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Securing the Civilian: Sex and Gender in the Laws of War

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"(T)o fight has always been the man's habit, not the woman's. Law and practice have developed that difference, whether innate or accidental."
- Virginia Woolf. (1938) Three Guineas 9

I.

This paper examines the productive power of discourses of gender by analyzing a particular institution of global governance—international humanitarian law or the laws of war. I focus on the laws of war for two interdependent reasons.[i] First, the laws of war are a central feature of global governance. They reflect and regulate customs and practices of war among and, less extensively, within states. The laws of war govern both the resort to force (*ius ad bello*) and the use of force (*ius in bello*). Specifically, the laws of war outline the permissible actions for states, militaries, combatants and non-combatants to take in war according to the formal classification of armed conflicts as international or non-international. As a result, the laws of war are the primary referent for the training and disciplining of those entities and, very recently, the peacekeeping troops of the United Nations (Rowe, 2000: 45-62).

Yet, second, precisely at the moment that the currency of the laws of war has been generally revalued, and specifically invested with newfound worth for the protection of women, the relationships among power, gender, and the laws of war are scarcely analyzed. The scholarship that does engage in an analysis of gender and the laws of war focuses primarily on the *protection* of women within the law rather than *the production* of women in the law and, importantly, the production of the laws of war themselves.

By explicitly focusing on the productive power of gender, and its relationship to structural power, I sketch the relations between different forms of power implicated in the laws of war. To presume that power should only be, or can only be, analyzed in its productive mode is to misread the work of Foucault (2000: 337), who is most immediately associated with this mode of theorizing. What he proposes is a "critical investigation of the *thematics* of power," an investigation that is inspired by the disarmingly simple question of "how is power exercised?"

For example, the laws of war rely upon both institutional and structural power in regulating the behavior of individuals—e.g. combatants may not purposely kill civilians. Combatants who do so are considered to be in violation of the laws of war and may be tried for their crimes. Alternatively, attending to institutional and compulsory power illuminates how the very choice of targets upon which combatants may fire results from complicated interaction in which positive law, the vagaries of public opinion, strategic options, and command hierarchies converge.

But, in both cases, these exercises of power also produce that which they seeks to regulate—'combatants' and ' targets'—for neither of those categories exists outside of the law and practices which makes them possible. As evidence, witness the intense debates over the proper identification and treatment of the called 'unlawful detainees' of Camp X-Ray and the 'American Taliban,' as well as the international outcry over the legality of the bombing of the Afghan wedding party in the ground war in Afghanistan. Significantly, in identifying and

defining both 'combatants' and 'targets,' discourses of gender are central. After all, it was the killing of women and children during the bombing that was taken as determinant of the civilian character of the wedding party, as well as the barbarity of US actions, underscoring the importance of discourses of gender in constituting both 'combatants' and 'targets.'

Therefore, my response to the query that informs this volume, namely, how is power exercised, is to investigate the structural and productive power of sex and sex difference in the laws of war. Accordingly, I write a genealogy of a founding tenet of the laws of war known as the principle of distinction: the injunction to distinguish at all times between combatants and civilians in times of armed conflict. This genealogy considers two crucial moments in the articulation of the principle of distinction—the production of the 'combatant' and the 'civilian' and the difference between them—as captured in the work of the Dutch diplomat and lawyer Hugo Grotius and in the codification of the 1949 IV Geneva Convention Relation to the Protection of Civilian Persons in Times of War. From this analysis I conclude that discourses of gender do not simply *denote* the difference of combatant and civilian, but *produce* that difference—one that lies at the foundation of the laws of war. Before turning to the writing of this genealogy, however, I first situate my own work in relation to the extant scholarship on gender, power, and the laws of war.

II.

