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SYMPOSIUM ON CRITICAL PERSPECTIVES ON HUMAN SHIELDS

GENDER AND HUMAN SHIELDING

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Human shielding occurs through the use of the body—an individual or collective physical presence—which is not armed and does not rely on the use of force or fire. Understood as both a means (human shields) and a method (human shielding), shielding is the use of "civilians or other protected persons, whose presence or movement is aimed or used to render military targets immune from military operations."[1] Human shielding raises difficult doctrinal questions as to the interpretation and implementation of international humanitarian law that are not easily answered. This is in part because human shielding reanimates a series of queries that, as I argue elsewhere, are constitutive of international humanitarian law itself, namely: What and who is a combatant? What and who is a civilian? Who is to judge and according to which premises?[2] Human shielding reanimates these questions because it is upon the definition of a civilian, in contradistinction to the combatant, that the power and efficacy of shielding depends. As I have shown, the distinction between civilian and combatant is partially constituted through discourses of gender which naturalize sex and sex difference.[3] These discourses, as I sketch out below, are cited when theorizing the significance of human shields and reappear when evaluating the representation and meaning of the embodied movement of human shields.

All forms of human shielding are informed by the same proposition: shielding is presumed to deter the opposing forces from exercising violence or, at the very least, to moderate that violence. Thus, all forms of shielding rely in some way upon the strategic invocation of civilian status—and the protections and immunities it provides—to intervene in potential or actual military operations. Such invocation is made possible by the fact that the distinction between combatant and civilian is a fundamental predicate of international humanitarian law. Therefore, the efficacy of human shielding depends upon combatants' compliance with the principle of distinction and their capacity and willingness to uphold the provisions that civilians "shall enjoy general protection against dangers arising from military operations ... [and] shall not be the object of attack."[4] Combatants must take reasonable precautions to avoid and minimize civilian deaths "which would be excessive in relation to the direct and concrete military

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[1] Vera Rusvina, *Human Shields*, *in* Max Planck Encyclopedia of Public International Law (May 2011).

[2] Helen M. Kinsella, The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian (2011).

[3] Helen M. Kinsella, *Gendering Grotius: Sex and Sex Difference in the Laws of War*, 2 Pol. Theory 34 161 (2006).

[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 51, June 8, 1977, 1125 UNTS 3 [hereinafter Protocol I].

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advantage anticipated" and are simultaneously prohibited from striking "military objectives and civilians or civilian objects without distinction."[5]

Considering the scope of these provisions, and the robustness of their acceptance, there is reason to debate whether calculated use of human shielding can devolve into a form of lawfare—"the use of law as a weapon of war"—as parties to a conflict seek to interfere with the military operations of their enemy by influencing the evaluation of military necessity and proportionality, and make their violation of the principle of distinction more probable.[6] This is captured in the 2010 statement of Afghan General Mohaidin Ghori who noted that there were "two things that restrict our movement: Taliban mines and the fear of civilian casualties."[7] Taliban fighters, he went on to explain, "have put women and children on rooftops and fired from behind them." The Taliban's strategy forced him "to make the choice either not to return fire" or "to advance much more slowly in order to distinguish militants from civilians."[8] A constellation of reasons may explain General Ghori's decision to abide by the principle of distinction, including his unwillingness to violate the laws of war and cede the moral high ground or his reluctance to risk negative portrayal in the media.[9]

Yet, it is vital to underscore a whole other dimension that is at work in General Ghori's statement. In it, women and children stand in—unnoticed and unmentioned—for the civilian. These seemingly self-evident and obvious attributions—of age and sex—work to make possible a stable, visible, and certain opposition in a battlefield where "the line between peaceful villager and enemy fighter is often blurred."[10] While it is empirically unclear if women and children are actually used more often than men as human shields, the concept has congealed so as to denote "mostly women and children."[11] This is because the use of women and children draws upon conceptions of innocence and lack of culpability and therefore their conversion into human shields is assumed to be more easily and immediately identifiable and condemnable.[12]

Furthermore, women and children are presumed to be more powerful deterrents because the protection of certain women and children has been invoked as a sign of civilized-namely, discriminate-warfare.[13] Moreover, protection of those named as lesser and dependent—i.e., women and children—is fundamental to a "masculinist logic of protection."[14] Thus, decisions to comply are not simply a regulative move (in conformance with the law), but are also a productive one in which individuals and states claim and identify with certain normative hierarchies constitutive of the laws of war.

