

SYMPOSIUM ON CRITICAL PERSPECTIVES ON HUMAN SHIELDS

HUMAN SHIELDS, SOVEREIGN POWER, AND THE EVISCERATION OF THE CIVILIAN

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Human shields were prominent in the 2016 military campaign seeking to recapture Mosul from the hands of ISIS militants. On October 24, 2016, Pope Francis expressed his concern over the [use of over two hundred boys and men as human shields](#) in the Iraqi city.¹ In an election rally the following day, Donald Trump decried the enemy's use of "[human shields all over the place](#),"² while the New York Times reported that the Islamic State is driving hundreds of civilians into Mosul, using them as human shields. A few days later, the United Nations disseminated a press release, warning that ISIS militants are using "[tens of thousands](#)" as human shields, thus casting massive numbers of Iraqi civilians as weapons of war.³

Surely thousands of Iraqi civilians did not volunteer to become shields, and, most likely, the vast majority of them were not coerced into becoming involuntary shields. Their [proximity to the fray](#) in Mosul,⁴ a city that had become a conflict zone, was enough to brand them as weapons and to categorize them as human shields, thereby stripping them of some of the protections international humanitarian law (IHL) bestows on civilians.⁵ International law allows military forces to strike targets protected by human shields and even to kill these shields, provided the attack takes place in accordance with the principles of proportionality and military necessity.⁶ The human shield is a civilian whose status as a civilian is *assumed only to be disavowed*.

This paradoxical dual nature of the human shield informs the 2015 U.S. Department of Defense Law of War Manual, which explains that

in some cases, a party to a conflict may attempt to use the presence or movement of the civilian population or individual civilians in order to shield military objectives from seizure or attack. When enemy persons engage in such behavior, commanders should continue to seek to discriminate in conducting attacks and to take feasible precautions to reduce the risk of harm to the civilian population and civilian objects. However,

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¹ [Pope Francis distressed at use of boys as human shields in Mosul, Iraq](#), ROME REP. (Oct. 24, 2016).

² Tim Hains, [Trump: Now We're Boggled Down In Mosul Because Obama Gave Away The Element Of Surprise](#), REALCLEARPOLITICS (Oct. 24, 2016).

³ [U.N.: ISIS using "tens of thousands" as human shields in Mosul](#), CBSNEWS (Oct. 28, 2016, 6:18 AM).

⁴ Matthew W. Ezzo & Amos N. Guiora, [A Critical Decision Point on the Battlefield – Friend, Foe or Innocent Bystander](#), in SECURITY: A MULTIDISCIPLINARY NORMATIVE APPROACH (Cecilia M. Bailliet ed., 2009).

⁵ [Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts](#) art. 51(7), June 8, 1977, 1125 UNTS 3 [hereinafter Protocol I].

⁶ YORAM DINSTEIN, [THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT](#) (2004).

the ability to discriminate and to reduce the risk of harm to the civilian population likely will be diminished by such enemy conduct.⁷

Human shielding, in other words, increases the scope of legitimate “collateral damage” (i.e., killing of civilians), and, as the debates about the Manual indicate ([here](#),⁸ [here](#),⁹ and [here](#)¹⁰), produces a legal grey zone.

The phrase human shield is not merely descriptive. Rather, the term operates as a “perlocutionary speech act.” Philosopher of language John Austin explained that these kind of speech acts “produce certain consequential effects upon the feelings, thoughts, or actions of the audience, or of the speaker, or of other persons: and it may be done with the design, intention, or purpose of producing them.”¹¹ As a perlocutionary speech act, the term “human shields” bestowed a legal definition upon thousands of Iraqi civilians—before the assault on Mosul even began—that preemptively relaxed the conditions under which Iraqi forces and their allies could deploy violence. Consequently, the phrase itself actively participated in structuring acts of war. This is why Judith Butler argues that such framing should not be understood as the neutral description or a belated neutral arbiter of a conflict that has already taken place.¹² Precisely because international law treats human shields differently from civilians, relaxing, as it were, the deployment of violence, the very uttering of the phrase human shields by the United Nations and other prominent international political actors served to legitimate in advance repertoires of violence that militaries could use when fighting in Mosul.