A fundamental axiom of this essay is that an analysis of gender and the laws of war should not pivot solely on its conception and corresponding treatment of women. Such an analysis considers only how inequities and differences in the conception of women *vis a vis* a comparable norm (most commonly men) affect the conception and treatment of women. To rephrase in the taxonomy of this volume, such an analysis focuses upon structural and institutional power—forms of power that feminists have theorized extensively within standpoint and liberal feminisms, but that arguably inform in principle all feminist theorizing. This is not to minimize the contributions made by Gardam (2000), specifically on the laws of war, as well as Askin (1997), Copelon (1994), Charlesworth and Chinkin (2000) among others, who deepened our understanding of the relationship among gender, power, and the laws of war by documenting how the provisions of the law "operate in a discriminatory fashion in relation to women." It is, however, to call for a careful evaluation of the critical purchase of such an approach and to propose a reconfiguration of its critical concepts.

The drawback of an approach that only addresses the protection and treatment of women is that it obscures how gender operates not only to institute difference in the structural relations between men and women, but also to create that difference itself. What I mean by this statement is best clarified by reference to my essay's epigraph: "(T)o fight has always been the man's habit, not the woman's. Law and practice have developed that difference, whether innate or accidental." Although the impulse is to read Woolf as if she were only saying that men fight and women do not, what I find intriguing about this statement is that a certain ambiguity unsettles its reference to "that difference" developed by law and practice. Is the difference in question here that men *fight* and women *do not*? Or is it that *men* fight and *women* do not? Can it be either without being both? Here it is apt to heed Foucault's (1994: 344) insight that "every relationship of power puts into operation differences that are, at the same time, its conditions and its results." Read in these terms, Woolf's statement suggests that analyses of gender, power, and the laws of war must attend not only to the differences created and conceptualized within the laws of war

(i.e. combatant v. civilian), but also to the discourses of gender that produce the differences (i.e. oppositional sex) that serve as the law's referents. We lose this insight when we limit our focus to the *protection* and *treatment* of women within the laws of war. Analyses that engage only structural, institutional, and compulsory power risk overlooking the fully productive power of discourses of gender in constituting the laws of war themselves.

III.

Let me draw out the context of this claim. In their masterly overview of women, armed conflict, and the law, Gardam and Jarvis (2001: 10) define gender as " the socially constructed roles of women and men ascribed to them on the basis of their sex . . .(which) . . . refers to biological and physical characteristics." Gender is here taken as derivative of sex, as a binary difference, rather than generative of it. Gender, in essence, is here the cultural interpretation of sex. The balance of scholarship attending to the laws of war accepts this definition. This lends itself to a focus on sexual violence (primarily rape) as the paradigmatic expression of both the construction of women within the law (as symbols of family honor; as property of their male relatives) and, conversely, of the relative dismissal of women's experiences during war (as rape, for example, was accepted as a traditional and inevitable strategy of war).

Such analyses and corresponding advocacy on the part of feminist scholars and practitioners led to historic shifts in the prosecution of perpetrators, an improvement of protection for women, as well as a reinterpretation of the laws of war to more adequately respond to women's experiences of rape.[ii] These are laudable achievements for they challenge the radical inequalities of institutional and compulsory power within which male sexual violence is strategically facilitated and favored—what feminists have long discussed under the rubric of patriarchy.

Nonetheless, it behooves us to reconsider the premise upon which such success is gained. If sex and sex difference is understood as an ontological referent for the social or cultural understandings of gender, then sex becomes an incontrovertible ground and reason for the *necessity* of increased protection of women, while gender is said to explain the *paucity or neglect* of protection of women. This explanation runs the substantial risk of reifying a conception of women as 'always already' victims who are subject to the benevolence or malevolence of their benefactors for presumably immutable anatomical differences. Yet, as Butler (1990: 7) has so precisely detailed, these ostensibly natural facts of sex which are taken to explain displays of protection or predation are themselves produced through discourses of gender which give sex and sex difference meaning.

