

## Using civilians as shields\*

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### 1. Introduction

The principle of civilians immunity, whereby civilians are given a range of protections in war, is a central tenet of both just war ethics and the laws of war. Yet, it is a well-documented feature of so-called new wars that belligerents tend to withhold those protections from civilians; in addition, they use tactics which exploit their enemy's unwillingness to do precisely that.<sup>1</sup> One such tactic is the use of civilians as human shields. Others include the deliberate targeting of civilians, or dressing up as a civilians so as to approach the enemy's installations and personnel safely, thereby maximising their chances of destroying them.

None of those tactics are new – nor is the general problem of asymmetry between belligerents. However, addressing the ethical issues raised by asymmetrical warfare is particularly pressing for a cosmopolitan account of the just war. For as we have seen throughout this book, such an account regards as just causes rights violations which can be blocked only by resorting to the aforementioned means. The cosmopolitan account thus faces the following dilemma:<sup>2</sup> either it denies the weak the right to resort to those means, which is tantamount to denying them the right to go to war; or it grants them that right, in which case it weakens standard protections afforded to civilians. Yet, surely we want the weak to be able to protect their rights, if necessary by force, against wrongdoers. At the same time, surely we want to minimise harm to civilians.

My aim, in this paper, is to tackle this dilemma, by focusing on the coercive use of civilians as shields. Human shields are a depressingly familiar feature of contemporary wars. Here are some examples. In May 2002, the Israeli Defense Force invaded the Palestinian refugee camp of Jenin in the West Bank, as part of its *Operation Defensive Shield* Campaign. Israeli authorities claimed to have intelligence that the camp was used as a base by Palestinian terrorists to launch attacks on Israeli villages. During and after the battle, allegations were made by both parties, and documented by Human Rights Watch and Amnesty International, that Palestinian civilians had been used as shields – for example by being forced to stand in front of soldiers while the latter shot at their enemy, or by having their houses used, without their consent, as shooting bases and being prevented from leaving them.<sup>3</sup> Similarly, testimonies from the conflict which opposes the Sri Lankan authorities with

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<sup>1</sup> See, e.g., I. Duyvesteyn and J. Angstrom (eds.), *Rethinking the Nature of War* (London: Frank Cass, 2005), R. Geiß, 'Asymmetric Conflict Structures', *International Review of the Red Cross* 88 (2006): 757-77; F. Hampson, 'Winning by the Rules: Law and Warfare in the 1980s', *Third World Quarterly* 11 (1989): 31-62; M. Kaldor, *New & Old Wars* (2nd edn.; Cambridge: Polity, 2006), and H. Munkler, *The New Wars* (Oxford: Polity, 2005).

<sup>2</sup> D. Rodin, 'The Ethics of Asymmetric War', in Richard Sorabji and David Rodin (eds.), *The Ethics of War: Shared Problems in Different Traditions* (Aldershot: Ashgate, 2006).

<sup>3</sup> See Amnesty International, 'Gaza: Military Tactics on Both Sides Endangering Civilians', (Amnesty International: 08-01-2009) <[http://www.amnesty.org.uk/news\\_details.asp?NewsID=18000](http://www.amnesty.org.uk/news_details.asp?NewsID=18000)>, (Access-08-01-2009). (accessed on 10-09-2009); Human Rights Watch, 'Israel/Occupied Territories: Jenin War Crimes Investigation Needed', (Human Rights

separatist Tamil Tigers suggest that the latter have also been using civilians as human shields.<sup>4</sup> The Rwandan conflict provides yet another example of such tactics. According to a number of sources, Hutus militias, which had been defeated in the 1994 civil war, used refugee camps in Zaire between 1994 and 1997 as bases for launching attacks into Rwanda – departing from the camps and returning after fighting, in the knowledge that their opponents would hesitate to pursue them there precisely because of the risks for refugees posed by a battle within the camps.<sup>5</sup> Finally, during the US-led *Operation Iraqi Freedom* of 2003, the then-Iraqi regime and military authorities were widely reported to as coercively using civilians as shields, for example by ordering their soldiers to drive next to civilian cars as soon as Coalition helicopters appeared.<sup>6</sup>

The foregoing examples suggest that there are broadly two ways in which belligerents use civilians as shields: by forcibly positioning them in the line of fire, or by drawing the fight into densely populated areas. In both cases, the party who so acts – in the present context, militarily weaker belligerent W – relies on the fact that its enemy – militarily powerful belligerent P – will want to (be seen to) respect the principle of non-combatant immunity and will thus have a narrower range of strategic options.<sup>7</sup> In both cases, the practice is prohibited by the laws of war. Thus, according to article 51(7) of the 1977 *Protocol I Additional* to the 1949 *Geneva Conventions*, ‘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, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. 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.’<sup>8</sup>

Not only is the practice unlawful: it also elicits near-universal moral condemnation. A cursory look at the contemporary literature on human shields reveals, first, that scholars assume,

Watch: 02-05-2002) <<http://www.hrw.org/en/news/2002/05/02/israeloccupied-territories-jenin-war-crimes-investigation-needed>>, (Access-02-05-2002). (accessed on 10-09-2009); Human Rights Watch, ‘Israel: Decision to Stop Use Of “Human Shields Welcomed’, (Human Rights Watch: 09-05-2002) <<http://www.hrw.org/en/news/2002/05/09/israel-decision-stop-use-human-shields-welcomed>>, (Access-09-05-2002).(accessed on 10-09-2009). A recent UN report into human rights abuse by both Israel, Hamas and the Palestinian Authority into the Occupied Territories reports similar incidents. See United Nations, *Human Rights in Palestine and Other Occupied Territories - Report of the United Nations Fact Finding Mission on the Gaza Conflict*, (United Nations: 15/09/2009) <<http://image.guardian.co.uk/sys-files/Guardian/documents/2009/09/15/UNFFMGCReport.pdf>>, (Access-15/09/2009).(accessed on 17-09-09).

<sup>4</sup> See, e.g., Amnesty International, ‘Sri Lanka: Un Security Council Must Demand Immediate Access and Accountability’, (Amnesty International: <[http://www.amnesty.org.uk/news\\_details.asp?NewsID=18235](http://www.amnesty.org.uk/news_details.asp?NewsID=18235)>, (accessed on 10-09-2009).

<sup>5</sup> Source??

<sup>6</sup> See M. N. Schmitt, ‘Precision Attack and International Humanitarian Law’, *International Review of the Red Cross* 87 (2005): 445-66, at 458 (and ft 45).

