

SYMPOSIUM ON CRITICAL PERSPECTIVES ON HUMAN SHIELDS

NO GOOD OPTIONS AGAINST ISIS BARBARISM? HUMAN SHIELDS IN 21ST CENTURY CONFLICTS

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One of the most vexing conundrums of 21st century warfare has been not just the explosive growth in the use of human shields, but the apparent systemization of the tactic, particularly by nonstate actors. In noting the international prohibition, the International Committee of the Red Cross (ICRC) [defines](#) the practice 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.”¹

Unfortunately, the international law community has yet to devise an effective way to stem the use of human shields even as it has proliferated around the globe. To the frustration of rule-of-law armed forces, human shielding has also proven quite militarily effective. In August, *USA Today* [reported](#):

Last month, hundreds of fighters escaped Manbij in northern Syria by placing civilians in a convoy of 500 vehicles. Hundreds of militants were killed in battle but several hundred others escaped with weapons and may have gone elsewhere to defend Islamic State territory. The Pentagon said it didn’t fire on the convoy for fear of hitting civilians.²

For the Islamic State of Iraq and Syria (ISIS), this is a continuation of an approach it employed to great effect in Iraq as well as elsewhere in Syria. Regrettably, there are no signs that ISIS intends to halt or even diminish their use of human shields. In fact, we should fully expect it to continue and expand.

In a stunningly prescient [1994 article](#), Ralph Peters virtually predicted the rise of an enemy such as ISIS:

Unfortunately, the enemies we are likely to face through the rest of this decade and beyond will not be “soldiers,” with the disciplined modernity that term conveys in Euro-America, 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.³

ISIS—with its ideological basis and penchant for an organized “caliphate”—is not quite conterminous with Peters’ prediction, but the similarities are obvious. Although [Michael Ignatieff’s](#) 1998 book, *The Warrior’s Honor: Ethnic War and the Modern Conscience*, predates the rise of ISIS, it offers more insight about the then emerging phenomena of violent nonstate “irregulars” who, Ignatieff suggests, were “one reason postmodern war is so savage [and] why war crimes and atrocities are now integral to the very prosecution of war.” Ignatieff points out that:

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¹ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 [CUSTOMARY INTERNATIONAL HUMANITARIAN LAW](#) 337 (2005).

² Jim Michaels, [U.S. plans to hit ISIL before militants grab human shields](#), USA TODAY, (Sept. 6, 2016).

³ Ralph Peters, [The New Warrior Class](#), 24 [PARAMETERS](#) 16 (1994).

We in the West start from the universalist ethic based on ideas of human rights; they start from particularist ethics that define the tribe, the nation, or ethnicity as the limit of moral concern. What many agencies, including the Red Cross, have discovered is that human rights have little or no purchase on this world of war.⁴

ISIS' sheer brutality and indifference to humanitarian norms has confounded its opponents who seek to observe the law. Regrettably, the United States and its coalition partners seems to have [largely yielded to ISIS's use of human shields](#), and doing so has come at a real military and moral cost.⁵ Is it *always* admirable, as the U.S. air commander for operations against ISIS has [said](#), to try to “drive [combat operations] to zero civilian casualties”?⁶ Certainly. Unless, of course, that aim is executed in a way that allows an enemy to survive and to inflict horrors on civilians that are worse than whatever civilian losses might have occurred had an attack been conducted in compliance with the more permissive law of war (which allows otherwise lawful strikes that do not produce casualties that are [“excessive in relation to the concrete and direct military advantage anticipated.”](#))⁷

More-than-what-the-law-requires policy restrictions embedded in [rules of engagement](#) that limit otherwise lawful uses of force have resulted in severe criticism, not only on military grounds,⁸ but also on moral grounds.⁹ Though not specifically commenting on human shields, former Air Combat Command chief General (Ret.) Mike Loh contends that overly-restrictive rules of engagement violate the [“just war principle of winning quickly with a high probability success.”](#)¹⁰

Notwithstanding Loh's and others concerns about current policies, the recently updated (December 2016) U.S. Department of Defense (DoD) [Law of War \(LoW\) Manual](#) may provide a conceptual legal basis for a more aggressive use of force against those who use human shields.¹¹ The revised *Manual* strengthens the emphasis on strict adherence to the principle of distinction: those legitimately entitled to civilian status (that is, civilians who are not directly participating in hostilities as voluntary human shields) cannot themselves be made the object of attack.¹² In addition, it elaborates extensively on the application of the proportionality rule, and the requirement to take “feasible precautions” to protect civilians in any attack.