To fully appreciate the importance of Butler's argument, observe how a continued emphasis of male on female sexual violence has made it more difficult to investigate the meanings and consequences of the breadth of sexual violence perpetrated during war—a violence which victimizes men, women, and children and whose purpose includes not only the violation, but production of distinct identities. As Zarkov (2001: 69-82) notes, characterizing men as "never victims of rape and other forms of sexual violence is a very specific, gendered, narrative of war... dominant notions of masculinity merge with norms of heterosexuality and definitions of ethnicity and ultimately designate who can and cannot be named a victim of sexual violence." Discourses of gender, interwoven with other discourses of identity, infuse sex and sex differences with specific meaning. It is a specific meaning that we might be tempted to otherwise accept as

already *given* solely by sex itself—e.g. men are not raped/rapeable—if it were not for the presence of evidence to the contrary, and in Zarkov's work, the detailing of the sheer force and persistence of a discourse of gender in shaping the visibility, and the meaning, of male rape. This underscores Butler's (1990: 7) most salient point: "gender is not to culture as sex is to nature, gender is also the discursive/cultural means by which "sexed nature" or "a natural sex" is produced and established as prediscursive. . a *politically neutral surface* on which culture acts."

Scholars and activists have long commented upon the contrived roles of women during armed conflicts—"soldiers, saints, or sacrificial lambs" who are "enlisted with or without consent" to wage and witness war (Dombroski, 1999). Political theorist J.B. Elshtain (1987) invoked the perennial images of a 'Just Warrior,' the male protector of home and hearth, and a 'Beautiful Soul,' the female innocent whose purity is to be defended, to represent the symbolic and actual gendering of narratives and practices of war. [iii] Stiehm (1982) introduced the now canonical terms of Protector and Protected to capture the fraught and sexed dynamic among those who wield the power of destruction and those dependent upon them to desist or defend from its expression. Women as conscripts or combatants are only provisionally, and frequently at great cost, granted an introduction to the fraternity of fighters within the militarization of masculinity—what Ignatieff (1998:128) describes as an incitement of "toxic testosterone."

Participation in war, within these analyses, is structured according to a dyad wherein men are regularly positioned as combatants and protectors during war and women as civilians and protected. Indeed, the putative self-evidence of this remains sufficiently powerful that the recognition of women as active and committed participants/combatants within war requires explicit acknowledgement and, frequently, draws explicit condemnation. This is most clearly captured by the very need to continually establish that women can *also* be combatants and should *also* be allowed to do so. As the study undertaken by the International Committee of the Red Cross on women and war concludes, " it is also important to state that women in armed conflicts are *not solely* "victims" in need of assistance and protection" but are often active and committed participants (Lindsey 2001: 212, emphasis added). Indeed, one of the purposes of the report conducted under the auspices of the groundbreaking Security Council Resolution 1325 on Women and Peace and Armed Conflict is to continue document and verify the participation of women in combat and as combatants.

Such a resistance to considering women as combatants certainly affects their participation and acceptance—a consequence well articulated by the representative of Jamaica to the Security Council who noted, during a recent discussion on women, peace and armed conflict, "a narrow definition of who is a soldier or fighter often discriminated against women and girls involved in fighting" (SC/6847, 2000). And, as many have documented, such discrimination prevents demobilized female combatants from receiving appropriate resources post conflict, and often hinders their successful reintegration within society. Further, scholars of nationalisms and revolutions call our attention to one of the contradictions of female participation. Depicted as militant virgins simultaneously birthing and defending a nation that may or may not imagine itself male, women are frequently caught within the paradox of forging a new nation and reproducing the old (Pettman, 1996, Yuval-Davis 1997). Consistently, then, the participation of women in war is conceived of and interpreted primarily in terms of sex and sex difference—the

most brutal manifestation of which is the kidnapping of young girls and women for forced sexual and domestic servitude in national militias.