<sup>7</sup> For a useful discussion of the advantages gained in those ways by the Taliban’s in Afghanistan over the US-led coalition in 2002 (and of similar issues raised by the NATO campaign in Kosovo), see, e.g., B. Kashnikov, ‘Target Approval Delays Cost Air Force Key Hits’, *Journal of Military Ethics* 1 (2002): 125-28; O. O’Donovan, *The Just War Revisited* (Cambridge: Cambridge University Press, 2003); T. Ricks, ‘Target Approval Delays Cost Air Force Key Hits’, *Journal of Military Ethics* 1 (2002): 109-13; M. Schmitt, ‘Target Approval Delays Cost Air Force Key Hits: Law, Policy, Ethics and the Warfighter’s Dilemma’, *Journal of Military Ethics* 1 (2002): 113-25; T. Westhusing, ‘Target Approval Delays Cost Air Force Key Hits: Targeting Terror: Killing Al Qaeda the Right Way’, *Journal of Military Ethics* 1 (2002): 128-36

<sup>8</sup> See article 28 of the Fourth Geneva Convention. For a good summary of the legal position, see, e.g., R. Lyall, ‘Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States’, *Melbourne Journal of International Law* 9 (2008): 1-21.

rather than argue, that it is morally wrong and, second, that the crucial issue, in their view, is whether combatants may target civilians whom they believe to be shielding enemy combatants, or, indeed, to be combatants dressed as shields.<sup>9</sup> In this paper, I shall focus on the morality of using (as opposed to targeting) civilians as shields. I shall argue that civilians – whether on W’s side or on P’s side – are *sometimes* under a moral duty to offer their services as shields in prosecution of W’s (just) war. By implication, then, I shall argue that W *sometimes* may seek to<sup>10</sup> use those civilians as shields. Further, when assessing whether W wrongs civilians, we shall have to bear in mind the following distinction between two issues: (a) whether the harm which W themselves inflict, or risk inflicting, on shields is wrongful, and (b) whether the wrongful harm which P inflict or risk inflict on shields as a result of W’s use of the latter is one for which W are responsible as well, so much so that they may not, in fact, resort to such tactics. To illustrate, suppose that W take the fight into densely populated areas in order to make it more difficult for P to identify who is a combatant and who is not. If P do not desist from fighting, non-combating residents in those areas will be at risk of dying at the hands of both W and P: for it is likely that both W and P will carry out acts of killing against one another at the risk of unintentionally killing civilians; or it may well be that P will deliberately target those civilians in sheer frustration at W’s refusal to fight out in the open. It is one thing to claim that W may themselves impose such a risk on those residents; it is another to claim that they may take the fight in those areas knowing that the residents will be at even greater risks at the hands of P. In sections 2 and 3, I will address the question of whether W may inflict on civilians the harm attendant on being coercively used as a shields, focusing first on W’s use of its own civilians, before turning to its use of P’s civilians.<sup>11</sup> In section 4, I will discuss the problem of intervening agency, as raised by (b). Finally, in section 5, I will tackle two often-raised objections to the use of shields by belligerents, to wit, that they are unfair to the enemy, and that they undermine the principle of non-combatant immunity.

Three final remarks before I start. First, I posit that W have a reasonable chance of success against P if they resort to asymmetrical tactics. In addition, W have a just cause against their unjust enemy P. For as I assume throughout this paper, combatants’ right to kill depends on the justness of their cause. If W’s cause were unjust, it simply would not be allowed to wage war against P, which would render the problem of asymmetry uninteresting from an ethical point of view.<sup>12</sup> Relatedly, I

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<sup>9</sup> See, e.g., D. H. Fischer, 'Human Shields, Homicides, and House Fires: How a Domestic Law Analogy Can Guide International Law Regarding Human Shield Tactics in Armed Conflict', *American University Law Review* (2008): 479-522; E. Gross, 'Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State against Terrorism', *Emory International Law Journal* 16 (2002): 445-524; T. J. Koontz, 'Non-Combatant Immunity in Walzer's *Just and Unjust Wars*', *Ethics & International Affairs* 11 (1997): 55-82; G. Overland, 'Killing Civilians', *European Journal of Philosophy* 13 (2005): 345-63; M. Skerker, 'Just War Criteria and the New Face of War: Human Shields, Manufactured Martyrs, and Little Boys with Stones', *Journal of Military Ethics* 3 (2004): 27 - 39; N. J. Wheeler, 'Dying for 'Enduring Freedom': Accepting Responsibility for Civilian Casualties in the War against Terrorism', *International Relations* 16 (2002): 205-25.

<sup>10</sup> Throughout the paper, I shall use the phrase 'seek to use', or 'seek to force to', to mean, 'direct civilians to act in certain ways, and imposing sanctions on them for refusing to comply.'

<sup>11</sup> I will not address the question of whether W may use civilians from a third-party community. Whether they may do so in large part depends on whether one believes that third parties have a right not to interfere in a military conflict between some other communities. The issue is related to that of humanitarian intervention, though it differs from it in some important respects.

<sup>12</sup> This (admittedly controversial) assumption is one which I defend in Chapter 3 of the book. For ease of exposition, I use here the simplified version of the moral inequality thesis (between just and unjust combatants). On the complex

also assume that the fact that W's cause is just does not entail that W may do whatever is necessary to pursue it: if the end always did justify the means, asymmetrical tactics, as used by W, would be equally uninteresting. I shall take it for granted that the end does not justify the means, and thus focus on the task of exploring *which* means it allows.

Second, I will not discuss the case of voluntary shields such as third parties who do not belong to either P or W and who willingly interpose themselves between warring factions. Although W can properly be described as *using* those agents as shields, to the extent that they consent so to be used and that their consent is free and fully informed, W does not act wrongly towards them.

Third, my argument in this paper unfolds against the background of a cosmopolitan theory of justice. Cosmopolitanism can be broadly defined as the three-pronged view that (a) human beings are the fundamental and primary *loci* for moral concern and respect and (b) have equal moral worth, (c) whichever group (cultural, familial, ethnic and national) they belong to. It is, thus, individualist, egalitarian, and universal, and insists that individuals' basic entitlements should not be affected by political borders. At the bar of cosmopolitan justice (or so I posit here), individuals wherever they reside have human rights to the fundamental freedoms, and resources, which they need to leave a minimally flourishing life. In addition, individuals *qua* group members have collective rights to (and, by implication, collective duties in respect of) goods which can only be produced, or enjoyed, collectively.

## 2. Using one's own civilians

As I noted above, resorting to unwilling human shields is standardly condemned as morally impermissible. At first sight, that seems to be correct. For as we have repeatedly seen throughout this book, agents are generally not under a duty to rescue others from death when the cost to them of doing so is as high as (*inter alia*) death or long-term, severe and debilitating injury or illness. Suppose that someone, A, subjects another person, V, to a lethal threat. Suppose further that a third party, S, is at the scene, and is not related to V nor has undertaken, by contract, to protect her. Suppose, finally, that S will die if he shields V from A. Surely S is under a moral duty neither to step, nor to remain, in the line of fire. For to require of S that he should take either of those courses of actions would be to treat him merely as a means to someone else's ends. That requirement, in turns, is entirely out of place in a morality based on the importance of respecting agents as ends in themselves.<sup>13</sup> By that token, then, V may not grab S and forcibly place him in front of her. That, in fact, is precisely why agents may not kill bystanders in self-defence. Although, in the case of shields, S dies at the hands of the attacker (if the latter persists in attempting to kill V), and not at the hands of V, both attacker and victim treat S merely as means, and thus both act wrongly towards her.<sup>14</sup>

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version, you recall, combatants have the right to kill enemy combatants if, and only, they do so to forestall an unjust threat; in so far as even just belligerents sometimes pose unjust threats to the enemy, it is false (or, at the very least, a considerable oversimplification) to say that combatants' right to kill (or, for that matter, their liability to attack) depends on the moral status, *in toto*, of their war. For my purposes here, however, the oversimplification will do. Readers who do not accept that it does should assume, instead, that W has a just cause for the specific acts of killing which it intends to carry out – the question being that of the legitimacy of the means which it employs.