Mosul is not unique. Numerous state and nonstate actors have been warning the world that the use of human shields is on the rise in different theatres of violence. Media reports from Syria, where [ISIS fighters fled Manbij in convoys apparently using human shields](#),¹³ to Iraq, where government forces had halted the “[Fallujah advance amid fears for 50,000 human shields](#),” have criticized the use of civilians as weapons in war.¹⁴ These incessant invocations, we maintain, are part of an ongoing process that has the potential to eviscerate IHL’s category of civilian. The civilian, in other words, is deflated and transformed into a legal figure that can be more readily killed without it being a crime.

The prominence of this legal figure is relatively new. In October 2015, a LexisNexis search of English-speaking media outlets detected 314 articles referring to human shields; by October 2016, the number of articles using the phrase reached 2675 (an increase of 850%). But even more remarkable is the fact that in the articles covering the June 2014 ISIS onslaught on Mosul there was not a single mention of human shielding. Thousands of Iraqi troops were stationed inside the city in an effort to defend it from an ISIS attack. Neither the United Nations nor any other actor cast the civilians among whom the Iraqi army was stationed as shields. So what is the difference between Mosul 2014 and Mosul 2016? And why have human shields suddenly become so prominent within a variety of battlespaces across the globe? Looking back at the first historical debates surrounding the use of human shields sheds important light on the way this legal figure is currently being deployed and its ambivalent function in contemporary wars.

⁷ DEPARTMENT OF DEFENCE, [LAW OF WAR MANUAL](#) (2015).

⁸ Adil Ahmad Haque, [The Defense Department’s Indefensible Position on Killing Human Shields](#), JUSTSECURITY (June 22, 2015, 2:11 PM).

⁹ Charles J. Dunlap, Jr., [Human Shields and the DoD Law of War Manual: Can’t We Improve the Debate?](#), JUSTSECURITY (June 25, 2015, 9:43 AM).

¹⁰ Neve Gordon & Nicola Perugini, [Human Shields: The Weapon of the Strong](#), JUSTSECURITY (Oct. 22, 2015, 9:30 AM).

¹¹ JOHN LANGSHAW AUSTIN, [HOW TO DO THINGS WITH WORDS](#) 101 (2d ed. 1975).

¹² Judith Butler, [Human Shields](#), 3 LONDON REV. INT’L L. 2, 5 (2015).

¹³ Jamie McIntyre, [U.S. held fire as ISIS fighters fled Syrian city using human shields](#), WASH. EXAMMER (Aug. 16, 2016, 2:54 PM).

¹⁴ Martin Smith, [Iraqi forces halt Fallujah advance amid fears for 50,000 human shields](#), UPI (June 3, 2016, 10:23 AM).

Human Shields and Sovereignty

While it is likely that the practice of human shielding has a long history, the legal debate surrounding the use of human shields acquired an international dimension after the 1870–71 Franco-German War. Following numerous sabotage attacks carried out by *Francs-tireurs* against trains controlled by the Germans, the German Civil Governor of Rheims published the following order in 1870:

[T]he trains shall be accompanied by well-known and respected [French] persons inhabiting the towns or other localities in the neighborhood of the lines. These persons shall be placed upon the engine, so that it may be understood that in every accident caused by the hostility of the inhabitants, their compatriots will be the first to suffer. The competent civil and military authorities together with the railway companies and the *etappen* commandants will organize a service of hostages to accompany the trains.¹⁵