The revised *Manual* does make clear that in the DoD's view, the “party that employs human shields in an attempt to shield military objectives from attack assumes responsibility for their injury,” provided the attacker takes feasible precautions to protect civilians. This point seems beyond cavil: Hays Parks, one of the world's foremost law of war scholars, [recently made it plain](#) that the legal responsibility for incidental civilian deaths lays *not* with the attacker, but with those that employ them.¹³

But the revised *Manual* eliminates a controversial statement that in the original version concluded that harm to human shields does “not prohibit attacks under the proportionality rule.” [§ 5.12.3.3]. Although this is simply a reflection of the principle of international law expressed in the maxim *ex injuria non jus oritur* or “legal rights should

⁴ MICHAEL IGNATIEFF, [THE WARRIOR'S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE](#) 6 (1997).

⁵ Adil Ahmed Haque, [Human Shields in Mosul](#), JUSTSECURITY (Oct. 21, 2016, 1:01 PM).

⁶ Jim Michaels, [Exclusive: Inside the anti-Islamic State air campaign command center](#), USA TODAY (Sept. 13, 2016).

⁷ HENCKAERTS & DOSWALD-BECK, [supra note 1](#), at 46.

⁸ Kristina Wong, [US aim for ‘zero civilian casualties’ draws criticism](#), THE HILL (June 24, 2015, 6:00 AM).

⁹ Curtis E. Lemay Center for Doctrine Development and Education, [Annex 1-04 Legal Support to Operation](#) 30 (2012).

¹⁰ John Michael Loh, [ISIS campaign is unjustified](#), DAILY PRESS (Feb. 6, 2016, 6:18 PM).

¹¹ DEPARTMENT OF DEFENSE, [LAW OF WAR MANUAL](#) (Dec 2016).

¹² HENCKAERTS & DOSWALD-BECK, [supra note 1](#), at 3, 19–24.

¹³ Charles J. Dunlap, Jr., [Exclusive: Hays Parks on Human Shields and Restrictive Rules of Engagement](#), LAWFIRE (Oct. 17, 2016).

not be understood to result from the commission of wrongful acts,” it generated considerable criticism (that I have addressed [elsewhere](#)) even though current U.S. military practice is significantly more restrictive.¹⁴

Instead, the revised *Manual* distinguishes between voluntary and involuntary human shields, explaining in a new § 5.12.3.4: that “the enemy use of voluntary human shields may be considered as a factor in assessing the legality of an attack. Based on the facts and circumstances of a particular case, *the commander may determine that persons characterized as voluntary human shields are taking a direct part in hostilities.*” (Emphasis added.)¹⁵

This statement seems to be half-right. Whether or not a civilian—human shield or otherwise—needs to be considered in the proportionality analysis in determining whether or not their loss is anticipated to be “excessive” in a particular situation does not turn on their voluntary/involuntary mental state, but rather whether or not their *actions* constitute “taking part” in hostilities.¹⁶ If by their behavior they take a direct part in hostilities, they lose their protection from attack, and need not be considered in the proportionality analysis. It is hard to think of what action could be more directly participating in hostilities than attempting to shield a *bona fide* military objective from an otherwise legitimate attack.

Put another way, battlefield realities typically make it impossible to divine whether or not the persons in an area controlled by the enemy are voluntarily or involuntarily taking part in hostilities, and in my view the law does not require doing so.¹⁷ Again, the inquiry is not as to the mindset of the shields, but rather whether their *actions* effectively and directly defend enemy forces, facilities, or equipment. And it is undeniable that human shield activity, like other efforts to defend military assets, is intended to cause harm to the attacking force by preserving the defender’s military capability. More to the point, experience suggests that the tactic works.