<sup>13</sup> The claim that S is not under a duty to offer himself as a shield is compatible, of course, with the view that he *may* do so. Note that I take my point (on S's not being under that duty) to apply whether or not V has a gun. If it applies even if V is strictly speaking defenceless, then it applies, *a fortiori*, if V has the means to (attempt to) defend herself.

<sup>14</sup> Of course, the fact that V 'merely' (forcibly) uses S as a shield whereas A kills her (in some cases) is relevant to judgements about their relative degrees of responsibility and culpability for S's death. Thus, if A is morally innocent (for

If the foregoing points are correct, it seems that civilians<sub>w</sub> are not under a duty to shield combatants<sub>w</sub> from combatants<sub>p</sub> and, moreover, that combatants<sub>w</sub> may not force civilians<sub>w</sub> to stand in front of their tanks; nor may they choose as a battlefield densely populated refugee camps and prevent refugees from leaving those camps; nor may they forcibly march those civilians into close proximity to military objectives. For in so acting they would treat those civilians as means only to their own (admittedly just) ends, which is impermissible.

But perhaps this is too quick. The objection to the forcible use of civilians as shields rests on the general point that agents are not under an enforceable duty to die or suffer serious injury for the sake of others: that, I suggested, is why S is not under an enforceable duty to stand or remain in the line of fire between A and V. However, S's case might be thought to differ in one crucial respect from the case of human shields, to wit, that civilians<sub>w</sub> are asked to incur high risks of harm, not for the sake of other persons, but for the sake of prosecuting a war in the success of which they, as members of W, have a strong interest. And in some cases, one might argue, conscripting individuals into the army to fight such a war is permissible. Might that also apply to shields?

The standard (and most plausible) case for military conscription appeals to the moral prohibition on free-riding – a prohibition which rests on the so-called principle of fairness. Broadly put, the principle of fairness stipulates (*inter alia*) that agents are under a moral duty to contribute to the costs and burdens attendant on the joint production of non-excludable public goods – goods, in other words, such that they are necessarily enjoyed by all agents within the group whether or not those agents contribute to them. An agent who enjoys the benefit of a public and non-excludable good and who is in a position to contribute to its production but does not do so is guilty of the wrongdoing of free-riding. In many cases, moreover, particularly when the benefits yielded by the collective venture are important and the burdens shouldered by contributors onerous, there is a strong case for enforcing the duty to contribute – as the best means to solve compliance problems. Appositely, collective self-defence is a paradigmatic example of a good which is public, non-excludable, yields crucially important benefits such as collective security, and whose production is onerous, most obviously in war time – and onerous enough, in fact, to justify enforcing individuals' moral duty to contribute to it.<sup>15</sup>

The principle of fairness has been criticised on a number of grounds, the most important of which is that it licences the coercive imposition of contributory costs upon anyone who benefits from a collective venture, irrespective of her consenting to receiving such benefits and of the moral status of the venture.<sup>16</sup> Furthermore, as applied to wartime conscription, the principle cannot, *ex post*, justify coercing into contributing individuals who die on the battlefield, since they will not benefit from the good of collective self-defence. Faced with the first objection, proponents of the principle have sought to qualify it in the following ways: the collective venture must be just, and the

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example, deeply psychotic), one might conclude that V bears a greater degree of moral responsibility for S's death than him. And so on. I shall return to the issue of intervening agency in section 4.

<sup>15</sup> For formulations and defences of the principle of fairness, see, e.g., H. L. A. Hart, 'Are There Any Natural Rights?' *The Philosophical Review* 64 (1955): 175-91, esp. p. 183; Rawls, *A Theory of Justice* 108-114; G. Klosko, *The Principle of Fairness and Political Obligation* (Lanham: Rowan and Littlefield, 1992); R. J. Arneson, 'The Principle of Fairness and Free-Rider Problems', *Ethics* 92 (1982): 616-33; R. Dagger, 'Membership, Fair Play, and Political Obligation', *Political Studies* 48 (2000): 104-17.

<sup>16</sup> See, e.g., R. Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) esp. p. 93; D. McDermott, 'Fair-Play Obligations', *Political Studies - Journal of the Political Studies Association* UK 52 (2004): 216-33; A. J. Simmons, 'The Principle of Fair Play', *Philosophy and Public Affairs* 8 (1979): 307-37.

benefits it provides must be important enough that whether or not one consents to receiving them is irrelevant to the determination of one's obligations. (Similarly, a child, once adult, is plausibly thought to be under an obligation to care for his elderly parents if they have brought him up with love and care, even though he has not consented to receiving the benefits of their parental work.) Moreover, in response to the second objection, the principle ought to stipulate that agents who are coerced into contributing must stand at least a higher chance of benefitting from the collective venture than not. As applied to collective self-defence, the principle of fairness thus generates an obligation to contribute if, and only if, the war is just. In so far as a just war is one which is fought for a just cause such as blocking serious rights violations, the benefits it confers are such that one is under an enforceable duty to contribute to it, whether or not one has consented to having those rights secured for oneself, and provided that one stands a higher chance than not, not merely of surviving the war, but of enjoying a minimally flourishing life after the war.<sup>17</sup>

Wartime military conscription is not antithetical to the central tenets of cosmopolitan justice, in so far as the latter allows for the conferral of group rights on individual agents and, thereby, of duties which they owe to fellow group members as joint participants in a collective venture from which all are highly likely to benefit. Accordingly, the duty to take part in a (just) war of self-defence should be seen, not as a duty to expose oneself to considerable risks for the sake of another person, but as a duty not to free-ride on fellow members' costly contribution to a mutually beneficial joint venture. And it is precisely because the benefits are of considerable magnitude (to wit, the protection of fundamental human rights at the hands of the enemy) and the costs of non-participation very high (to wit, the violation of those rights) that enforcing the duty, through conscription, is legitimate. Or so the standard argument goes.

