, but not necessarily excessively so, given the fact that military targets were placed amongst the civilian population’.<sup>178</sup>

However, if we are to accept the notion that VHSs are entitled to a lesser degree of protection against attack, then we place an added burden on military commanders to establish whether the civilian had the requisite intent to act as a shield,<sup>179</sup> and secondly, whether it can be determined that their actions were voluntarily.<sup>180</sup> This, while all the time remembering that in cases of doubt the presumption in favour of non-shielding must prevail.<sup>181</sup> This seems to be a burdensome obligation to expect a military commander to be able to satisfy in the heat of hostilities. Before imposing these extra demands, we need to be sure that they are an accurate reflection of IHL, and I am not certain that this is the case.

Those opposed to any discounted application of the proportionality test – like the ICRC<sup>182</sup> – point to GC IV article 8, which states that protected persons ‘may never renounce the rights secured to them’ by that Convention, thus suggesting that some rights are inalienable in IHL.<sup>183</sup> Mostly, they argue that ‘although a distinction based on willingness could have some relevance in a criminal case, it has no place in the conduct of hostilities as it cannot be applied on the ground’.<sup>184</sup> For those rejecting a discounted proportionality calculation, there is only one justification for excluding the presence of civilians from a proportionality analysis, and that is by actions which amount to direct participation in hostilities.<sup>185</sup> For as long as their actions do not amount to direct participation in hostilities, VHSs enjoy full immunity from attack, and the full benefit of the proportionality calculation. In the words of Schmitt, ‘if all shields deserve full civilian treatment ... everyone counts and counts equally’.<sup>186</sup> Melzer maintains that the relevant standard of excessiveness in the proportionality analysis, is flexible enough to account

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<sup>178</sup> Dinstein n 82 above at 155; Doswald-Beck ‘The civilian in the crossfire’ (1987) 24 *Journal of Peace Review* 251 at 257.

<sup>179</sup> Schmitt n 6 above at 335.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Id* at 334.

<sup>182</sup> ICRC n 7 above at 57.

<sup>183</sup> Bouchié de Belle n 2 above at 902.

<sup>184</sup> *Id* at 903.

<sup>185</sup> *Ibid.*

<sup>186</sup> Schmitt n 6 above at 334.

for VHSs who voluntarily expose themselves to the risk of incidental injury.<sup>187</sup> Oeter also notes that it is not clear in IHL whether ‘collateral damage to civilians working in military objectives ... is of lesser weight in striking a balance with the military advantage that potential damage to “innocent” civilians’ might achieve.<sup>188</sup> What this means is that according to the proportionality analysis, a sufficient number of VHSs located at a military objective, could by their presence alone, ‘absolutely immunize the target as a matter of law because their death or injury would be excessive in relation to the military advantage likely to result from the attack’,<sup>189</sup> even if their actions do not amount to direct participation in hostilities.

Even when the proportionality requirements have been met, belligerents are still obliged to observe the IHL precautions<sup>190</sup> in attack, to ensure that losses to VHSs are kept to a minimum, and that VHSs are moved from the vicinity of the military objective.<sup>191</sup> Consequently, an attacker is expected to minimise the harm they cause by utilising alternative methods of warfare.<sup>192</sup>

#### **VHSs who are found to be ‘directly participating in hostilities’**

As is the case with any civilian, a VHS who is determined to participate directly in hostilities, will lose his protection against the effects of hostilities, and can in fact be legitimately targeted (without concern for issues of proportionality<sup>193</sup>). In short, this effectively relieves the attacking commanders of observing the principle of distinction,<sup>194</sup> for the duration of the VHS’s participation in the hostilities. Accordingly, VHSs do not feature in the calculation of incidental injury when assessing proportionality.<sup>195</sup> Harming VHSs is permissible, provided there is no other less harmful means

<sup>187</sup> Melzer n 88 above at 346.

<sup>188</sup> Oeter ‘Methods and means of combat’ in Fleck (ed) *The handbook of humanitarian law in armed conflict* (1995) at 187.

<sup>189</sup> Schmitt n 29 above at 732.

<sup>190</sup> Parties to a conflict are obliged to do ‘everything feasible’ to: ‘verify that the objectives to be attacked are neither civilians nor civilian objects’; ‘remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives’; ‘avoid locating military objectives within or near densely populated areas’; ‘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’; and ‘avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects’ (Henckaerts & Doswald-Beck n 10 above at 51).

<sup>191</sup> AP I arts 57 & 58(a).

<sup>192</sup> Schmitt n 6 above at 325.

<sup>193</sup> Schmitt n 29 above at 703; Schmitt n 10 above at 541.

<sup>194</sup> *PCATI* n 37 above at 60.

