



# The Human Shield in Islamic Jurisprudence

Major Benjamin Buchholz, U.S. Army

*The outcome of the IDF operation was harsh: The goal of eliminating Salah Shehade was achieved; however, fifteen civilians were also killed, among them nine children.<sup>1</sup>*

— Amos Harel, *Ha'aretz*, 24 July 2002

*This article contains the author's personal views and does not necessarily reflect the views of the U.S. government, the Department of Defense, or its components.*

MAJ Benjamin Buchholz is a foreign area officer fluent in Arabic and specializing in the Middle East. A student in the Advanced Civil Schooling Program, he is attending Princeton University and will serve as an Army attaché in Yemen. Little, Brown recently published his novel, *One Hundred and One Nights*, set in the town of Safwan, Iraq.

ARTWORK: *Entry of the Crusaders in Constantinople*, Eugene Delacroix, Oil, 1840, Louvre, Paris.

**T**HE KILLING OF Salah Shehade and the associated deaths of civilians surrounding him point to a dilemma in the present-day military balance of power, a dilemma with both tactical and strategic implications, as strikes continue against non-uniformed, nonstate actors. On the one hand, the current technology and capacity of Western armed forces precludes any insurgent attempt at uniformed resistance in keeping with the codes and norms of the Geneva Convention, leaving recourse only to drastic measures, such as the use of human shields.<sup>2</sup> On the other hand, even targeted killing of non-uniformed personnel has drawbacks, not only ethically in terms of collateral damage, but also strategically insofar as it presents an opportunity for media exploitation.<sup>3</sup>

Much has been written in both English and Arabic on the ethics of using human shield tactics in war, but Western and Islamic theories have developed almost wholly within self-referential frameworks. Western theorists resort to Kant, to a secular utilitarianism styled on Jeremy Bentham, to treaty accords such as the Geneva Convention, or to Christian notions of right and wrong.<sup>4</sup> They assume the canon of Western legal ethics is, *ipso facto*, the governing principle.

Richard D. Rosen, in his article “Targeting Enemy Forces in the War on Terror,” says, “The Geneva Conventions have achieved *universal* acceptance.”<sup>5</sup> To this he adds, by way of justification: “The four Geneva Conventions of 1949 [are] the first in modern history to . . . [have] been formally accepted by all 194 states in the world.”<sup>6</sup> Thus, Rosen seems to proclaim, state acceptance equates with popular and universal acceptance. He neglects the fact that the primary combatants in modern warfare operate at a level below and between the functioning of modern states. He also has failed to observe that many of the Geneva Convention’s signatory states exhibit little control or responsibility for the actions of agencies or personnel within their jurisdiction.<sup>7</sup>

The Western norms of war are not circumscribed by international law, however. A better understanding of the historical underpinnings of Islamic theories with respect to the ethics of using human shields in battle will suggest the possibility that the Western reaction to the depredation would have more resonance in the hearts and minds of Islamists if framed in terms that show an awareness of Islamic discourse on the subject. In other words, the universal principles involved evince themselves in Islamic experience and might best be couched in an awareness of that tradition.

## Human Shield

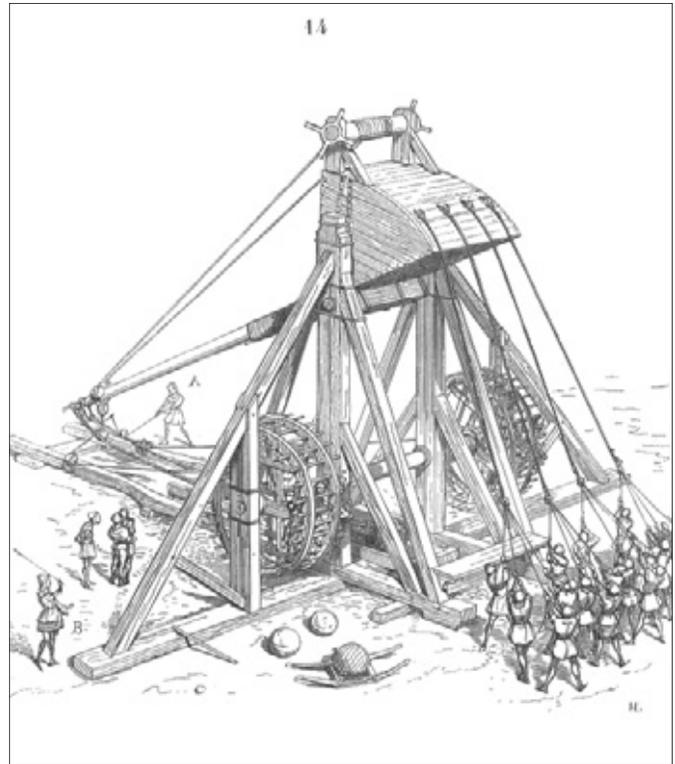
To start with, it is important to note that Islamic writing on the subject of the human shield has a much more *specific* basis than that of the West. Almost all commentaries on the subject cite or flow from the Prophet Muhammad's use in war of a catapult-like device called a *mangonel*, annotated in Abu Jafr Muhammad Ibn Jarir al-Ṭabarī's *Tarikh*:<sup>8</sup>