If there is an enforceable duty to contribute to the war effort, as the case for war time military conscription suggests, then it would seem that there is an enforceable moral duty to contribute as a shield.<sup>18</sup> But more needs to be said here. For a start, the argument is an argument about moral *contributory duties*. Accordingly, only those agents who can, in general, be regarded as

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<sup>17</sup> Those points imply that conscripting individuals into *fighting* duties is permissible only if those conditions are met. I am happy to accept that. For accounts of military of conscription in the history of political thought, see, e.g., M. Walzer, 'The Obligation to Die for the State', in Michael Walzer (ed.), *Obligations : essays on disobedience, war, and citizenship* (Cambridge, Mass.: Harvard University Press., 1970); A. Carter, 'Liberalism and the Obligation to Military Service', *Political Studies - Journal of the Political Studies Association UK* 46 (1998): 68-82; I. Z. Baron, *Justifying the Obligation to Die: War, Ethics, and Political Obligation with Illustrations from Zionism* (Lanham, MD: Lexington Books, 2009). For a justification of conscription which circumscribes it to the protection of fundamental values such as liberty and rights, see, e.g., Rawls, *A Theory of Justice* pp. 380-81; A. Gewirth, *Human Rights* (Chicago: University of Chicago Press, 1982), 251-53. Rawls' position is interesting. Consider: 'Conscription is permissible only if it is demanded for the defence of liberty itself, including here not only the liberties of the citizens of the society in question, but also those of persons in other societies as well. Therefore, if a conscript army is less likely to be an instrument of unjustified foreign adventures, it may be justified on this basis alone despite the fact that conscription infringes upon the equal liberties of citizens.' (380.) Rawls does not tell us whether, on his view, conscription is justified as a means to wage a war of humanitarian intervention.

<sup>18</sup> Walzer's remarks on the status of civilians in besieged cities are particularly apposite here. As he puts it, 'Civilians performing essential services for the army will not, of course, be permitted to leave; *they are in effect conscripted*. Along with the civilian heroes of the siege, they are henceforth legitimate objects of military attack.'<sup>18</sup> In the case at hand, of course, where *ex hypothesi* W is engaged in a just war, its civilians are not legitimate targets for P, even if they decide not to leave the camp into which they reside and in which W draw the fight (to anticipate on points raised below). The interesting point remains here that in so far as a contribution other than fighting needs to be made to the war effort, conscription can extend to it as well.

holders of that kind of duty can be held under a duty to act as a shield. This rules out using as shields infants, the very elderly, the disabled, etc.

Moreover, the conclusion reached so far does not say that agents are under a moral duty to offer themselves as *defenceless* shields. One might think that it does say precisely that. For as we saw at the outset, the appeal of using shields as a tactics is that in so far as those shields are, or at least appear to be, defenceless, they are likely to deter P from fighting, thereby narrowing its range of options and, in turns, strengthening W's hand. But we should resist that conclusion. Return to our one-to-one case again. A subjects V to a wrongful lethal threat of harm. Suppose that, if S were to stand in the line of fire, unarmed, A would desist, as a result of which no one would be killed. Suppose further (to make the case closer to a war of self-defence) that S would benefit from the attack being stopped. Is S under a duty so to act? If he knows *for sure* that A will stop, perhaps. But in the highly likely event that he does not know for sure (he is not, after all, a mind reader), then we could not hold him under a duty to step in unarmed – a duty, in other words, not merely to expose himself to the risk that A will not be deterred but, in addition, to deny himself the means to protect his own life should A carry on attacking. For to hold him under such a duty would, I believe, significantly impair his chances of benefitting from the war, in violation of the aforementioned qualifications to the principle of fairness. Thus, the considerations which support a contributory duty to fight do *not* also support a contributory duty to offer oneself as a defenceless shield. But they may well (it seems to me) support a duty to contribute by way of one's deterring presence, as it were, as a civilian, with the added point that, if P does not desist, one is clearly permitted to defend oneself.

If the foregoing point is correct, it might in fact make the whole issue moot. For why not, more straightforwardly, say that all agents on whom it is generally appropriate to impose contributory duties are under a duty to serve in the army? For the simple reason that a community simply cannot survive – indeed, cannot hope to win the war - if all its members are deployed to the front. There are in short different ways in which to contribute to a war. Fighting is one such way. Deflecting the enemy's threats by helping to deter them to fight is another. *That* is what I mean, by shielding.

Some loose ends need tying. First, one might think that the analogy between conscription and the use of civilians as shields founders on the issue of enforcement.<sup>19</sup> If a conscript defaults on her duty to serve, she will be punished, but she will not be sent back to the front. In the case of shields, however, the situation seems very different. For when W take the fight into a densely populated area, or use civilians' occupied dwelling as shelters behind which they can fire at the enemy, they in effect force their compatriots to provide the relevant service. It is not clear at all, then, that the rationale for the enforceable duty to serve in the army for the sake of collective self-defence can serve as a justification for W's use of their own civilians as shields.

Note, however, that there are different ways in which a moral contributory duty can be enforced: on the one hand, one might force the duty-bearer to provide the relevant service or resource; on the other hand, one might impose penal sanctions on the duty-bearer falling short of, or distinct from, the contribution itself. Thus, Paul's failure to pay child maintenance might invite enforcement in the form of direct and forcible extraction by the state of what he owes to his son. His repeated failure to show up for parental visits might invite enforcement in the form of forcible

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<sup>19</sup> I am deeply grateful to Vinit Haksar for pressing me on this.

attendance. There are good reasons, in fact, to resist the view that a dereliction of a moral duty to provide a service or to perform a task may be redressed by forcing the agent to do the latter. Simply put, the prohibition on forced labour supports jettisoning a requirement of specific performance. Thus, to say that a moral duty to provide a service is enforceable is to say that failure to fulfil the duty will result in sanctions of some kind, falling short of actually providing that service. With that point in hand, the analogy between conscripting individuals into the army and using them as shields stands: the set of considerations which support a contributory (enforceable) *moral* duty on the part of citizens towards collective self-defence in wartime also support a contributory (enforceable) moral duty on the part civilians<sub>w</sub> to serve as shields in prosecution of their community's just war of collective self-defence – at least under the aforementioned risks- and costs- related conditions. This implies that they are under a moral duty not to desert, as it were, i.e. by leaving the area. If they resist, or seek to leave, then, just as a government may not force its conscripts into actual fighting, W's regime or leaders may not force them to stay, but may subject them to some sanction (assuming that this would be feasible) – just as military commanders who defend a besieged city may not prevent its inhabitants from leaving.<sup>20</sup>

Second, the cosmopolitan account of war I have defended so far presents a difficulty for conscription which is particularly acute when brought to bear on the issue of shields. As I have argued elsewhere, at the bar of cosmopolitan morality, it is not a necessary condition for a war to be just that it be waged by a legitimate authority such as a state, a coalition of states, supra-national institutions or quasi-state forces such as recognised national liberation movements.<sup>21</sup> On that view, it would seem that *any* belligerent has the right to coerce its members into contributing to a just war if the latter are to benefit from the goods which it would secure: thus, a small guerrilla force locked into a lethal conflict with a genocidal regime seemingly has the right to force potential victims of that regime to fight, as if it were a state. However, if one is to confer any normative weight at all on the character of the procedures by which individuals are subject to coercion, one ought to reject that implication of the cosmopolitan account of the *ad bellum* requirement of legitimate authority. Thus, narrowing the reach of the principle of fairness to *just* collective ventures does not merely mean that one is only under an enforceable duty to contribute to just outcomes; it also suggests that one is only under a duty to comply with the demands of one's fellow members as mediated by procedurally just institutions. Such institutions are characterized by transparency, democratic accountability, and respect for human rights. Accordingly, if W does not meet those conditions, it may not enforce their duty to fight or, by that token, to act as shields (however remote the risk of death). That implies, for example (and perhaps controversially), that conscription as carried out by the USSR during WWII was illegitimate; it also implies – relevantly to new wars – that belligerents such as para-military