Writing about human shields employed in what he calls “a just guerrilla war,” [Michael Gross](#) may have (unintentionally) laid out a more radical rationale for this view. Gross approvingly contends that human shields “provide guerrillas with a low cost and effective tactic to counter the military might of their adversaries.” He insists that “shielding has its legitimate uses” and can be a “permissible strategy of war,” when insurgents fight “for a dignified life” and “self-determination.”¹⁸ Gross reaches these conclusions, however, by arguing that nonstate actors “conscripting human shields” are essentially the same as nation-states conscripting unwilling citizens for traditional military service.

This raises some interesting questions. For example, should “conscripted” human shields be considered equivalent to any other unwilling member of an enemy force? If the enemy obliges conscripted (and unwilling) human shields to don some sort of uniform and declares them part of their organized armed group, does that obviate the issue of proportionality?

Still, is it possible to address the dilemma of human shields without getting enmeshed in arguments about whether or not human shields are directly participating in hostilities? Perhaps. If one takes the view that in evaluating the “[concrete and direct military advantage anticipated](#)” in conducting a particular attack, a commander might conclude that *discouraging the use of human shields* is one of those advantages anticipated.¹⁹

¹⁴ Charles J. Dunlap, Jr., *DoD Law of War Manual and Its Critics: Some Observations*, 92 INT’L L. STUD. 85 (2016).

¹⁵ This runs counter to the DoD General Counsel’s predication in a late November (2016) that the revised Manual would assert that both voluntary and involuntary human shields “would not be considered to be directly participating in hostilities and would not thereby lose their protections from attack.” Hon. Jennifer O’Connor, *Applying the Law of Targeting to the Modern Battlefield*, (Nov. 28, 2016).

¹⁶ Charles J. Dunlap, Jr., *A Squarable Circle?: The Revised DoD Law of War Manual and the Challenge of Human Shields*, JUSTSECURITY, (Dec. 15, 2016).

¹⁷ *Id.*

¹⁸ Michael Gross, *The Paradox of Using Human Shields in War*, ETHICS & INT’L AFF. (Oct. 6, 2014).

¹⁹ HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 46.

That is, the United States might interpret as a proper [military objective](#) the neutralization of the effectiveness of the enemy's use of human shields to create an illicit sanctuary for otherwise legitimate military targets.²⁰ Accordingly, if the aim is to demonstrate to the enemy the futility of using human shields as a way of inducing him to abandon the tactic, accounting for human shields in a proportionality analysis might produce a different conclusion as to what constitutes "excessive" civilian deaths than what might otherwise be the case were human shields not part of the equation.

In the near term this approach would obviously cause civilian casualties, but it might avoid a situation where "several hundred [ISIS fighters] escaped" as was the case in Manbij. Given the potential of ISIS fighters to inflict every imaginable brutality on civilians, the hard truth is that eliminating those fighters could save many civilians over the longer term. In this respect the Manual revision in § 5.12.3 concerning the evaluation of expected incidental harm to civilians in relation to expected military advantage recognizes this issue. It sensibly permits considering those civilians who would be "at risk if the attack is not taken."

Could such an approach find its way in state practice? Maybe. Consider, for example, how quickly key nations adopted the U.S.'s long-held view that "war-sustaining" targets (in the case of ISIS, revenue-producing oil fields and banks) can be considered proper military objectives despite their more complex relationship to an "effective contribution to military action" and "definite military advantage" that accepted [definitions of a lawful military objective](#) require.²¹

While Oona Hathaway has [observed](#) that the "weight of scholarly opinion has long maintained that such objects are not legitimate military targets,"²² we have witnessed in the past two years a sea change in international opinion.²³ Virtually no nations are now objecting to what has been at times "[tidal wave](#)" bombing of ISIS oil fields.²⁴ Given the relatively few civilian casualties these attacks cause, and the real effect they seem to have on the enemy (airstrikes have helped cut ISIS oil "[smuggling by 95%](#)"²⁵), the rapid acceptance of an heretofore controversial interpretation of the LoW is something we can expect to see more frequently in the future.