It is at this juncture—the question of whether or how to comply with the principle of distinction and its prohibitions against harm in response to human shielding—that the distinction of voluntary and involuntary shielding and the assessment of direct participation in the hostilities become increasingly important for the adjudication of a military response. This is so because the protections granted to civilians are not absolute, and are suspended for

[5] *Id.*

[6] Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflict*, Humanitarian Challenges in Military Intervention Conference (Nov. 29, 2001).

[7] *Afghanistan Taliban 'Using Human Shields'*, BBC News (Feb. 17, 2010, 4:09 PM); Jim Michaels, *Mines, fear of civilian casualties slow Marjah advance*, USA Today (Feb. 18, 2010, 12:06 AM).

[8] BBC News, *supra* note 7.

[9] James D. Morrow, *When Do States Follow the Laws of War?*, 101 Am. Pol. Sci. Rev. 559 (2007).

[10] Yaroslav Trofimov, *New Battles Test U.S. Strategy in Afghanistan: Focus on Safeguarding Civilian Lives Frustrates Troops in Taliban Territory*, Wall St. J. (Feb. 9, 2010).

[11] Rusvina, *supra* note 1.

[12] Laura Sjoberg, *Gendered Realities of the Immunity Principle: Why Gender Analysis Needs Feminism*, 50 Int'l Stud. Q. 889 (2006).

[13] Helen M. Kinsella, *Discourses of Difference: Civilians, Combatants, and Compliance with the Laws of War*, 31 Rev. Int'l Stud. 163 (2005).

[14] Iris Marion Young, *The Logic of Masculinist Protection: Reflections on the Current Security State*, 29 Signs: J. Women Culture & Soc'y 1 (2003).

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"such time" as they take a "direct part in hostilities."[15] Accordingly, some legal scholars maintain that, when human shielding is voluntary, parties to the conflict do not need to take into account the same considerations of avoiding harm, and may relax the dictate of "constant care" and efforts to find alternative methods to minimize collateral damage. When human shielding is voluntary, they claim, human shield deaths need not be considered in calculating proportionality.[16]

It makes absolute sense to recognize the radical difference of patterns in power and control among voluntary, involuntary, and proximate shields. Involuntary or proximate shields are forced against their will, and often against their knowledge, into the position of defending military targets. The vast majority of instances whereby civilians become human shields fall under these two categories. From Syrian rebel groups who moved captive military officers and their families to sites in Damascus under assault by government air strikes to ISIL's conversion of two thousand civilians into shields as they retreated from the city of Manbij, it cannot be said that these civilian hostages are taking a direct part in hostilities for they are unable to express their will.[17]

Contrast such cases with that of Mona Abu Jasir who, in 2006, recounts hearing "the call for women to help the fighters" besieged at the Um Nasir mosque in Palestine.[18] She and others offered themselves as decoys and defenders, willing to shelter and to shield those fighters who were in the mosque or attempting to escape it. Noting, "we had no weapons," she used her presence to secure the safety of others. Neither hostage nor coerced, Abu Jasir's actions could be interpreted as direct participation in hostilities.[19]

