

Legislation as a Tactical Tool to Overcome the Limits of International Community Powers: H.R.3342 - Sanctioning the Use of Civilians as Defenceless Shields Act

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In recent years, conflicts around the world have seen the increasing use of civilian populations as a 'shield' to protect fighters, military infrastructures or stocks of munitions. This disturbs the delicate norms and rules set by the international community in order to frame and limit the consequences and resulting disasters for civilians generated by armed conflicts.

'Unfortunately, the enemies we are likely to face through the rest of this decade and beyond will not be 'soldiers,' like the ones identified in armed conflicts that have marked the modern history of the Western countries, but 'warriors'—erratic primitives of shifting allegiance, habituated to violence, with no stake in civil order. Unlike soldiers, warriors do not play by our rules, do not respect treaties, and do not obey orders they do not like.'¹

As Ralph Peters, anticipated, human shielding would become one of the new legal challenges posed by the increasing 'weaponisation' of human bodies with the emergence of 'fighters' such as ISIS, Hamas, or Hezbollah. When examining the challenges and possible solutions to the issue of human shields in conflict, it is useful to establish a definition of the phenomenon itself. Here, human shielding refers to 'the deployment of civilians in order to deter attacks on combatants or military sites as well as their transformation into a technology of warfare.'²

The history of human shielding and the corresponding legislation aiming to prevent and limit its use illustrates how law was transformed into a new tool in which politics becomes, as Michel

¹ Ralph Peters, 'The New Warrior Class,' *Parameters*, no vol. (Summer 1994), p. 16.

² See Nicola Perugini & Neve Gordon, 'Introduction to Symposium on Critical Perspectives on Human Shields', *American Journal of International Law Unbound*, Vol. 110 (2016), pp. 296-298.

Foucault once stated, the 'continuation of war by other means.'³ The most recent legislation on the topic enacted by the United States, titled 'Sanctioning of the Use of Civilians as Defenceless Shields Act', definitely confirms this axiom since this law intends to weaken their enemy's capability to use human shields.

The law aims to blacklist entities and individuals involved, or complicit in, the use of civilians as human shields, specifically by Hamas, Hezbollah, or other terrorist organizations. It is the first time that a country is enacting a law to sanction foreign terrorist organisations at a national level based on intelligence reports and under presidential power. First, this article examines the concept of human shields and international law; and secondly, it suggests the possible impact on this issue of the Sanctioning the Use of Civilians as Defenceless Shields Act, which was recently enacted by the United States.

The concept of 'Human Shields' and International Law

The word 'shield', in relation to human shield issues, first appeared in the 1977 Additional Protocol I to the Geneva Conventions. The introduction of the human shield clauses within the Fourth Geneva Convention and Additional Protocol I was spurred by memories of the Nazi practice of transporting civilian prisoners on trains carrying ammunitions in order to shield railway tracks from aerial attacks. Article 51(7) both prohibits the use of human shields and reiterates that it is legitimate for militaries to attack areas protected by human shields, provided that they abide by the principles of proportionality and military necessity. According to Protocol 1 of the Geneva Convention, 'the presence or movement of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations' and more specifically, civilians should not be used to shield military targets. The aforementioned protocol also specifies that 'the parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.'⁴

Recently, a new type of 'shield' has been identified by experts:

³ Michel Foucault, *Society Must be Defended: Lectures at the Collège de France, 1975-76*, ed. by Mauro Bertani & Alessandro Fontana, trsl. by David Macey trans (Saint Martin's Press Inc., 2003), pp. 15-16.

⁴ Article 51(7), Additional Protocol I, Geneva Convention (1977).

'proximate shields'. These are the most widespread and most ethically challenging, involving civilians living in the midst of fighting who become shields simply by continuing to inhabit their homes, schools, or workplaces. For instance, hundreds of thousands of civilians from Fallujah and Mosul in Iraq to Raqqa in Syria have been categorized by the mainstream media, as well as military and legal experts, as proximate shields. Amnesty International described the conduct of the Islamic State during the siege in Raqqa '[in] which [IS] had used civilians as human shields and committed other war crimes.'⁵ *The Independent* also titled one of its articles on the fighting in Raqqa: 'Isis: 2,000 fighters using Raqqa's civilians as human shields as US-led coalition makes significant gains in Syria.'⁶

In the review of the indictments in the Karadžić and Mladić case, the International Criminal Tribunal for the former Yugoslavia (ICTY) qualified physically securing or otherwise holding peacekeeping forces against their will at potential NATO air targets, including ammunition bunkers, a radar site and a communications centre, as using 'human shields'.⁷ The International Committee of the Red Cross (ICRC) defines the practice comprehensively as the 'intentional co-location of military objectives and civilians or persons hors de combat with the specific intent of trying to prevent the targeting of those military objectives'⁸: these are the criteria setting up the definition of human shields used in this article.