These analyses definitively document the way in which gender acts to demarcate combatants and civilians, but do not necessarily displace an understanding of sex as a prior materiality upon which gender acts. Each underscores the pervasive and persistent inequities of institutional, structural, and compulsory power—indicated by the degree to which women are consistently and categorically conceived of as in need of protection and incapable of protecting. Present, however, in these analyses is a disquieting reliance on the binary opposition of protector: protected to explain the distinctions between combatant and civilian as if it were not only the true or only relation *of* each pair, but a natural analogy *to* each pair. In other words, these binary oppositions (men:women and combatant:civilian) are accepted as given, their prior existence presumed, and they become points of origin for these analyses.

This reifies a dualism of combatant/civilian and protector/protected, whose meaning is constructed as and through opposition, in which an asymmetry of power is rendered intelligible and inevitable in a discourse of gender. Subsequently, this 'matching principle' aids the primary and customary assignation of women *as* the paradigmatic 'victims' of armed conflict (in particular, of its sexual violence) and not its agents, while re-inscribing the binary logic of either one (victims/civilians) or the other (agents/combatant). Ironically, if one of the emphases is to alter the laws of war to accord more accurately and responsively with women's experiences of war, maintaining a binary which is founded on women's exclusion from the primary term and vulnerability and relative lack of power in the second will be most difficult. In this respect, advocating for the recognition of women as combatants does not *dismantle* the binary logic; it simply reconfigures it. The production of the signal differences—the *difference* of combatant and civilian, the *difference* of protector and protected— remains unexplored and undisturbed. Thus, rather than accept as given, I first open an inquiry into the emergence and articulation of the 'combatant' and the 'civilian:' to ask how a discourse of gender renders that equivocal difference to which Woolf referred intelligible and (seemingly) inevitable.

IV.

The importance of this task is not to be underestimated. As I delineated above, the laws of war are a formidable institution of global governance. The concepts of 'combatant' and 'civilian' upon which I focus are the foundation of the essential dictate of the modern laws of war—the principle of discrimination. The principle of discrimination is the injunction to distinguish between combatants and civilians at all times during armed conflicts, it "forms the basis of the entire regulation of war" (Sandoz, 1987: 586). Therefore, to consider the relations among gender, power, and the laws of war it is imperative to return to its most generative concepts, and to do so with full acknowledgement of the *multidimensionality* of power expressed in the relationship of the combatant and the civilian.

Required, then, is no less than a genealogy of the principle of discrimination. For, as Foucault (1994b: 118) most succinctly stated, a genealogy is a form of history which transforms the "development of the given into a question." A genealogy begins with a careful analysis of the historical articulations of each of these concepts, tracing their graftings at particular moments in

which their meanings are created and configured—meanings that we now attribute as essential to their form and function.

In this paper, I emphasize the emergence and construction of the category and concept of 'civilian' for that is the category to which women are most often relegated and the concept by which they are most frequently defined. This does not re-instantiate the belief that to analyze discourses of gender is to analyze the position of women, for, as I demonstrate, discourses of gender will always exceed that reference. Rather, it is because although the combatant and the civilian are irreducibly codetermined (in that a civilian is that which a combatant is not), the civilian has not been made an equal subject of analysis. I first concentrate explicitly upon the pivotal formation of the concepts and relations of the 'combatant' and the 'civilian' in the work of Hugo Grotius, works that histories of the laws of war hold as fundamental to our contemporary understandings. Once set forth, I turn to an analysis of the 1949 Convention Relative to the Protection of Civilian Persons in Times of War in which the civilian is first made formally a subject of treaty law.

As a final note, I use the term 'civilian' advisedly throughout this paper. While 'combatant' is part of common parlance from the 12th century, it was not until the 19th century that the civilian, a "nonmilitary man or official," entered into broad use (Oxford English Dictionary, 1989). The locution favored by Grotius and his fellow writers, is that those who are to be spared from war are 'innocents.' This locution informs our present understandings of who shall be spared from war to such a degree that that the phrase 'guilty civilian' sounds, to us, utterly oxymoronic. The 1949 IV Convention formally refers to 'protected persons, while it is in the 1977 Protocols Additional I to the IV Convention that the concept of the 'civilian' is invested with a formal definition in the laws of war. I argue that by tracing the descent of the 'civilian' from its earlier manifestations, as an 'innocent' and as a 'protected person,' we can identify the persistent presence of discourses of gender and their integral force in determining the difference of 'combatant' and 'civilian.'