Alongside fresh interpretations of international law, the technologically advanced nations are likely to develop new weaponry to help address the challenge of human shields. For example, the U.S. Air Force is [developing the Small Diameter Bomb II](#), or SDB II, which is "designed to destroy moving targets in all kinds of weather, such as small groups of ISIS or terrorist fighters on-the-move in pick-up trucks." According to the developers, the SDB II "is of extreme relevance against ISIS fighters as the group is known to deliberately hide among the civilian population."²⁶

Because the SDB II can be launched at ranges greater than forty miles, and also because it can distinguish between certain kinds of vehicles, it may provide a better opportunity to strike the enemy before it can deploy human shields. It appears that this counter-human-shields tactic is already being fielded as *USA Today* further observed that "Military planners said they will design surveillance and other intelligence to determine when militants will quit fighting and attempt to escape. That might allow U.S. aircraft to strike militants before they can grab civilians."²⁷

²⁰ *Id.* at 29.

²¹ *Id.*

²² Oona Hathaway, [The Law of War Manual's Threat to the Principle of Proportionality](#), JUSTSECURITY (June 23, 2016).

²³ Ryan Goodman, [Targeting 'War-Sustaining' Objects in Non-International Armed Conflict](#), 110 AJIL (forthcoming 2016).

²⁴ Charlie J. Dunlap, Jr., [Is it always illegal and against our values to "tidal wave" or "carpet" bomb? Not necessarily](#), LAWFIRE (Mar. 23, 2016).

²⁵ Ahmed Rasheed, [ISIS suffers near collapse in oil revenue as it loses territory in Iraq](#), BUSINESS INSIDER (July 28, 2016, 9:00 AM).

²⁶ Kris Osborn, [Why Raytheon's New Small Diameter Bomb II Could be a Game Changer](#), THE NAT'L INT. (Sept. 24, 2016).

²⁷ Michaels, [supra note 2](#).

There are other technological capabilities that could possibly be developed to address the problem of human shields. For example, as suggested [elsewhere](#), facial recognition software married to a lethal microdrone could attack enemy fighters even when they seek to hide behind civilians.²⁸ In short, technology may give now-frustrated and perplexed commanders a means by which they can pick their way through human shields in order to strike belligerents.

However, not all technological solutions may be to the liking of some in the international law community. For example, I can see increasing pressure to employ non- or low-lethality weaponry in situations involving human shields, even at the expense of rethinking current prohibitions. I have [argued](#) on *LAWFIRE*²⁹ in a different context that somewhat counterintuitively, the [Biological Weapons Convention](#) and the [Chemical Weapons Convention](#) have long been seen as impeding the development of nonlethal weaponry.³⁰ As Jonathan Alexander explained in the *Harvard International Review* “[t]he treaties were established to minimize the use of these inhumane agents that kill and maim indiscriminately. Without envisioning the possibility that some chemical and biological agents could actually be used to reduce casualties, emotionally-based and broadly worded treaties were enacted to forbid the use of such agents.”³¹

It may be that nations will want to not only seek to develop non- or low-lethal options that could involve biological or chemical processes, but to also recharacterize situations of their use against nonstate actors in noninternational armed conflicts who are using human shields. For example, they may describe incidents involving human shields as “law enforcement” situations for the purpose of treaty interpretation as opposed to a means or method of warfare (or, alternatively, they may consider the use as a matter of [reprisal](#)).³²

In any event, even taking the critics of the *Manual’s* approach to human shields at face value, the real problem is that the detractors offer no alternative for rule-of-law nations, except to accept that ISIS and other nonstate actors who flaunt the law of war are able, *de facto*, to create an impregnable legal “fortresses” to safeguard their key fighters and vital military equipment if they acquire enough human shields and position them in such a way as to create a “proportionality” conundrum. This cannot—and should not—be acceptable to the international community.