International humanitarian law strictly prohibits the use of human shields and, through a well-known genealogy of supranational efforts that passes through the Hague Convention IV (1907), the Geneva Conventions III and IV (1949), the Additional

⁵ Kumi Naidoo, 'Syria: A year after Raqqa, US-led Coalition's ongoing denials an insult to survivors', 15 October 2018, online at <https://www.amnesty.org/en/latest/news/2018/10/syria-a-year-after-raqqa-us-led-coalitions-ongoing-denials-an-insult-to-survivors>. (Here and subsequently, all internet links were last accessed on 18 March 2019.)

⁶ Lucy Pasha-Robinson, 'Isis: 2,000 fighters using Raqqa's civilians as human shields as US-led coalition makes significant gains in Syria', in *The Independent*, 5 August 2017, online at <https://www.independent.co.uk/news/world/middle-east/isis-2000-fighters-raqqa-civilians-human-shields-us-coalition-significant-gains-syria-a7878631.html>.

⁷ See International Committee of the Red Cross, 'Rule 97 "Human Shields"', in *ICRC Customary International Humanitarian Law*, online at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule97.

⁸ Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. 1: Rules* (Cambridge University Press, 2005), p. 337.

Protocol I (1977), and more recently, the Rome Statute of the International Criminal Court (1998), has sought to prevent this practice by characterising human shielding as a war crime.⁹ In addition, Rule 97 of the 161 rules of customary international humanitarian law of the ICRC, bans the use of human shields.¹⁰ State practices establish this rule as a norm of customary international law, which is applicable in both international and non-international armed conflicts.

In the context of international armed conflicts, this rule is set forth in the Third Geneva Convention (with respect to prisoners of war), the Fourth Geneva Convention (with respect to protected civilians) and Additional Protocol I (with respect to civilians in general).¹¹ Under the Statute of the International Criminal Court, 'utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations' constitutes a war crime in international armed conflicts.¹² In addition to international law, the prohibition of using human shields is contained in numerous military manuals, reinforcing norms against their use.¹³ Furthermore, using human shields constitutes a criminal offence under the national legislation of many states.¹⁴ This practice includes that of states not, or not at the time, party to

⁹ Banu Bargu, 'Bodies Against War: Voluntary Human Shielding as a Practice of Resistance', *American Journal of International Law Unbound*, Vol. 110 (2016), pp. 299-304.

¹⁰ ICRC, 'Rule 97 "Human Shields"'.
¹¹ Third Geneva Convention, Article 23, first paragraph (cited in Vol. II, Ch. 32, § 2251); Fourth Geneva Convention, Article 28 (ibid., § 2252); Additional Protocol I, Article 51(7) (adopted by consensus) (ibid., § 2254).

¹² ICC Statute, Article 8(2)(b)(xxiii), (ibid., § 2255).

¹³ See, e.g., the military manuals of Argentina (ibid., § 2259), Australia (ibid., §§ 2260–2261), Belgium (ibid., § 2262), Cameroon (ibid., § 2263), Canada (ibid., § 2264), Colombia (ibid., § 2265), Croatia (ibid., § 2266), Dominican Republic (ibid., § 2267), Ecuador (ibid., § 2268), France (ibid., §§ 2269–2271), Germany (ibid., § 2272), Israel (ibid., § 2273), Italy (ibid., § 2274), Kenya (ibid., § 2275), Netherlands (ibid., § 2276), New Zealand (ibid., § 2277), Spain (ibid., § 2278), Switzerland (ibid., § 2279), United Kingdom (ibid., §§ 2280–2281) and United States (ibid., §§ 2282 and 2284).