But this incident misleadingly suggests that it is simple to distinguish among voluntary, involuntary, and proximate shields. It is not. First, except in the clearest of situations or in a moment of self and collective disclosure (e.g., those individuals who entered Iraq with the express intention to serve as shields in the 2003 war), attackers and other observers can only rarely distinguish among the different kinds of shields. Second, the chaotic nature of war itself radically complicates the possibility of even considering whether shields—much less distinguishing between voluntary and involuntary—are present. Third, and equally troubling, is the fact that in the midst of war the attacker is granted undisputed authority to "impute intent," and determine the response.[20] Thus, it is not only that "the criterion of intention is always tricky," but the interpretation of intention is also highly subjective and at times prejudicial, often relying upon racialized and gendered logics.[21] For these reasons, the distinction among the different kinds of human shields is often "unworkable."[22]

The evaluation of direct participation in hostilities complicates matters even further, since there is no precise definition of the term and there is no consensus about the kind of human shielding actions that qualify as direct participation.[23] Some scholars offer blanket statements, claiming that "the most reasonable characterization of voluntary shields is that they are directly participating in hostilities and, resultantly, lose their protected civilian status."[24] While others aim to offer more precise interpretations, noting that it is only those voluntary shields

[15] Protocol I, *supra* note 4, art. 44.

[16] Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 38 Isr. Y.B. Hum. Rts. 17 (2008).

[17] *Syrian rebels use caged captives as "human shields"*, AlJazeera (Nov. 3, 2015, 1:05 AM); Mazin Sidahmed, *ISIS appears to use civilians as human shields to flee Syrian town*, TheGuardian (Aug. 19, 2016, 6:00 PM).

[18] Greg Myre, *Israel Kills 2 Women During Mosque Siege*, N.Y. Times (Nov. 3, 2006).

[19] *Id.*

[20] Michael L. Gross, The Ethics of Insurgency: A Critical Guide to Just Guerrilla Warfare 132 (2015).

[21] Stéphanie Bouchié de Belle, *Chained or wearing targets on their T-shirts: human shields in international humanitarian law*, 90 ICRC Rev. 883 (2008).

[22] Gross, *supra* note 20.

[23] International Committee of the Red Cross [ICRC], Customary International Law Database, *Rule 6*.

[24] Michael N. Schmitt, *Targeting and International Humanitarian Law: Current Issues*, 80 Int'l L. Stud., 151, 174 (2006).

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who "attempt to give physical cover to fighting personnel" or "inhibit the movement of opposing infantry troops," and who meet two additional criteria—there has to be a belligerent nexus, in that the shielding aims to support one belligerent against others, and that the shielding act must be "likely to adversely affect the military operations" directly—who will lose their protected status.[25] According to the latter criteria, Abu Jasir may or may not have been directly participating in hostilities, because her movement towards the mosque did not necessarily meet the threshold of direct causation of harm. This uncertainty, however, did not matter to those responsible for imputing intent, as she was "walking towards the mosque when shot."[26]

The introduction of complex elements of assessment further complicate an issue already "devilishly" so.[27] They underscore how the opposition between combatant and civilian is, by the law's very construction, mutable and unstable due to the *temporal* element instantiated in the distinction. Put another way, civilians who at a certain moment act as combatants undermine the assertion that the combatant and civilian are only "conceived in opposition to each other."[28] There are categories of combatant and civilian that do not remain in, much less draw their meaning from, a direct opposition to one another. For example, one category of civilians may, for the "duration of each specific act," lose their protection and be treated as combatants, while a category of combatants may "cease" to be combatants and be considered civilians when they stop performing a "continuous combatant function." This opposition is, however, not binary, permanent, or stable, not only because of the "revolving door" of categorization, but also due to a "factual grey-zone between peaceful civilians and regular combatants."[29] Nevertheless, "one cannot automatically attack anyone who might appear dubious."[30] So how is the distinction, upon which the construct of human shielding is premised, to be made?