Dedicating a section on such incidents in his book on international law, the renowned German jurist Lassa Oppenheim explained that

when unknown people frequently wrecked the trains transporting troops, the Germans seized prominent enemy citizens and put them on the engines of trains to prevent the latter from being wrecked, a means which always proved effective and soon put a stop to further train-wrecking. The same practice was resorted to, although for a short time only, by Lord Roberts in 1900 during the South African War.¹⁶

At around the same time, prominent French jurists such as Antoine Pillet and Henry Bonfils and the English lawyer William Hall argued that human shielding undermined the principle of noncombatant immunity and constituted a violation of military virtue.¹⁷ Speaking about the German deployment of human shields in Dijon, Gray, and Vesoul, Pillet writes:

On [these] occasions the notables of the occupied towns were forced to get on military trains in order to protect [German] soldiers from being shot by francs-tireurs [This] constitutes one of the most evident violations generated by recent practices of war This practice reminds us of those rioters who place in the first lines women and children, hoping that military troops will not shoot toward them. The fight might take place among soldiers and there is no military virtue in using non-combatants as shields against the military operations of the enemy Non-combatant immunity is against this kind of practice.¹⁸

By contrast, Oppenheim, followed by the British jurist James Spaight, defended the legitimacy of using human shields in instances when the forces attacking the train were not part of an official military and therefore not fighting at the behest of a sovereign power.¹⁹ The fact that the French militants were irregulars—militants whose fighting is not recognized as carried out on behalf of an acknowledged sovereign entity—justified, in their opinion, the use of human shields as a reprisal technique by the occupying forces.

While the recent military campaign in Mosul is clearly different from the Franco-German War, the statist conception of international law espoused by Oppenheim and Spaight underscores that the intervention of irregulars—today's insurgents, guerillas, or terrorists, but also at times protestors or rioters—is still decisive when

¹⁵ Cited in WILLIAM EDWARD HALL, [A TREATISE ON INTERNATIONAL LAW](#) 475 (1890).

¹⁶ LASSA FRANCIS LAWRENCE OPPENHEIM, 2 [INTERNATIONAL LAW: A TREATISE](#) 272 (1912).

¹⁷ ANTOINE PILLET, [LES LOIS ACTUELLES DE LA GUERRE](#) (1901) (translation ours); HENRY BONFILS, [MANUEL DE DROIT INTERNATIONAL PUBLIC \(DROIT DES GENS\)](#) (1898). HALL, [supra note 15](#).

¹⁸ PILLET, [supra note 17](#), at 213.

¹⁹ OPPENHEIM, [supra note 16](#); JAMES MOLONY SPAIGHT, [WAR RIGHTS ON LAND](#) (1911).

interpreting the meaning of violence. It helps us understand why Iraqi civilians in Mosul were not framed as shields in 2014, but were depicted as shields in 2016, and why civilians living near Israel's command base at the center of Tel-Aviv are not considered to be human shields when Hamas launches its rockets at the city, while Palestinian civilians are portrayed as shields when Israel fires missiles into Gaza.²⁰ If in the 19th century the intervention of irregulars legitimized the use of human shields by the military operating at the behest of a sovereign state, currently the proximity of civilians to irregulars transforms the former to human shields. Despite the gradual reconfiguration of what was "previously a purely statist European international law,"²¹ the specter of the statist approach continues to inform prevalent interpretations of international law.

The Various forms of Human Shielding

Legal experts generally refer to three types of human shields: voluntary, involuntary and proximate. Given [Banu Bargu's nuanced definition](#) of voluntary human shields in this symposium, here we just note that the term refers to a civilian who willingly decides to protect a military target using his or her body to achieve deterrence by invoking a certain moral sensibility among attackers and spectators.²² Voluntary human shields are often activists who travel to conflict zones in order to politically intervene against organized violence by situating themselves in high-value target areas while risking their lives in an effort to deter attacks.²³ An involuntary shield is a civilian who is forced by soldiers or militants to serve as a buffer between them and their enemies. Placing well-known French notables on the engines of trains during the Franco-German War was a case of involuntary shielding. Finally, proximate shields refer to civilians situated in the midst of a conflict zone and whose mere presence can serve to transform them into shields for one of the fighting parties. The vast majority of human shields in Sri Lanka's civil war, the case study discussed in [Beth Van Schaack's essay](#), seem to have been proximate shields.²⁴ Indeed, the dramatic increase in urban warfare, which the International Committee of the Red Cross has characterized as the "civilianization of armed conflict,"²⁵ entails that civilians inevitably occupy the front lines of the fighting and can thus be more easily categorized as proximate shields.