<sup>195</sup> Bouchié de Belle n 2 above at 901.

of achieving the military objective sought.<sup>196</sup> Like any civilian who takes an active part in hostilities, while VHSs continue to participate actively in hostilities, they expose themselves to attacks from the opposition acting in self-defence.<sup>197</sup> VHSs may be found to be participating in hostilities by their shielding activities. As Schmitt points out:

their military contribution only emerges at the point that they are shielding the military objective; thus, they enjoy no military significance distinct from the objective itself. This being so, there is no military necessity for attacking them when they are not engaged in shielding. Furthermore, even when they are shielding a target, there is no military rationale for attacking them directly instead of, or in addition to, the actual military objective. It is the target that they shield which can be targeted.<sup>198</sup>

Schmitt's argument is endorsed by the ICRC, who also conclude that

the fact that some civilians voluntarily and deliberately abuse their legal entitlement to protection against direct attack, in order to shield military objectives, does not without more, entail the loss of their protection and their liability to direct attack independently of the shielded objective.<sup>199</sup>

Others, Al-Duaij, for example, argue that VHSs who shield military objectives participate directly in hostilities and consequently lose their immunity from direct targeting.<sup>200</sup>

*The temporal scope of the loss of protection*

Dinstein maintains that 'since not much preparation is required for either "deployment" or "disengagement" of voluntary human shields – they can only be attacked "for such time" as they are physically in or near the lawful target'.<sup>201</sup> Consequently, as far as VHSs are concerned, were their actions to satisfy the three-pronged test for a specific hostile

<sup>196</sup> *PCATI* n 37 above at 60.

<sup>197</sup> AP I article 51(8).

<sup>198</sup> Schmitt n 10 above at 522. On this point, Schmitt correctly argues that 'children who act as voluntary shields would be an exception to this rule, for as a general matter of law they lack the mental capacity to form the intent necessary to voluntarily shield military objectives' (Schmitt n 10 above at 522). Without the necessary voluntary intent, children must be treated as one would treat an individual compelled to act as a human shield: retaining their protected civilian status and demanding a proportionality analysis.

<sup>199</sup> ICRC n 7 above at 57.

<sup>200</sup> Al-Duaij n 7 above at 126.

<sup>201</sup> Dinstein n 82 above at 154.



act which amounts to direct participation in hostilities, their loss of civilian immunity from attack would only apply only while they persisted in acts which amount to direct participation in hostilities.

## CONCLUSION

The fast pace at which the theatre of war is changing, is placing greater demands on commanding officers to make targeting decisions in instances where IHL is unable to provide a clear directive. The recent emergence of the VHS as a new actor in international armed conflicts, has highlighted another lacuna in the laws of war,<sup>202</sup> which has to date only considered the plight of the involuntary human shield. IHL must remain relevant to the evolving nature of modern warfare, and if VHSs are the new actors in international armed conflicts, then IHL needs to guide military commanders facing such actors. The current body of IHL (expressed in limited academic and judicial opinion, and very limited state practice) does little more than presume that VHSs retain their civilian status until a competent tribunal dictates otherwise.<sup>203</sup> While affording them civilian status goes some way towards assisting military commanders in their targeting decision, the real crux of the debate revolves around whether it can be said that VHSs are participating directly in hostilities.

In some part, the nature of the site which VHSs are shielding affects the way IHL views their actions. VHSs at civilian locations cannot be said to be participating directly in hostilities, since the site they are shielding does not amount to a military objective. Similarly, the presumption in favour of protected status for dual-use sites,<sup>204</sup> should afford VHSs – located at such sites – immunity from a legitimate attack, until the status of the installation can be deemed to be definitely military in nature. VHSs located at single-use military objectives<sup>205</sup> are exposing themselves to the greatest risk of harm as a result of potential collateral damage. That said, unless their actions amount to direct participation in hostilities, VHSs at any location, retain their civilian status. Consequently, provided they refrain from direct participation in hostilities, they are not themselves legitimate military targets, and there

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<sup>202</sup> Schmitt n 6 above at 338.

<sup>203</sup> Lyall n 4 above at 332.

<sup>204</sup> For more on the issue of VHSs and dual-use sites, see Bosch n 1 above at 322–349.