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<sup>20</sup> On sieges and the right to leave, see, e.g., Walzer, *Just and Unjust Wars* (note that Walzer claims that civilian inhabitants who provide essential services to a besieged army should be regarded as conscripts, and not permitted to leave. See p.168.) I have not addressed here the issue of conscientious objections – about which I have expressed scepticism elsewhere in connection with the duty to kill in defence of others. (See C. Fabre, 'Mandatory Rescue Killings', *Journal of Political Philosophy* 15 (2007): 363-84.) Let me simply say that, if an agent is allowed to opt out of 'conventional' wartime military service on conscientious grounds, then *mutatis mutandis*, a conscientious objector should be exonerated from a duty to serve as a shield. Note that this is not the same as to say that W ought not to force a civilian to do his duty, since in this case, unlike in the case of the conscientious objector, the civilian *is* under a duty to serve.

<sup>21</sup> See 'Cosmopolitanism, just war theory and legitimate authority', *International Affairs* 84 (2008): 963-76.



groups, bands of guerrilleros and self-appointed liberation movements which lack those procedures may not force hitherto civilians into either the battlefield or shielding positions.<sup>22</sup>

### 3. Using the enemy's civilians as shields

I have argued so far that, *if* one believes that military conscription for the sake of collective self-defence is permissible, then, *mutatis mutandis*, so is the use by W of its civilians as shields. Suppose now that W use as shields civilians who belong to P. Such tactics are more likely to succeed than the use of one's own members, since P might be more reluctant to kill its own members in prosecution of its war. In that particular case, of course, conscription as defined and justified in section 2 cannot support the claim that civilians<sub>p</sub> are under a moral duty to serve as shields.<sup>23</sup> Is it to say, then, that they have a right that W not use them in such ways? I can think of two reasons for resisting that conclusion. First, as I noted above, belligerents usually resort to human shields for two purposes: either to deter their enemy from targeting their combatants, or, should their enemy decide to press ahead with their campaign (thereby killing civilian shields), to reap the propaganda benefits of public outcry. Suppose, then, that combatants<sub>w</sub> have very good reasons to believe that combatants<sub>p</sub> *will* refrain from fighting in densely populated areas, or *will* desist from bombing military facilities near which civilians<sub>p</sub> have been placed. In this particular case, W are not exposing those civilians to a risk of death or serious injury, which opens the door, at least at first sight, to conferring on them a right to do so.

Suppose now that W seek to march civilians<sub>p</sub> towards military targets, or to force them to stand in front of its tank (and imposes penalties on them for refusing to comply). In that case, W *do* seek to impose on them the costs inherent on forcible movement or displacement. Unless one thinks that it is never permissible to seek to force anyone to do anything or be anywhere for the sake of furthering the rights of another person – a rather implausible view, and one to which I will return presently – one must accept that, *in this particular case at least*, W might be said not to act wrongly (which implies, thus, that civilians<sub>p</sub> do not have a right that W desist.) Moreover, if *all* that W do is fight from areas in which those civilians already reside and which they can leave, and does so in the verified knowledge that P will not take the fight there (as happened, it seemed, in the aforementioned Rwanda case), then it is equally unclear that it is acting wrongly towards those civilians (which, here again, implies that those civilians<sub>p</sub> lack the corresponding right against W).<sup>24</sup>

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<sup>22</sup> The claim is compatible with the view that they may fight on their behalf. On military conscription carried out by a non-state actor, see Baron, *Justifying the Obligation to Die* 171-72. Baron discusses proposals put forward by Zionist organisations in 1948 to conscript all Jewish refugees (aged 17 to 35) from Displaced Persons Camps into the army of the as-yet-not-existing state of Israel. Two particularly contentious points were the control exerted by Hagannah (a paramilitary organisation of dubious legitimacy) over security matters in general and the proposed draft in particular, and the suggestion that Jews who were in *Europe*, not in Palestine, should be conscripted. The proposal was not put into effect.

<sup>23</sup> Unless, of course, W wage a war of humanitarian intervention against P's regime, in defence of the latter's population. It might well be permissible, at least in some cases of HI, for the intervening party to impose on those civilians some of the costs attendant on rescuing them – in which case using them as shields to protect combatants<sub>w</sub> might sometimes be permissible. Note, though, that in so far as, in that case, P's regime and army are indifferent to the plight of its own civilians (*ex hypothesi*), they are not likely to desist just because the latter are interposed in the line of fire. Whether W may use those civilians as shields is tantamount to asking whether they may expose them to a very high risk of dying for the sake of their own liberation – an issue which I addressed in section 2.

<sup>24</sup> To be clear, I am not suggesting that the militias were prosecuting a just war: I am merely highlighting a salient feature of the tactics they used.

To be sure, it is very unlikely, as a matter of fact, that P will desist from fighting altogether, and much more likely that it will exercise greater caution in its selection of targets.<sup>25</sup> And in so far as P will not stop fighting altogether, W themselves will expose civilians<sub>p</sub>, not merely to the harm attendant on, e.g., forcible displacement, but also to the risk of being killed in the crossfire. In the next section, I will address the moral status of W's resort to human shields in the light of the harms which the latter thereby suffer at the hands of P. Here, I focus on the moral status of W's decision in the light of the harm which they themselves inflict on shields.

The question, then, is whether W are acting wrongly by exposing civilians<sub>p</sub> to the risk of dying at their hands in the crossfire - in addition to imposing on them, in some cases, the sanctions attendant on refusing to move as direct by combatants<sub>w</sub>. Some people believe that it is always wrong to seek to force someone to do something for the sake of a stranger. *A fortiori*, on that view, it is always wrong to seek to force someone to run a risk of death or serious injury for the sake of another – however minute the risk. As I have argued elsewhere, however, such a staunch commitment to individuals' personal prerogatives is highly implausible, particularly when coupled (as it usually is) with an equally staunch commitment to holding agents under an enforceable duty to give material resources to those in need.<sup>26</sup> If that is correct, then to the extent that cosmopolitans endorse enforceable duties of distributive justice across borders, they cannot subscribe to the view that for W to use civilians<sub>p</sub> as shields in prosecution of its just war is morally wrong irrespective of the degree of risk which those civilians would thereby run. Now, I do not know what counts as an acceptable risk, and doubt that one could plausibly reach such a judgement in general terms (as opposed to come to those judgements, through a process of reflective equilibrium, in very specific examples.) The lesson to draw from this discussion, however, is that, *in principle*, a theory of cosmopolitan justice wedded to a group-membership-independent duty of assistance cannot rule out the view that W sometimes acts permissibly when conscripting civilians as shields, *even if the latter belong to P*. However, cosmopolitan justice is also compatible (when combined with a fairness-based argument in favour of conscription) with the view that the risks to which combatants<sub>w</sub> may expose civilians<sub>p</sub> whilst using them as shields ought to be lower than those to which it exposes its own civilians, precisely because the war is conducted on latter's behalf, who, unlike the former, can be said directly to benefit from its successful completion.