¹⁴ [4] See, e.g., the legislation of Australia (ibid., § 2285), Azerbaijan (ibid., §§ 2286–2287), Bangladesh (ibid., § 2288), Belarus (ibid., § 2289), Canada (ibid., § 2291), Democratic Republic of the Congo (ibid., § 2292), Congo (ibid., § 2293), Germany (ibid., § 2294), Georgia (ibid., § 2295), Ireland (ibid., § 2296), Lithuania (ibid., § 2297), Mali (ibid., § 2298), Netherlands (ibid., § 2299), New Zealand (ibid., § 2300), Norway (ibid., § 2301), Peru (ibid., § 2302), Poland (ibid., § 2303), Tajikistan (ibid., § 2304), United Kingdom (ibid., § 2306) and Yemen (ibid., § 2307); see also the draft legislation of Burundi (ibid., § 2290) and Trinidad and Tobago (ibid., § 2305).

Additional Protocol I or to the Statute of the International Criminal Court.¹⁵

The use of prisoners of war as human shields during the Second World War was the subject of war crimes trials by the UK Military Court at Lüneberg in the Student case in 1946, and by the US International Military Tribunal at Nuremberg in the Von Leeb case (The High Command Trial) in 1948.¹⁶ Decades later, in 1990 and 1991, there was extensive international condemnation of the use of prisoners of war and civilians by Iraq as human shields; and at that time the United States had already taken a position against such practices, declaring that such use amounted to a war crime.¹⁷

Moreover, deliberately using civilians to shield military operations is contrary to the principle of distinction and violates the obligation to take feasible precautions to separate civilians and military objectives. While international human rights law does not prohibit the use of human shields as such, this practice would nevertheless constitute a violation of the non-derogable right not to be arbitrarily deprived of the right to life.¹⁸ Several military manuals which apply also to non-international armed conflicts prohibit the use of human shields,¹⁹ which is also criminalised in the legislation of several states²⁰ and the United Nations with respect to the conflicts in

¹⁵ See, e.g., the military manuals of France (*ibid.*, § 2269), Kenya (*ibid.*, § 2275), United Kingdom (*ibid.*, § 2281) and United States (*ibid.*, §§ 2282 and 2284) and the legislation of Azerbaijan (*ibid.*, §§ 2286–2287), Bangladesh (*ibid.*, § 2288), Belarus (*ibid.*, § 2289), Democratic Republic of the Congo (*ibid.*, § 2292), Georgia (*ibid.*, § 2295), Lithuania (*ibid.*, § 2297), Peru (*ibid.*, § 2302), Poland (*ibid.*, § 2303), Tajikistan (*ibid.*, § 2304) and Yemen (*ibid.*, § 2307); see also the draft legislation of Burundi (*ibid.*, § 2290).

¹⁶ United Kingdom, Military Court at Lüneberg, Student case (*ibid.*, § 2308); United States, Military Tribunal at Nuremberg, Von Leeb (The High Command Trial) case (*ibid.*, § 2309).

¹⁷ See, e.g., the statements of El Salvador (*ibid.*, § 2312), Germany (*ibid.*, § 2314), Italy (*ibid.*, § 2317), Kuwait (*ibid.*, § 2319), Senegal (*ibid.*, § 2324), United Kingdom (*ibid.*, §§ 2327–2328) and United States (*ibid.*, §§ 2335–2343) and the reported practice of Spain (*ibid.*, § 2325); also ICRC, ‘Rule 97 “Human Shields”’.

¹⁸ Article 51(7) of the 1977 Additional Protocol I, Geneva Convention, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule97, see Rules 23–24.

¹⁹ See, e.g., the military manuals of Australia (*ibid.*, § 2260), Canada (*ibid.*, § 2264), Colombia (*ibid.*, § 2265), Croatia (*ibid.*, § 2266), Ecuador (*ibid.*, § 2268), Germany (*ibid.*, § 2272), Italy (*ibid.*, § 2274) and Kenya (*ibid.*, § 2275).