The Commentary on Additional Protocol I suggests that it is "principally by visual means" that the combatant and the civilian are to be differentiated.[31] It goes without saying that visuality is not a neutral observation, but an embodied, racialized, and gendered practice that does not merely detect, but actively produces what is to be seen and how it is to be understood. In the history of the laws of war, visuality is a project of sorting, naming, and defining—of creating an order from chaos—targets and objectives into discrete categories that rely on notions of gender and its complex relationship to other putatively self-evident markers to identify and sustain them.

With this in mind, we can return to Abu Jasir. Recollect, in the development of the laws of war, civilians are first formally conceived as those "who, by definition, take no part in the fighting: children, women, old people, the wounded and the sick."[32] Conceived of as in need of protection due to their infirmity, debility, or injuries, it is only women whose categorization as civilian is invariable and naturalized due to their sex, while all others are marked by a specific duration. Discourses of sexual difference named women as "harmless and defenseless," due to their "suffering, distress, or weakness," establishing it as a "natural fact" which, in turn, relegated women to the category of the civilian while also making that category possible.[33] These differences of sex inform the principle of distinction and are held to impose a putative permanence on an increasingly temporalized

[25] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 56 (2009); Nils 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, 42 N.Y.U. J. Int'l L. & Pol. 831 (2009).

[26] Myre, *supra* note 18.

[27] Charles J. Dunlap Jr., *Human Shields: The Dialogue Continues*, JustSecurity (Dec. 16, 2015, 2:10 PM).

[28] ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 610 (1987).

[29] Nils Melzer, *Keeping the Balance*, *supra* note 25, at 856.

[30] ICRC, *supra* note 23.

[31] ICRC, *supra* note 28, at 686.

[32] ICRC, The Geneva Conventions of 12 August 1949: Commentary IV, at 118 (1958).

[33] *Id.* at 118–119.

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distinction. Indeed, the presumed suffering, distress, or weakness *allowed for* the protection of civilians because they posed no potential threat and, due to these limitations, could not act on their behalf or on behalf of others.

The call from the mosque animated these discourses in multifarious and contradictory ways. At the moment that Abu Jasir *acted* to extend protection, not only on her behalf but on the behalf of others, she contradicted the interdependent notions of naturalized female sex and passivity upon which the category of the "civilian" depends and, consequently, was no longer visible as such. Instead, she came to exemplify the increasingly racialized voluntary human shield literally and figuratively embodied in "the concrete example of a woman who shielded two fighters with her billowing robe."[34]

Finally, Abu Jasir's wounding also draws attention to one of the more recent responses to human shielding that arises from the authority to impute intent; namely, once intent is determined it provides the military forces the legal license to "counter-target." The injuries or deaths of human shields are accordingly no longer interpreted as the fault of the attacking forces, but of the shields or the forces they defend: "the blood is on ... [their] hands."[35] In other words, the attacking forces are forced to actively defend themselves *against* human shields as opposed to human shields passively defending the objects of attack. In this way, the deterrence logic motivating human shielding is inverted. Instead of serving as part of defensive strategy of protection by deterring the attacking forces from exercising violence, human shields are now conceived as a force that should be attacked in order to maintain deterrence. This helps explain the increasing importance of distinguishing between voluntary and involuntary, since it is vital for those who claim that human shields are leveraged against more powerful states that would otherwise be able to dominate militarily ("compliance-leverage disparity tactics"), and/or that for certain states civilian casualties are increasingly unacceptable unless it is for counter-targeting purposes.[36] This parsing of the law can result in what Neve Gordon and Nicola Perugini call a "kind of pre-emptive legal defence" against accountability for shooting or killing civilians.[37]