Second, even if the foregoing points are unsound, it does not strike me as wholly implausible to suggest that two (possibly overlapping) categories of civilians, within P, might be liable to being used as shields by W - to wit, those civilians who share causal and moral responsibility for the wrongdoings which gave W its just cause for going to war, and those who share causal and moral responsibility for the fact that their community chose to wage war against W instead of putting a stop to those wrongdoings.<sup>27</sup> Suppose, for the sake of argument, that those civilians' degree of

<sup>25</sup> There is evidence that the US-led coalition sought to do precisely that during the First Gulf War. See, e.g., E. J. Marolda and Schneller, Robert John, *Shield and Sword: The United States Navy and the Persian Gulf War* (Annapolis, MD: Naval Institute Press, 1998) pp. 245ff. NATO-led forces and US-led forces faced similar dilemmas during, respectively, the air campaign in Kosovo (1995) and *Operation Enduring Freedom* in Afghanistan (2002). See, e.g., Wheeler, 'Dying for 'Enduring Freedom': Accepting Responsibility for Civilian Casualties in the War against Terrorism', . It is likely that those belligerents would have taken even greater care had the shields been members of their own community.

<sup>26</sup> C. Fabre, *Whose Body Is It Anyway? Justice and the Integrity of the Person* (Oxford: Oxford University Press, 2006) esp. chs 2-3.

<sup>27</sup> In this paragraph and the next, I use the label 'civilian', as opposed to 'civilians', to denote the fact that those individuals are not wholly innocent either of the initial wrongdoings(s) or of P's subsequent unjust war.

responsibility for P's unjust war against W is not high enough to warrant the loss of their right not to be killed deliberately.<sup>28</sup> Still, they might be liable to incurring other costs – such as the costs attendant on running a risk of dying, or of being deprived of some essential freedoms. Return to our earlier, one-to-one case, where V uses S as a shield to protect herself from A at  $t_2$ , and suppose that S had culpably exposed V to A's attack at  $t_1$  (for example by luring her under false pretence to his house knowing that A was lying in wait). It seems to me that V would not wrong S by using her as a shield, at least if uses him in that way causes A to desist (for example because S is A's partner and A does not want to shoot through him, etc.)<sup>29</sup> *Mutatis mutandis*, then, it is not clear (at least, not to me) that combatants<sub>w</sub> may never use civilians<sub>p</sub> as shields in prosecution of their just war, at least in those cases where combatants<sub>p</sub> will, as a result, desist from (wrongfully) attacking the former and where, therefore, the lives of civilians<sub>p</sub> will also be spared.

Let me tie up a couple of loose ends before addressing the difficulties raised by the fact that, quite often, P, as much as W, will likely harm shields. In this section and the previous one, I spoke of a *moral duty* to assist W's just war effort by serving as shields. Consequently, the justification I offered for W's tactics only applies to those beings on whom it makes sense to impose moral duties – and not, for example, to very young infants, or severely mentally disabled or impaired individuals. Generally, however, the fact that one cannot be described as being under a moral duty to do  $x$  is compatible with the claim that third parties are at liberty to make one to  $x$ : thus, the fact that my cat cannot be described as being under a moral duty to step away from my plate and let me eat my diner is compatible with my being at liberty to (gently) push him out of the way. The question thus remains open as to whether W may permissibly use human beings who are not moral agents as shields, or whether they would wrong them in so doing. The latter claim does seem the right position to take. To press a vulnerable human being into service for the sake of one's ends, however just, who is not in any position whatsoever to understand what is being done to them, and to thereby expose them to some risk of harm does seem wrong, even if the risk is one which they could be held under a moral duty to do if they were moral agents. The very disabled, infants, very young children, and those who suffer from severe cognitive disorders, are the most vulnerable of all, and ought not to be subjected to a worse predicament still, by being made to provide assistance to those who are, for all intents and purposes, better off than they are.

#### 4. Shields and the problem of intervening agency

So far I have focused on the grounds upon which W may permissibly harm civilians by (coercively) using them as shields. In many cases, however, W's decision to resort to such tactics will expose shields to the risk of being harmed by P. The fact that some agent other than W intervenes in the chain of events which leads to shields' predicament raises the following difficulty. As we saw, a *risk* of death, as distinct from death itself, is a cost that agents do, and indeed (as we saw above) may be asked to, incur for the sake of others. But suppose that the risk of dying which shields incur at the hands of combatants<sub>p</sub> is higher than the risk which combatants<sub>w</sub> may *themselves* impose on them when they (for example) take the fight into densely populated areas. To revert to our earlier case,

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<sup>28</sup> For arguments along those lines, see, e.g., J. McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), esp. ch. 5, and my 'Guns, Food, and Liability to Attack in War', *Ethics* 120 (2010): 36-63, section V.

<sup>29</sup> If one believes that V may kill S in self-defence as a means to stop A (particularly if she would stand a better chance of surviving the attack than by attempting to kill A directly), then V may use S as a shield even if A would almost certainly shoot through S.

suppose that V permissibly imposes on S the cost (in terms of loss of freedom of movement and of risk of being killed by one of V's bullets) of standing in the line of fire, by shielding behind him; suppose further that there is a higher risk that S will be killed by A than he will be killed by V; suppose, finally, that the former risk is higher than any risk that V herself would have been permitted to impose on S had V herself caused the resulting harm. May V use S as a shield in that particular case?

Note that the problem of intervening agency – which is at the heart of the question – is problematic not merely for civilians<sub>w</sub>, who are more likely to be harmed by combatants<sub>p</sub>, but also for civilians<sub>p</sub> (who are innocent) and civilians<sub>p</sub> (who share moral and causal responsibility for W's predicament), since none of those categories of agents are liable to being killed deliberately. I shall assume, for the purpose of this discussion, that the risk which civilians incur to being killed by combatants<sub>p</sub> is higher than the risks which combatants<sub>w</sub> may impose on them, even though those latter risks differ depending on whether or not they are civilians<sub>w</sub> who are properly regarded by W as conscripts, or wholly innocent civilians<sub>p</sub>, and so on.