And the Muslims were not able to enter their walls. They closed (the gate) against them, at which time he struck those persons within by means of arrows (mangonel). . .

Then the Prophet (PBUH) besieged them and killed them vehemently and launched arrows until it was a day of smashing the walls of Ta'if . . . for he launched arrows straight upon them and killed their men.<sup>9</sup>

The interplay between this traditional story and later exegetical justifications or condemnations of human shield tactics depends on the fact that Muslims already inhabited the city or had been taken captive within it. Therefore, the firing of an indiscriminate weapon like the mangonel would harm not only lawful combatants but also civilians in general and other Muslims specifically.

Before turning to the classical discussion of the human shield problem with regard to this episode at Ta'if, it is worth noting that (in contrast to the *sahīh* (or verified) hadith collections of al-Bukhārī and Muslim), al-Tabari himself says, "There are, in my book, incidents mentioned by others which the reader might disapprove or the hearer find ugly. It is not known of them whether they are valid and they do not [always] mean truth."<sup>10</sup>



A medieval mangonel illustrated with its rod lowered. The weapon was used mostly for battering walls and was indiscriminate in terms of aim. (*Dictionary of French Architecture*, 1856)

## Commentaries

The collections of both al-Bukhārī and Muslim contain traditions that include the siege of Ta'if. But neither of them confirm the story about Muhammad's use of a mangonel.<sup>11</sup> This places some doubt on the veracity of the story, although jurists and theologians nonetheless use the less well-attested version of the episode as al-Ṭabarī recounts it.

Commentaries both prohibiting and allowing the human shield in the classical tradition also use Ṭabarī's version:

**The Ḥanbalī opinion (from Ibn Qudāma's *al-Mughnī*).** *And if they shield (themselves) in war with their women and their children, it is permitted to fire upon them and (to fire upon them) with the intention of killing; for the Prophet (PBUH) fired on them (at Ta'if) with the mangonel when women and children were with them. And this is because if one desists when Muslims are among them it leads to a crippling of jihad. When they (the fighters) know that the enemy uses them*

(civilians) as a shield it causes trepidation.<sup>12</sup>

**Ibn Rushd, providing the pacifist position.**  
*If there are Muslim captives and Muslim children in the fortress then, according to a group, mangonels should not be used, and that is the opinion of al-Awzā'ī. Al-Layth permitted this. The reliance of those who do not permit this is on the words of the Exalted, "If they (the believers and the disbelievers) had been clearly separated we verily had punished those of them who disbelieved with painful punishment. (Qur'an 48:25)<sup>13</sup>*

## Debate

Much of Islamic debate on the legality or morality of using human shields stems from or offers a slight variation on these opinions.

Two issues from the above quotes are of particular importance. First, there is a palpable presence of utilitarianism. The theologians say the use of the human shield should not be allowed to impede jihad. Second, both opinions deal with the issue of discriminating between lawful and unlawful targets. Ibn Qudāma resolves this by raising the distinction, *but then justifying attack in all cases*. Al-Awzā'ī takes the opposite course. He bans the mangonel, and by implication, any use of an indiscriminate force against groups of intermixed persons. These are the simple solutions.