²⁰ See, e.g., the legislation of Azerbaijan (*ibid.*, §§ 2286–2287), Belarus (*ibid.*, § 2289), Democratic Republic of the Congo (*ibid.*, § 2292), Germany (*ibid.*, § 2294), Georgia (*ibid.*, § 2295), Lithuania (*ibid.*, § 2297), Poland (*ibid.*, § 2303) and Tajikistan (*ibid.*, § 2304); see also the legislation of Peru (*ibid.*, § 2302) and Yemen (*ibid.*, § 2307), the

Liberia, Rwanda, Sierra Leone, Somalia, Tajikistan and the former Yugoslavia.²¹

Despite the international community's efforts to tackle the use of human shields, it has been relatively ineffective. The evolution of modern warfare and the corresponding trend towards the increasing use of civilians in non-international armed conflicts has demonstrated the limits of the international community's potential to protect civilians through international legal and diplomatic efforts.

The Sanctioning the Use of Civilians as Defenceless Shields Act

In its report from March 2015 about the 50-day war in Gaza, Amnesty International focused on the Islamist militant group Hamas and other armed factions in Gaza. It concluded: 'The military wing of Hamas committed war crimes, by indiscriminately firing unguided rockets and mortar rounds from civilian areas in Gaza at population centres in Israel.'²² The report condemned Palestinian militias for storing munitions in, and launching rockets from, schools, mosques, a Greek Orthodox church, and at least one hospital. Amnesty also reported that the militias launched attacks and stored rockets 'very near locations where hundreds of displaced civilians were taking shelter.'²³

In its resolution on the situation in Gaza, the European Parliament voted on 19th April 2018, stating that:

whereas Hamas is on the EU list of terrorist organisations and calls for the destruction of Israel; whereas the firing of rockets from the Gaza Strip into Israeli territory continues; whereas over the past few

application of which is not excluded in time of non-international armed conflict, and the draft legislation of Burundi (ibid., § 2290).

²¹ See, e.g., the statements of Chile (ibid., § 2310), Tajikistan (ibid., § 2326) and Yugoslavia (ibid., § 2346); the reported practice of Rwanda (ibid., § 2323); UN Commission on Human Rights, Res. 1995/89 (ibid., § 2348); UN Secretary-General, Progress report on UNOMIL (ibid., § 2349), Progress report on UNOMSIL (ibid., § 2350) and Report pursuant to paragraph 5 of Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on the UN forces in Somalia conducted on behalf of the UN Security Council (ibid., § 2351).

²² William Booth, 'Amnesty International says Hamas Committed War crimes, Too', in *The Washington Post*, 26 March 2015, online at https://www.washingtonpost.com/news/worldviews/wp/2015/03/26/amnesty-international-says-hamas-committed-war-crimes-too/?noredirect=on&utm_term=.89dca8ea9f11.

²³ Ibid.

weeks there has been an increase in terrorist attacks against Israel with the escalation of military incidents in and around Gaza; (...)

G. whereas Hamas continues to keep the population under its control and pressure in the Gaza Strip, which remains a hub of internationally recognised terrorist organisations; (...)

Recognises Israel's security challenges and the need to protect its territory and borders while using proportionate means; (...) strongly condemns the persistent tactic of Hamas of using civilians for the purpose of shielding terrorist activities.²⁴

While numerous reports of NGOs and UN and European Parliament resolutions were condemning the use of human shields (especially by Hamas), no coercive measures have been taken against entities that were using human shields. Despite the condemnation of the use by those terrorist organisations of civilian populations as human shields, the international community has been powerless to take efficient measures that significantly impact the practices of these groups. An early lesson that arose from the Nuremberg Trials highlighted the need to mould legal instruments to current problems: '[the] law is not static, but by continual adaption follows the needs of a changing world.'²⁵ Do we thus need to adapt to meet the challenge of ISIS's, Hamas's and Hezbollah's use of human shields?

In a press release, Senator Ted Cruz (R-Texas) declared about H.R.3342 – Sanctioning the Use of Civilians as Defenceless Shields Act: 'Terrorist groups, including Iranian proxies such as Hamas and Hezbollah, have made the use of human shields a routine tactic. This bill signals to the rest of the world that America will hold accountable anyone who uses civilians as shields to achieve military ends, as well as their enablers.'²⁶ This position from the US brings a new approach to an issue that international and humanitarian law has been unable to effectively counter, as those groups are primarily related to non-international armed conflicts. They benefit from loopholes in international legislation, as legislative efforts have mainly addressed international armed conflicts.

The bill requires and gives the president of the United States

²⁴ European Parliament Resolution of 19 April 2018 on the situation in the Gaza Strip (2018/2663(RSP).