We would do well to note that, while not her direct example, this kind of pre-emptive defense is what Judith Butler warns against when she maintains that the "wager" of human shielding (voluntary and involuntary) does not disrupt but instead fundamentally accepts the "economy of calculations" dictated by international humanitarian law.[38] If we accept that international humanitarian law reifies violence as law, in that it "privileges, channels, structures, legitimates, and facilitates acts of war,"[39] then any wager made within that system inevitably conceives of all human shields as mere variables[40] in a "mathematical minimum problem," regardless of the comparative weight or value of individual lives produced by discourses of gender and race.[41] To return to General Ghori, his hesitation can be attributed to the value placed on particular lives, that of women and children recognized as civilians, but this change in strategy was calculated in accordance with the metrics of violence that the laws enables and legitimizes. The killing of civilians was not impermissible, but at that particular moment he appears to have considered the cost of such action to be prohibitive. And, as I suggest above, since the calculation is always immersed in specific (gendered and raced) subjective interpretive decisions, one can always rerun the calculation in such a way that what at one moment is conceived as impermissible becomes, at another moment, permissible.

[34] Nils Melzer, *Interpretive Guidance*, *supra* note 25, at 56.

[35] Brigadier General Vince Brooks, *Centcom Operation Iraqi Freedom Briefing*, The White House (April 1, 2003).

[36] Dunlap, *supra* note 27.

[37] Neve Gordon & Nicola Perugini, *Human Shields as Preemptive Legal Defense for Killing Civilians*, Counterpunch (Aug. 31, 2016).

[38] Judith Butler, *Human Shields*, 3 London Rev. Int'l L. 2, 5 (2015).

[39] David Kennedy, Of Law and War 167 (2006).

[40] *Proportionality*, Forensic Architecture.

[41] Eyal Weizman, The Least of All Possible Evils: Humanitarian Violence from Arendt to Gaza (2011).

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Indeed, "the very fact that voluntary human shields are in practice considered to pose a legal-rather than a physical-obstacle to military operations," not only reveals the reach of this form of calculative logic and bounds its proposed solutions, but specifically as Banu Bargu brilliantly demonstrates, mitigates against recognizing voluntary human shielding as a "new form of agency."[42] This agency, contra to the merely physical or corporeal sense of an obstacle, literally and figuratively embodies a "specifically political meaning and value of human life," over and against the horror and dehumanization of conflict and the differential values placed upon life itself.[43] In Abu Jasir's case, her action was initiated on behalf of a chosen solidarity and through a decision to heed a call. For the Syrians, whose names we do not yet or may not ever know, no such mobilization or resistance was possible, and they were sacrificed in a name and for a cause not their own.

Considering the focus on human shields and movement, it is well worth pursuing how and by whom are they moved and motivated, as captured in the concepts of involuntary/voluntary and direct/indirect participation, and how regimes and regulations of movement are instantiated in the laws of war as reflective and constitutive of intertwined norms of gender and racialized rubrics of rule. It is of no small interest that the prohibition against shielding was expanded and detailed in the 1977 Additional Protocol 1 Article 51(7), a Protocol deeply entwined with the political history of decolonization, through the introduction of a "new" term—movements.[44] The Protocol sought to clarify the prohibition on human shielding by introducing and detailing different forms of allowable "movements" of civilians.[45] Hagar Kotef draws our attention to the significance of movement, as an "axis of difference" which "allows different bodies to take form."[46] As I have briefly sketched here the passive female body takes form as and gives form to the civilian. Female bodies are naturalized and immobilized (as a consequence of the terms of that naturalization) as civilians until, as in the case of Abu Jasir, they move of their own accord. Abu Jasir occupies a liminal position—the paradoxically agentic civilian—in which she is simultaneously "at risk" and "of risk," exposing the opposition of combatant and civilian presumably instantiated through discourses of gender as equally at risk.[47]

[42] Nils Melzer, *Interpretive Guidance*, *supra* note 25, at 56; Banu Bargu, *Human Shields*, 12 Contemp. Pol. Theory 279 (2013).

[43] Bargu, *supra* note 42, at 289.

[44] ICRC, *supra* note 27.

[45] *Id.*

[46] Hagar Kotef, Movement and the Ordering of Freedom: On Liberal Governances of Mobility viii, 14 (2015).

[47] Ann Stoler, *Colony*, 1 Political Concepts (Winter 2011).

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