The problem of intervening agency might be thought to dissolve once either one of the following two lines of thought is brought into view.<sup>30</sup> On the one hand, some might say that, in so far as, *ex hypothesi*, combatants<sub>w</sub> themselves are not imposing on shields an impermissible cost or risk of cost, and in so far as they do not intend for P to kill the shields, they share no responsibility for the latter's death at the hands of P, and thus may so act. On that view, agents are morally responsible for the imposition of a harm if, and only if, they themselves perform the act which results in the harm. That implies that, for example, you share no moral responsibility for the ensuing forest fire if you throw a lighted cigarette into a bucket in full knowledge that there is a high risk that someone else will subsequently pour petrol on it.<sup>31</sup> But there is an obvious difficulty with that first line of thought, to wit, that it regards as incoherent the very notions of accessory liability for, and conspiracy in, wrongdoing. I believe that this is too high a cost to pay, and that one should reject that view as implausible. Accordingly, it does not follow from the fact that combatants<sub>w</sub> do not themselves wrongfully harm shields that they may expose them to a higher risk of harm than they would themselves have been permitted to impose on them had they caused the harm directly.<sup>32</sup>

On the other hand, others might say that one may not act in such a way that others will suffer, at the hands of an intervening agent, a harm or risk of harm which one is not, oneself,

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<sup>30</sup> What follows is a very brief sketch of one of the thorniest areas of moral and legal philosophy. For good discussions of intervening agency, see M. J. Zimmerman, 'Intervening Agents and Moral Responsibility', *The Philosophical Quarterly* 35 (1985): 347-58, and F. M. Kamm, 'Responsibility and Collaboration', *Philosophy and Public Affairs* 28 (1999): 169-204. (Kamm frames her discussion within the context of a broader study of the moral differences between killing and letting die.) For a fascinating study of individuals' responsibility for collectively imposed harms, see C. Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge ; New York: Cambridge University Press, 2000). Finally, good criminal law textbooks usually have much to say about the philosophical underpinnings of the doctrines of conspiracy and accessory liability, both of which revolve around intervening agency. See, e.g., A. Ashworth, *Principles of Criminal Law* (5th edn.; Oxford: Oxford University Press, 2006), and A. P. Simester and G. R. Sullivan, *Criminal Law- Theory and Doctrine* (2nd edn.; Oxford: Hart Publishing, 2003). Hart and Honoré's *Causation in the Law* remains a classic. (H. L. A. Hart and A. M. Honoré, *Causation in the Law* (Oxford: Clarendon Press, 1959).

<sup>31</sup> See Hart and Honoré, *Causation in the Law*, p. 69, for the example.

<sup>32</sup> And in fact, under customary international law, the ultimate responsibility for civilian casualties which result from a belligerent's illegal use of shields fall on that belligerent, not on the party which actually kills those civilians. See Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 130. I am grateful to Chehtman for bringing this reference to my attention.

allowed to inflict on them. On that view, the moral status of one's actions wholly supervenes on the moral status of intervening agents' acts. Now, under the aforementioned conditions, where you know that someone will lit up the whole bucket and cause a forest fire, it is plausible to hold you morally responsible for the fire. Suppose, however, that your clothes have begun to catch fire as a result of someone else throwing the lit cigarette in your direction; and suppose, moreover, that you can avoid burning to death only by placing them in the bucket. Even if you know that there is a high risk that someone else will subsequently pour petrol in the bucket, thereby starting a forest fire, it is not clear that you have acted impermissibly. As applied to war, the 'dependence view' implies, for example, that the victim of an unwarranted military aggression may not defend itself, or stay in the war, if it can foresee that the enemy will, in all likelihood, deliberately target its civilian populations (thus inflicting on the latter a harm which the victim of the aggression itself is clearly not permitted to impose.) By that token, Britain was not permitted to defend itself against Germany in WWII – which, given all that we know about Nazi Germany and the circumstances under which Britain found itself at war, seems utterly absurd.

Articulating water-tight conditions under which W may use civilians as shields in cases where the problem of intervening agency raises its intimidating head is beyond the scope of this chapter. As a first, rough cut, though, the foregoing considerations suggest that the permissibility of using civilians as shields, knowing that they are likely to be wrongfully subjected to serious harms by the enemy, partly depends on the justness of one's cause, whether using them as shields is necessary to one's just ends, whether one is prepared to defend those shields from the enemy, and whether their deaths or maiming satisfies the proportionality requirement for war.

### **5. Asymmetrical warfare, fair play and the erosion of non-combatant immunity**

To recapitulate, I have argued that W may sometimes use civilians from either sides as shields, in prosecuting its just war against P. A standard objection to human shields (and, indeed, to asymmetrical tactics in general) as used by military weak belligerents against their conventionally more powerful foes is that they are unfair to the latter. W, it is argued, imposes on P the burden of not being able to defend itself (for example, of not being able to shoot through the shields, or pursue W into refugee camps), and benefits from P's compliance (or, as the case may be, costly (to P) non-compliance) with the principle of non-combatant immunity; at the same time, it itself refuses to shoulder that burden. As critics of asymmetrical tactics sometimes put it, W is not 'fighting fair', or 'free-rides' on P's respect for the moral restraints on war. In Churchill's memorable words, put to the British cabinet in the early stages of the war, and recorded in his memoirs, 'It would not be right that the aggressive power should gain one set of advantages by tearing up all laws, and another set by sheltering behind the innate respect for law of its opponent.'<sup>33</sup> Replace 'aggressive powers' with 'weak powers', and you get the fair play objection to asymmetrical tactics.

The objection, which draws support from the widely shared intuition that free-riding is morally wrong, conceives of war as if it were a sporting contest in which the following three conditions obtain which together generate an obligation to abide by the rules of the contest: (a) the *equality condition*, whereby no player has a greater claim than other players to win or lose; (b) the *consent condition*, whereby by taking part in the contest, both players consent to playing by the rules;

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<sup>33</sup> W. Churchill, *The Gathering Storm* (Harmondsworth: Penguin Classics, 2005), **page number**. See also T. Meisels, 'Combatants: Lawful and Unlawful', *Law and Philosophy* 26 (2007): 31-65.

and (c) the *mutual benefit condition*, whereby the rules operate to the advantage of both players.<sup>34</sup> If no football team has a greater claim to win the tournament than any other, if all players willingly take part, and if the rules operate to the advantage of all, then all must obey by the rules of the game, such as, for example, not handling the ball, not playing off-side, etc.

The claim that free-riding is morally wrong is at the heart of my limited defence of the use of W of (some of) its non-combatant as shields, and one might think, therefore, that my argument (at least at that juncture) is particularly vulnerable to the fair-play objection. Admittedly, on the orthodox account of the moral status of soldiers, it may well make sense to see war, for all its atrocities, as relevantly similar to a game. For on that view, once the war has started, soldiers are equally at liberty to kill one another (subject to the requirements of proportionality and necessity), and are under an equal obligation not to kill civilians (condition (a)). By consenting to take part in the war, belligerents signal their consent to abide by the rules of war and in particular the principle of non-combatant immunity - which are different from the rules of, say, policing (condition (b)). Finally, the rules work to the advantage of both parties in so far as compliance with them minimizes the damage and destruction caused by the war (condition (c)). According to the fair play objection, by resorting to tactics which blur the distinction between combatants and civilians as a means to blunt P's effectiveness, W subvert this mechanism and put P at a serious disadvantage (in breach of (a)). They participate in the war yet do not respect its rules (in breach of (b)), and they benefit from P's willingness to abide by the rules whilst placing them at a serious disadvantage (so that, *pace* (c), the advantage of compliance clearly is not mutual.) In so doing, the objection maintains, W are acting wrongly towards their enemy.