²⁵ M. Cherif Bassiouni, *International Criminal Law: International Enforcement*, Vol. 3 (Brill, 2008), p. 53.

²⁶ U.S. Sen. Ted Cruz, Press Office, 'Sens. Cruz, Donnelly's Bipartisan Bill Imposing Sanctions on Those Who Use Civilians as Human Shields and Their Enablers Passes Senate', online at https://www.cruz.senate.gov/?p=press_release&id=4142.

the authority to identify and impose sanctions on a foreign individual who is a member of, or acting on behalf of, terrorist groups, and 'who knowingly orders, controls, or otherwise directs the use of civilians protected as such by the law of war to shield military objectives from attack.'²⁷ This new sanction category will give the United States Treasury Department another tool to cut off Hamas, Hezbollah and other terrorist organizations from the global community. The US seek to target the resources and assets of those groups in order to strike where they can be harmed, in a way that the international community did not previously succeed.

In section two of the bill, it is clearly stated that: 'It shall be the policy of the United States to officially and publicly condemn the use of innocent civilians as human shields.'²⁸ This is a very strong commitment as it becomes a prerogative for the US to intervene in non-international armed conflicts – an issue that has traditionally been very sensitive. According to this law, the president of United States will determine and submit to the appropriate congressional committees a list of:

- each foreign person that is a member of Hezbollah, Hamas, or is knowingly acting on behalf of Hezbollah; and knowingly orders, controls, or otherwise directs the use of civilians protected as such by the law of war to shield military objectives from attack.
- each foreign person or agency or instrumentality of a foreign state that knowingly and materially supports, orders, controls, directs, or otherwise engages in actions helping the aforementioned persons.
- each foreign person that knowingly orders, controls, or otherwise directs the use of civilians protected as such by the law of war to shield military objectives from attack.

The sanctions to be taken according to this law against the identified foreign persons are:

- blocking of property based on the powers granted to the President under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) to the extent necessary to block and prohibit all transactions in property and interests in property of the foreign person or agency or instrumentality of a foreign state if such property or interests in property are in the United States, come within the United States, or are or come within the possession or control of a United States person.²⁹

²⁷ Senate of the United States, July 24, 2018; 115th Congress, 2d Session, Calendar No. 618.

²⁸ Ibid.

²⁹ Ibid.

It is the first time that, based on gathered intelligence data, a country will take sanctions on its own territory against the members or accomplices of those terrorist groups when identified and after validation by a designated Congressional Committee. The originality of such a measure is a validation by Congress of a new prerogative given to the president without control or review by the Judiciary. Indeed, the sanctions would be taken against people without the control of a judge that could verify the balance of powers and respect of fundamental rights.

It brings a very interesting way of sanctioning those groups without interfering directly in non-international armed conflicts by means of sanctions, which are probably the only way to take efficient measures against such groups, i.e. by targeting their network abroad. Indeed, such measures can clearly impact on the structure of those organisations that are based on a very strong supportive platform abroad, to coordinate, help and finance their actions in the field.

Nevertheless, some questions remain. As the sanctions will be based on intelligence reports, important questions of reliability and of the origins of gathered information that determines or identifies such targets will surely arise. In addition, human rights lawyers and activists are likely to question issues of about the proportionality of such sanctions or their unilateral character. Indeed, the law does not indicate what possible recourses to counter or appeal the measure exist. Finally, we might question how the law squares with the presumption of innocence that lies at the heart of the US legal system? Scrutinising these ethical questions is crucial at a time where dubious procedures seem to be arising more frequently in the name of fighting terrorism.

Conclusion

This new approach to 'Sanction the Use of Civilians as Defenceless Shields' is a novelty in history and the implementation of this law will be interesting to follow in order to measure its concrete impact on terrorist groups and their use of human shields. Importantly, it also enables the more specific targeting of those organisations and not the populations held hostage by them. Targeting Hamas abroad may be an effective tool to impact their sustainability without 'sanctioning' the population living in the Gaza Strip that is already suffering from Hamas rule. However, this new law is sure to raise a lot of important issues regarding the fundamental principles such as

right of defence, equality of human rights and the presumption of innocence. Yet, if this legislation is significantly impactful on reducing the use of human shields in global conflict, this model should be implemented in many other countries in order to prevent the use of civilians by terrorist organizations to shield themselves and their infrastructure, thereby saving innocent civilian lives.