ISIS, in its human shield tactics and other affronts to the law of war, presents a particularly difficult challenge for nations adhering to international law. It is using a [lawfare](#) strategy to turn interpretations of the law of war against those law-abiding nations seeking to stop them.³³ This is exacerbated by the fact that a central pillar of the law of war—[reciprocity](#)³⁴—has all but collapsed, at least vis-à-vis nonstate adversaries like ISIS who believe—[with good reason](#)³⁵—that they have nothing to fear from the law of war.

In the search for solutions to the proliferation of human shields, we must steer away from the ICRC’s notion of reciprocity, which is at odds with everything we know about adversaries like ISIS. Last May, Peter Maurer of the ICRC, obviously annoyed by officials who asked him “If ISIS doesn’t behave, why should we behave?,” snapped

²⁸ Charles J. Dunlap, Jr., *The Hyper-Personalization of War: Cyber, Big Data, and the Changing Face of Conflict*, 15 GEO. J. INT’L AFF. 108 (2014).

²⁹ Charles J. Dunlap, Jr., *Why didn’t the Dallas police use nonlethals against Micah Johnson? Some observations*, *LAWFIRE* (July 18, 2016).

³⁰ [Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological \(Biological\) and Toxin Weapons and on Their Destruction](#), April 10, 1972, 1015 UNTS 163; [Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction](#), January 13, 1993, 1974 UNTS 45.

³¹ The quote is from Jonathan Alexander, *Optional Lethality*, *HARV. INT’L REV.* (May 6, 2006).

³² Michael A. Newton, *Reconsidering Reprisals*, 20 DUKE J. COMP. & INT’L L. 361 (2009).

³³ Charles J. Dunlap, Jr., *Lawfare*, in *NATIONAL SECURITY LAW* (John Norton Moore & Robert F. Turner eds., 2015).

³⁴ Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT’L L.J. 365 (2008).

³⁵ Ben Taub, *Does Anyone in Syria Fear International Law?*, *NEW YORKER*, (Aug. 31, 2016).

back that “[y]ou treat detainees humanely, because you know the other side will also treat detainees humanely.”³⁶ Is there *anyone* opposing ISIS who would expect to be treated humanely if captured by them?

The better view is to embrace the lessons from the Nuremberg Trials. There, the International Military Tribunal observed that the “[law is not static, but by continual adaption follows the needs of a changing world.](#)”³⁷ Do we need to adapt to meet the challenge of ISIS’s use of human shields? In anticipating the rise of ISIS-like enemies, Ralph Peters leveled this still-apt challenge more than two-decades ago:

Do we have the strength of will, as a military and as a nation, to defeat an enemy who has nothing to lose? When we face warriors, we will often face men who have acquired a taste for killing, who do not behave rationally according to our definition of rationality, who are capable of atrocities that challenge the descriptive powers of language, and who will sacrifice their own kind in order to survive.³⁸

Accordingly, rather than simply criticizing those trying to halt one of the most barbaric forces the world has ever seen—while at the same time doing their best to adhere to the fundamentals of legal warfighting—it may be better to work to reasonably and honorably adapt and, where necessary, reinterpret or even revise the LoW in order to meet the extraordinarily dangerous threat of ISIS. In short, we need to innovatively create options, even imperfect ones, for decision-makers. If the international legal community fails to do so, the LoW and international law generally risks slipping into irrelevance—a condition [some ominously argue is already extant.](#)³⁹

³⁶ Kimberly Dozier, [International Red Cross Chief to World: 'What the Hell?'](#), THE DAILY BEAST (May 2, 2016).

³⁷ International Military Tribunal, [Trial of the Major War Criminals Before the International Military Tribunal](#) (1947).

³⁸ Peters, [supra note 3](#).

³⁹ Patrick Porter, [Sorry, Folks. There Is No Rules-Based World Order.](#), THE NAT’L INT. (Aug. 28, 2016).