Yet, the objection is not persuasive. For a start, it clearly begs the question since it presupposes exactly that which is at issue, to wit, that the rules of war include an absolute prohibition on such tactics as discussed here.<sup>35</sup> Moreover, in the kinds of conflict which I discuss here, neither of those three conditions obtain.<sup>36</sup> Consider first the equality condition. As I posit in this paper, soldiers are *not* morally on a par once the war has started, and thus do not have equal liberties to kill one another. Rather, whether or not they are permitted to kill other soldiers depends (in large part) on the justness of their war *ad bellum*, so that just combatants have a claim to kill unjust combatants, and thereby to win the war, but unjust combatants certainly lack such claim. That

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<sup>34</sup> There are two ways in which they could be said to benefit from compliance with the rules. If the rules are *constitutive* of the game, they enjoy the benefit of playing *that* game so defined (thus, the no-hand-on-the-ball rule is constitutive of football in the sense that if all players handled the ball, the game played would not *be* football.) If the rules are *regulative* of the game, they enjoy the benefit of playing a game with, e.g., minimised risk of injury (through respecting the no-kicking-down-your-opponent rule), good compromise between scoring opportunities and defensive play (through the off-side rule, etc.) The rules of war are clearly regulative – not constitutive: a so-called *total war*, which is characterised by the absence of compliance with most rules, remains a war. For a classic account of the distinction between constitutive and regulative rules, see J. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969). For a useful discussion of the distinction in the context of adversarial ethics, see A. I. Appbaum, *Ethics for Adversaries - the Morality of Roles in Public and Professional Life* (Princeton, NJ: Princeton University Press, 1999), ch. 5.

<sup>35</sup> As Chehtman incisively pointed out to me.

<sup>36</sup> Note that my critique of the mainstream conception of war as a sporting contest differs from McMahan's. McMahan argues that, *pace* the sporting context analogy, it does not follow from the fact that combatants consent to participate in the war that they consent to being killed by enemies whose war is unjust (whereas someone who takes part in, e.g., a boxing match clearly consents to being hit.) My focus is not on whether W consent to being killed by P but whether they consent to respecting the principle of non-combatant immunity. (See McMahan, *Killing in War*, 51-57. See also Coady, *Morality and Political Violence*, 128ff, for criticisms of the sporting contest model in the context of unequal war.)

point constitutes a decisive reply to the fair play objection, for in so far as unjust combatants lack a claim to win the war, they are not owed a duty by just combatants to be placed on an equal footing. It is worth nothing, however, that the consent condition does not fare much better. It is true, of course, that W may well consent to fight P. However, given that the alternative to waging the war is to (continue to) suffer a wrongdoing which is severe enough, *ex hypothesi*, to constitute a just cause for war, W's consent to taking part in the war cannot be deemed to generate an obligation (to the enemy) to expose oneself to the risk of suffering further wrongdoing by taking a military superior unjust enemy on the latter's own terms.

Finally, although adversaries in sports clearly benefit from each other's compliance with the rules of the game, in a war where one party is vastly superior in conventional power than the other, it is not clear at all what the latter *gains* by observing the rules of war in general and those pertaining to non-combatant immunity in particular. W benefits from observing the principle, it might be thought, in so far as it's more likely, in so doing, to minimise non-combatant deaths. Thus, if W uses civilians<sub>p</sub> as shields, not only is it more likely that their enemy will do the same with civilians<sub>w</sub>, but it is also likely that, over time, they will shoot through those shields in order to kill combatants<sub>w</sub> and, more generally, abandon their commitment to the principle of non-combatant immunity.

Whether the use of shields have tended to erode belligerents' willingness to respect the principle of non-combatant immunity remains an open question. The crucial issue, however, is whether W would gain more by fighting the war on P's military terms than by resorting to such tactics. It is unclear that it necessarily would. For consider. W has three options: (1) W can fight on P's terms, in which case (*ex hypothesi*) it will lose the war, and its members will continue to suffer severe rights violations, both as individuals and as group members; (2) W does not go to war against P in the first instance, knowing that it cannot win by resorting to conventional means of warfare, in which case too its members will remain victims of the severe, ongoing rights violations which provided it with a just cause; or (3) W fights the war on asymmetrical (as opposed to unequal) terms, in which case (*ex hypothesi*) it will win the war and stop, perhaps even obtain redress for, the wrongdoings suffered by its members. If W decides to fight its war by asymmetrical means, it can be said not to gain from its decision to violate the rules if, and only if, the loss of non-combatant lives from its side (resulting from its use of such tactics) is disproportionate in relation to the just cause, so that W would have been better off not waging the war in the first instance, or waging the war on P's terms. Whether that is so is entirely contingent on the facts of the case. By that token, it is only contingently true that W and P *both* gain by observing the principle of non-combatant immunity, and it is thus only contingently the case that a war displays the third feature of the sporting contest model which is at the heart the fair play objection to asymmetrical tactics. Accordingly, even if (contrary to what I have, in fact, claimed) W's war against P meets the conditions of equality and consent, in those cases where W does not stand to gain by observing the principle of non-combatant immunity, it is not under an obligation *to P* not to use those tactics.

That said, the foregoing points might be thought to suggest that W, in so doing, wrongs its own civilians, since it exposes them to the risk either that P might decide deliberately and knowingly to violate the principle, in retaliation for W's own violation (as, in fact, Britain did throughout WWII when bombing German cities), or that they might be led to take less care when attempting to discriminate between combatants and civilians. One of the most interesting, and least studied, questions raised by the conduct of war is, precisely, that of what counts as an acceptable distribution

of risks and costs between combatants and civilians from the same side, in prosecution of a just cause. I suggested in section 2 and 3 that agents are sometimes under a duty to incur a risk of serious harm, either on conscription-related grounds, or in virtue of a general duty of assistance. Those remarks, together with the points made in connection with the problem of intervening agency in section 4, support the suggestion that W may sometimes expose its civilians to the aforementioned risks and costs.

## **6. Conclusion.**

To conclude, I have argued that, given certain assumptions about the scope of, and justification for, our duties to other agents, notably duties to provide assistance, the near-universal moral condemnation which the resort to human shields elicits is not always warranted – at least in those cases where the belligerent who uses human shields is militarily weaker than its enemy, cannot win the war in any other way, and wages a just war. It remains to be seen, *inter alia*, whether a military powerful *and just* belligerent may also use civilians, whether on its side or not, against a militarily weaker, and unjust, foe. I do not address this issue here. For now at least, I must postpone this particular line of inquiry.