<sup>205</sup> For more on the issue of VHSs and single-use military sites, see *idem*.

is no legitimate military advantage to be gained from targeting VHSs in their personal capacity, independently of the site which they shield.<sup>206</sup>

The overriding concern is to ascertain whether the actions of VHSs amount to direct participation in hostilities. It is not considered direct participation in hostilities when VHSs are ‘simply causing... the attacker moral pause or creating... a legal barrier (through operation of the proportionality principle or precautions in attack requirements)’.<sup>207</sup> All three prongs of the test for direct participation in hostilities (proposed by the ICRC) must be satisfied, before these civilian VHSs forfeit their civilian immunity. The issue is further complicated by the fact that under IHL, even a breach of law will not strip the VHSs of their inherent civilian status.<sup>208</sup> So, for example, when civilians take an active part in hostilities, they do not lose their civilian status – they merely compromise their immunity from direct targeting.<sup>209</sup> In short, if we conclude that VHSs are inherently civilian in character, then they cannot (by their actions) attain combatant status.<sup>210</sup> Moreover, for as long as they continue to participate directly in hostilities, while they might lose protection against direct targeting, they will not lose their civilian status.<sup>211</sup> Even if it is concluded that VHSs are participating directly in hostilities, whether or not they can be labelled unlawful *combatants*,<sup>212</sup> as Dinstein proposes, and whether in fact such a classification exists under IHL, is debatable.

Where VHSs are found to have participated directly in hostilities, they are exposed to potential prosecution upon capture.<sup>213</sup> This was the fate of US citizens who, in 2003, were found to have acted as VHSs in Iraq.<sup>214</sup> There was even serious consideration given to the possibility of

<sup>206</sup> Fenrick n 7 above at 293.

<sup>207</sup> Schmitt n 6 above at 317.

<sup>208</sup> Lyall n 4 above at 318.

<sup>209</sup> Haas n 15 above at 200.

<sup>210</sup> Lyall n 4 above at 319; Haas n 15 above at 200.

<sup>211</sup> Gasser n 30 above at 209; Melzer n 15 above at 869.

<sup>212</sup> Schmitt n 6 above at 321.

<sup>213</sup> In terms of GC IV art 38, aliens accused of violations of the laws of war, or engaging in hostilities without the authorisation, can be criminally prosecuted, provided that all the international human rights conventions applicable to the prosecuting state are observed in respect of the proceedings brought against them (ICRC n 7 above at 12). However, Parrish has argued that ‘captured, authorised, authorised, voluntary human shields should be treated as prisoners of war’ (Parrish n 84 above at 14).

<sup>214</sup> Lyall n 4 above at 324; Sciarrino & Deutsch ‘Conscientious objection to war: heroes to human shields’ (2003–04) *18 Brigham Young University Journal of Public Law* at 59.

charging them with treason<sup>215</sup> under the domestic laws of some states. Where VHSs are found to have been participating directly in hostilities without authorisation, they might be held to account for their unauthorised actions. However, quite what offences they might be prosecuted for, remains unclear – they are, after all, unarmed, playing a largely passive role, and probably also rather seeking more media attention, than intentionally engaging with the armed forces.

Should VHSs fall into the hands of the enemy, they will still be entitled to humane treatment and the basic fair judicial guarantees extended to civilians,<sup>216</sup> and if tried for these activities, such trials must adhere to the generally recognised regular judicial procedures.<sup>217</sup> This right is afforded even the so-called ‘unlawful combatant’, and spies. There is, therefore, no reason why it should be extended to the VHS.<sup>218</sup> While they may face domestic prosecution, VHSs will be unlikely to face prosecution before the ICC for their actions, because being a VHS is not in itself a war crime in terms of article 8(2)(b)(xxiii)<sup>219</sup> of the Rome Statute.

Commanding officers who give orders to attack sites shielded by VHSs, will, nevertheless, still be called upon to justify their actions in accordance with the targeting principles of military necessity, discrimination/distinction, humanity, and proportionality. Despite the hard-line approach suggested by Schmitt and others, the practice of commanding officers faced with VHSs in their cross-hairs, suggests that VHSs do enjoy a form of protected status in the theatre of war. Just how far commanding officers will be required to go in justifying such attacks, will remain to be determined by the physical location of the VHSs.

<sup>215</sup> Teninbaum n 88 above at 139; Sciarrino & Deutsch n 214 above at 105.

<sup>216</sup> Civilians may only be interned (according to regular procedure and subject to regular review) in exceptional cases, where it is necessary for reasons of security or as a penalty imposed on civilians, and provided the security concerns cannot be addressed by less severe measures (GC IV articles 5(3); 27; 41–43; 68; 78(1) & (2); 79–135; 136(2) & common art 3; AP I art 75; Gasser n 30 above at 211 & 288–292; Bouchié de Belle n 2 above at 891).

<sup>217</sup> AP I art 75(4).

<sup>218</sup> GC IV art 5(3) and AP I article 75; Gasser n 30 above at 211.

<sup>219</sup> The Elements of Crimes, which flesh out the specific legal requirements for the crimes falling within the jurisdiction of the ICC, require the perpetrator of the crime of human shielding to have ‘moved or taken advantage of the presence of protected persons to shield a military objective’, which does not occur in the case of VHSs (ICC ‘Elements of Crimes’ UN Doc. PCNICC/2000/1/Add.2 (2000) available at: <http://www.icc-cpi.in> (last accessed 27 May 2012)).