Other jurists call for greater discrimination between civilians and combatants. For example, the Ḥanafī opinion as given by al-Kasani's *Bada'i' al-Sana'i' fi Tartib al-Shara'i'* states, "If they shield with Muslim children, there is no harm in firing upon them, for necessity provides the command. However, they should intend (to aim for) the infidel rather than the children."<sup>14</sup>

In al-Kasani's construction, the Islamic ethical concept begins to creep closer toward a secular utilitarianism familiar to the West (but *not* in accord with the Geneva Convention's total prohibition against the human shield).<sup>15</sup> Emmanuel Gross sums up this Western utilitarian position as follows:

The moral value of an act is determined in accordance with its impact on happiness in the world . . . It follows that if injury to civilians who provide a human shield will lead to injury to the terrorists and comprise

an essential measure in the war against terror, significantly eroding the force and capabilities of the terrorists, the injury to the innocent civilians will, in effect, lead to better results than avoiding harm to them.<sup>16</sup>

This principle of utilitarian proportionality has been incorporated into the U.S. military's Joint Publication 3-60: *Joint Targeting*.<sup>17</sup> It also forms the basis for the next layer of Islamic ethical commentary.

## ***This principle of utilitarian proportionality has been incorporated into the U.S. military's Joint Publication 3-60: Joint Targeting.***

This layer consists of several opinions.

First, as stated above, al-Awzā'ī preferred total "abstention from direct attack."<sup>18</sup>

Al-Thawrī and Abu Ḥanīfa "permitted attack provided that the jihadists intend to shoot the unbelievers; the killing of believers (including women and children) would be regarded as killing by mistake."<sup>19</sup>

Al-Shāfi'ī advises attack on "fortified places and castles, but not on the houses; however, if fighting was at close range, they ought not abstain from shooting, even if it results in killing believers."<sup>20</sup>

Finally, al-Ghazzālī (from the Shāfi'ī *madhhab*) moves to an ethical position that matches the utilitarianism of Joint Publication 3-60, basing his opinion on the idea that, in the event of a confrontation using a human shield, the killing of a few believers "would serve the greater interests of the Muslim community."<sup>21</sup>

## Current Islamic Ethics

This brings us to the current state of Islamic ethics with regard to human shield tactics in war. Matthew Ezzo and Amos Guiora cite Moshe Yaalon of the *Washington Post* as having written, "Terrorists are fanatics, but they are not idiots. If the terrorist tactic of using human shields helps them achieve

their goals, they will utilize it. If it undermines their goals, they will abandon it.”<sup>22</sup> This statement goes to the heart of the utility question.

Whether the answer is positive or negative with regard to the utility of the tactic, the issue is a contemporary one. It is also a concern that does not exhibit consensus in current Islamic jurisprudence or in the actions of those who employ the technique.

For instance, during the al-Anbar Awakening in 2006, when Iraqis turned against Al-Qaeda in Iraq and reestablished local control of their province, one of the foremost complaints from Iraqi dissident fighters was that “Al-Qaeda members . . . were using the population as a human shield, without consulting with the clerics on this matter.”<sup>23</sup> This demonstrates the internal perception, even among other participants in jihad, that the human shield is a sensitive, ambiguous topic that requires legitimizing.

Suicide martyrdoms are a closely related phenomenon. David Cook, in his article “The Implications of ‘Martyrdom Operations’ for Contemporary Islam,” examines 46 recent *fatawa* related to martyrdom operations and says, “Most of these pieces start out

with a political commentary, leading us to note the primary reason for martyrdom operations: the perceived situation of the Muslim world [which is] presented as lacking all choice or volition in the contemporary world.”<sup>24</sup>

Furthermore, he says, “The fact that martyrdom operations are very new to Islam leaves these legal opinions . . . open to the deadly accusation of being an ‘innovation.’”<sup>25</sup> While human shield traditions and legal opinions are well-founded enough in the history of Islamic jurisprudence to avoid a charge of ‘innovation,’ the presence of conflicting, even quietist opinions on the subject—along with strong injunctions in the Qur’an and in *sahih ahadith* from both the life of the Prophet and the Caliphate of Abu Bakr—require radical Islamists to constantly justify, *within the framework of their own ethics*, the tactical and strategic uses to which they put the human shield.