The United Nations categorization of "tens of thousands" of Iraqi civilians in Mosul as human shields is not the only instance where civilians in conflict zones were framed as proximate shields. A LexisNexis search in "major publications" for the phrase "human shields" over the one-year period between November 1 2015 and October 31, 2016 found 1,221 articles.²⁶ Of these articles, sixty-five describe voluntary shields, 272 depict involuntary shields, 731 portray civilians who have become shields because they live in the midst of the fighting, and 153 use the phrase as a metaphor. When examining the actual number of people who are described as human shields in these articles, one finds reference to seven voluntary shields, 9,456 involuntary shields and 3,354,800 proximate shields. The number of voluntary human shields is negligible despite being discussed in 5 percent of the articles, while involuntary shields account for 0.2 percent of the people who are described as shields and 22 percent of the articles. The fact that almost 75 percent of the articles describe proximate shields and that over 99 percent of the

²⁰ NEVE GORDON & NICOLA PERUGINI, [THE HUMAN RIGHT TO DOMINATE](#) 84–100 (2016).

²¹ CARL SCHMITT, [THEORY OF THE PARTISAN: INTERMEDIATE COMMENTARY ON THE CONCEPT OF THE POLITICAL](#) 15 (G.L. Ulmen transl. 2007).

²² Banu Bargu, *Bodies against War: Voluntary Human Shielding as a Practice of Resistance*, 110 AJIL UNBOUND 299 (2016).

²³ Banu Bargu, [Human Shields](#), 12 CONTEMP. POL. THEORY 277 (2013).

²⁴ Beth Van Schaack, *Human Shields: Complementary Duties under IHL*, 110 AJIL UNBOUND 317 (2016).

²⁵ Andreas Wenger & Simon JA Mason, [The Civilianization of Armed Conflict: Trends and Implications](#), 90 ICRC REV. 835 (2008).

²⁶ The search identified 1,903 articles that used the phrase human shields, but 682 of these were duplicates. When counting the number of people used as shields, we counted each incident only once but used the largest figure provided in the articles describing the incident.

civilians who are characterized as shields belong to the proximate category is an extremely important finding, not only because it suggests that legal scholars should not limit their analysis to voluntary and involuntary shields, but also because the framing of so many civilians as proximate shields reveals something noteworthy about the use of IHL in contemporary wars.

The Colonial Imprint of Human Shielding

Decolonization, as [Vasuki Nesiiah argues](#), is a crucial setting for understanding both the current political significance of the human shield clause and the way it helps undo the civilian/combatant distinction in contemporary wars.²⁷ We maintain that the figure of the human shield has, in many ways, come to replace the colonial subject of old. During colonialism, when colonial states killed the colonized, they did so without violating international law because, *inter alia*, the distinction between a civilian and combatant did not apply to the indigenous populations. In other words, colonial subjects—the uncivilized nonsovereign—were considered outside IHL's sphere of protection.²⁸ Following decolonization, the category of civilian and the distinction between civilians and combatants were extended to include the ex-colonized, who were then guaranteed protection under international law.

It is precisely within this context that we read the postcolonial articulation of Article 51(7) of the 1977 Additional Protocol I to the Convention, which prohibits the use of human shields while reiterating the legitimacy of military targeting of areas protected by human shields.²⁹ This Protocol, it is crucial to emphasize, coalesced in the wake of decolonization, when former nonwhite subjects first acquired self-determination and sovereignty through the establishment of independent states. For the first time, killing civilians in Africa and in other previously colonized regions was considered a crime according to IHL, since the residents in these decolonized countries became citizens of an autonomous sovereign entity.