For example, Abu Yahya al-Libi, a young Al-Qaeda leader said to be among the successors of Bin-Laden, devotes a monograph specifically to the subject of the human shield in modern warfare.<sup>26</sup> He discards 14 centuries of Islamic jurisprudential tradition<sup>27</sup> and goes to bat against “Qur’anic and hadith passages regarding the prohibitions against killing innocent Muslims.”<sup>28</sup> This should alert his co-religionists to the possibility that he and other radical Islamist organizations are not interested in a limited justification of the use of human shields but in a far-reaching subversion of the terms and inherent powers of shari’a law. It would be far simpler and would leave the matter much less open to accusations of innovation if al-Libi simply adopted the time-honored utilitarianism of al-Ghazzali, which provides adequate precedent for using the human shield but *does not* allow a radical usurpation of wider religious authority. Were Abu Yahya al-Libi, Al-Qaeda, and other similar organizations to adopt Al-Ghazzali’s utilitarianism, they would put themselves on an exact moral footing with current U.S. military doctrine.

## Opportunities

Al-Qaeda’s choice to discard Islamic traditions with regard to the human shield leaves the door open for exploitation in three ways.

First, the U.S. military should explain more effectively how doctrine regarding countering adversaries that employ human shields is consistent with the Geneva Conventions.



*Litigants before a Judge*, from an Arabic manuscript in the British Museum (Or. 1200; No. 1007 in Rieu’s Arabic Supplement), dated A.H. 654 (1256 CE).

Second, we should bring to attention, when operations such as the IDF bombing of Shehade occur, the innovation inherent in Al-Qaeda's human shield theories and practices as propounded by al-Libī. Certainly the Islamic tradition leaves plenty of room, depending on the *madhhab*, for employment of the tactic. Drawing positive parallels between the discriminatory permission granted by al-Shafi'ī or the utilitarianism of al-Ghazzālī and the United States' own doctrines of proportionality will be, if not satisfactory, then at least more understandable to the intended audience.

Third, creating an awareness of al-Libi and al-Qaeda's innovation should lead to a marginalization akin to that which occurred in al-Anbar. Mainstream opinion in classical Islamist jurisprudence with

regard to the permissibility of using a human shield in war is closer to current Western military practices than to the impractical prohibitions to which Western powers nominally subscribe.

If the United States decides to engage in communications with a Muslim audience regarding the innovations of Al-Qaeda's human shield tactics, it would be wise to explain how U.S. doctrine is consistent with the Geneva Convention, and it would also be wise to acknowledge the various strands of utilitarianism and pacificism in traditional Islamic jurisprudence, calling upon verses from the Qur'an that explicitly outlaw the practice or upon *sahīh* hadith that fail to canonize the Prophet's use of indiscriminate weapons as *sunna*, i.e., the proper observance of Islam. **MR**