Within this postcolonial context, whereby IHL applies to all civilians, and in an era where most fighting transpires in civilian spaces often situated in ex-colonies, the legal phrase human shields helps to transform civilians into legitimate targets of lethal violence while justifying their wide-scale killing, often along racial lines. Beyond the prominence of proximate human shielding, the LexisNexis search also exposed that the phrase human shield has been mobilized *almost exclusively* in conflict zones that have been taking place in decolonized areas of the globe. Indeed, practically all references to human shielding in the one-year period we examined are from Yemen, Iraq, and Syria. A search that includes the past five years reveals that human shields are mentioned in Ukraine but that human shielding is primarily used in reference to Gaza, Nigeria, and other ex-colonized spaces. In the case of Israel's recent wars in Gaza—in which the human shield argument has been mobilized against the entire population—the figures of the nonsovereign-colonized-subject and the civilian-transformed-into-a-human-shield completely coincide.³⁰ The Gaza war also illuminates the colonial imprint on our present moment.

Human Shielding as State Lawfare

The predominance of the statist approach to human shielding, the perlocutionary mobilization of the phrase human shield, and the framing of so many nonwhite civilians as killable proximate shields highlight something crucial about the increasing use of IHL's shielding clause by sovereign states in contemporary wars. What

²⁷ Vasuki Nesiiah, *Human Shields/Human Crosshairs: Colonial Legacies and Contemporary Wars*, 110 AJIL UNBOUND 323 (2016).

²⁸ ANTONY ANGHIE, [IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW](#) (2007).

²⁹ Protocol I, [supra note 5](#).

³⁰ Neve Gordon & Nicola Perugini, [The Politics of Human Shielding: On the Resignification of Space and the Constitution of Civilians as Shields in Liberal Wars](#), 34 ENV'T & PLAN. D: SOC'Y & SPACE 34 168, 183 (2016).

seems clear is that the phrase human shield is not only descriptive, but is also being adopted pervasively, preemptively, and strategically as a constitutive part of warfare. Indeed, the human shielding clause forcibly demonstrates how IHL can be a tool that enables sovereign violence against civilians, rather than one that restrains it. The legal figure of the human shield is a war-making and war-enabling tool: a form of lawfare that is quickly eviscerating the notion of the civilian or any universalist pretensions of the notion of the civilian.

Legal experts often define our era as one dominated by lawfare, whereby international law is used as technique of warfare by nonstate actors against sovereign states. According to [Charles Dunlap](#), certain actors provoke the use of violence against civilians by deploying human shields, and when civilians end up dying during the fray these same actors accuse liberal militaries of war crimes.³¹ The processes we analyzed in this essay point to a different and more complex reality. First, state actors are equally involved in wars taking place in civilian areas—producing situations of civilian involvement in hostilities and human shielding. Indeed, human shielding is produced through the interaction of different actors within battlespaces and is not the prerogative of nonstate-actors. Second, it is precisely state actors and organizations operating at their behest that have been more frequently invoking human shielding clauses as lawfare against nonstate actors in order to protect themselves from any form of legal accountability for the killing of civilians in contemporary wars.

We therefore agree that lawfare has become pervasive, but in contrast to Dunlap, we maintain that the legal phrase human shields is frequently deployed by sovereign states as a form of lawfare. IHL human shielding clauses, in their current configuration, function as a lawfare tool for preemptively legitimizing state violence against vast groups of civilians living in areas controlled by nonstate actors. Indeed, human shielding is being translated into state lawfare: the use of international law to justify sovereign violence against civilians.

³¹ Charles J. Dunlap, Jr., [Lawfare Today: A Perspective](#), 3 YALE J. INT'L AFF. 146 (2008).