#### NOTES

1. Amos Harel, "How the Assassination of the Most Senior Terrorist in the Territories was Transformed into the Mass Killing of Civilians," *Ha'aretz*, 24 July 2002.
2. Richard K. Betts, "The Soft Underbelly of American Primacy: Tactical Advantages of Terror," *Political Science Quarterly* 117, no. 1 (2002): 19-36.
3. "Even when justified under the law of war, bombings that result in civilian casualties can bring media coverage that works to the insurgents' benefit." Section E-5, "Airpower in the Strike Role," App. E of the U.S. Counterinsurgency Field Manual, U.S. Army and Marine Corps, 2005. <<https://rdl.train.army.mil/catalog/view/100.ATSC/1449AB4-E8E0-46C4-8443-E4276B6F0481-1274576841878/3-24/appe.htm>> (1 May 2012).
4. Emmanuel 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 Review* 16 (2002): 445-524.
5. Richard D. Rosen, "Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity," *Vanderbilt Journal of Transnational Law* 42, no. 3 (2009): 712 (emphasis mine).
6. *Ibid.*, footnote 177.
7. On the applicability of the Geneva Convention in a failed state such as Afghanistan see: Francisco Forrest Martin et al., *International Human Rights and Humanitarian Law: Treaties, Cases, and Analysis* (Cambridge: Cambridge University Press, 2006), 528.
8. For purposes of brevity, I omit other foundational texts that are used to support and argue the case of the human shield, including both the more antagonistic and pacific verses of the Qur'an (such as 48:25, 9:8, 5:32, 2:190, and 2:194) and also two Prophetic traditions, one related to the authority of 'Alqama b. Marthad and Ibn Burayda, "Nor should you mutilate or kill children, women, or old men" (*Sahīh Bukhārī* 4:26 3014) and another related to the authority of Rabāh Ibn Rabī, "Hurry and go to Khālid Ibn al-Walīd (and convey to him) that he must not slay infants, serfs, or women," (Ibn Rushd, 459-60). A further tradition from the practice of Abu Bakr in which he lays out ten rules for the conduct of armies also comes into play in the exegetical material, taken from al-Tabarī's *Tārīkh al-Rusul wal-Mulak*, 1: 1850, Vol. 3, 226.
9. Abu Jafr Muhammad Ibn Jarir al-Tabarī, *Tārīkh al-Rusul wal-Mulak*, Dar al-Ma'arif, Egypt, 1962. (All translations are my own unless otherwise noted.)
10. *Ibid.*, 1:7, vol. 1, 8.
11. The relevant hadīth are *Sahīh Bukhārī*, 109 and 572; and *Sahīh Muslim* 2309, 4074, 4393, and 5415.
12. Ibn Qudāma, Muwaffaq al-Dīn 'Abd Allāh ibn Aḥmad, *Al-Mughni*, Imbābah,

- Al-Qāhirah, 1986, 141.
13. Ibn Rushd, *The Distinguished Jurist's Primer: A Translation of Bidāyat Al-Mujtahid*, trans., Imran Ahsan Khan Nyazee, Center for Muslim Contribution to Civilization (Garnet Publishing, 1996), 460.
14. Abu Bakr Ibn Mas'ud al-Kasani, *Bada'i' al-Sana'i' fi Tartīb al-Shara'i'*. Dar al-Kutub al-'Ilmiyya, Beirut, 1997, <[http://www.islamweb.net/newlibRARY/display\\_book.php?flag=1&bk\\_no=12&ID=3223](http://www.islamweb.net/newlibRARY/display_book.php?flag=1&bk_no=12&ID=3223)> (2 May 2012).
15. Gross, 455, says: "Article 51(7) of Protocol I prohibits the parties from using the civilian population as a human shield or as a means of achieving immunity from military attack."
16. *Ibid.*, 465.
17. Michael N. Schmitt, "Human Shields in International Humanitarian Law," *Columbia Journal of Transnational Law* 47 (2008-2009): 328. Also, Joint Publication 3-60 states, "In such cases, otherwise lawful targets shielded with protected civilians may be attacked."
18. Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: The Johns Hopkins University Press, 1955), 106.
19. *Ibid.*, 107.
20. *Ibid.*
21. *Ibid.*
22. Matthew V. Ezzo and Amos N. Guiora, "A Critical Decision Point on the Battlefield—Friend, Foe, or Innocent Bystander," University of Utah Legal Studies Research Paper Series, Research Paper No. 057-08-03, 2008, 22, <<http://ssrn.com/abstract=1090331>> (2 May 2012).
23. The Middle East Media Research Institute, Special Dispatch #1323, "Islamist Websites Monitor #7," 13 October 2006, <<http://www.memri.org/report/en/0/0/0/0/1909.htm>> (2 May 2012).
24. David Cook, "The Implications of 'Martyrdom Operations' for Contemporary Islam," *Journal of Religious Ethics* 32, no. 1 (2004): 131.
25. *Ibid.*, 134.
26. Craig Whitlock and Munir Laada, "Abu Yahya al-Libi, Religious Scholar, Nationality: Libyan," *Washington Post*, 2006, <<http://www.washingtonpost.com/wp-srv/world/specials/terror/yahya.html>> (2 May 2012).
27. Abdullah Wariis and Jarret Brachman, "Abu Yahya al-Libi's Human Shields in Modern Jihad," Combating Terrorism Center Sentinel, 2008, <<http://www.ctc.usma.edu/posts/abu-yahya-al-libi%E2%80%99s-%E2%80%99Chuman-shields-in-modern-jihad%E2%80%99D>> (2 May 2012).
28. *Ibid.*