V.

The 17th century Dutch lawyer and diplomat Hugo Grotius wrote two highly influential works on the laws of war (*De Jure Pradae* 1604; *De Jure Belli ac Pacis Libri Tres* (On the Law of War and Peace) 1625). Scholars of international law, specifically the laws of war, identify these works as shaping the possibility and substance of the laws of war. As the respected historian of the laws of war Geoffrey Best (1994: 26) states, "no writing has been more determinant of the consideration given to the non-combatant in the modern history of the law of war than Grotius's early 17th century masterwork, the Laws of War." Legal and international relations scholars contend "that the issues that Grotius addressed, the concepts and language he used, even the propositions he advanced, have become part of the common currency of international debate about war in general" (Kingsbury and Roberts, 1990: 26). The immediate impetus of *The Laws of War* was to advocate for the establishment and recognition of an order that would moderate and restrain war. How did Grotius imagine its accomplishment? It is here that the analysis of discourses of gender finds its own imperative.

Opening his discussion of the law, Grotius first sets forth the distribution of rights that inform and maintain social order. He proclaims "(b)y generation parents acquire a right over children. . .(b)ut, if there is a variance in the exercise of these rights the right of the father is given preference on account of the superiority of sex" (Grotius, 1625: 231). Essential to the peace and order of domestic society is the proper distribution of power between the sexes. Yet, it is not only domestic order that is founded upon and arises from these hierarchical and gendered relations of power, international order does as well For the 17th century Dutch, "(h)ome. . was both a microcosm and a permitting condition of a properly governed commonwealth" (Schama, 1997: 386).

Grotius also held that the "maintenance of social order. . .is the source of the law so called," and, indeed, "no association of men can be maintained without law" (Grotius, 1625: "Prolegomena" 12, 17).[iv] For Grotius, then, the source and purpose of the law is to be found in the preservation of the proper social order founded in the arrangement between the sexes. Reasoning from this recursive relationship, it is fair to say that the peculiar position of women as both subject to and property of men is not simply reflected and regulated in the social order, but also generates the law that governs that social order.

VI.

Ever careful to parse the degree of differences within the desired social order, and cognizant of the desirability of peace and the persistence of war, Grotius remains intent upon limiting the authority and right to wage war to those entities identified as public and sovereign. Although it is tempting to deduce from this that the actual pursuit and practice of war should be limited to militaries, armies, and recognizable vested representatives of that sovereign power, it is difficult to find a consistent identification of belligerents or combatants within his work. For one, while the law of nations might so restrict the pool of combatants to the above, the law of nature (the dictate of right reason) holds that "no-one is enjoined from waging war" (Grotius 1625: 165).

This tension is complicated by Grotius' position that *all* inhabitants of a country may be warred against not just "those who actually bear arms, or are the subjects of him that stirs up war" (Grotius, 1625: 646). Grotius writes that "*how far* this right to inflict injury extends may be perceived from the fact that the slaughter even of infants and of women is made with impunity and that this is included in the law of war" (Grotius, 1625: 648). Since"(n)either sex nor age found mercy," it is established both within the law of nations, evidenced by the practice of nations, and within natural law that the right of killing in war is extensive.

Therefore, Grotius sets himself the task of developing a "remedy" to this "frenzy" of war (Grotius, 1625: "Prolegomena" 20). He does so by establishing a mean between "nothing is allowable" and "everything is" (ibid). This mean derives from the "bidding of *mercy*, if not of justice, that, except for reasons that are weighty and will affect the safety of many, *no action should be attempted whereby innocent persons may be threatened with destruction*" (Grotius, 1625:716). It is this principle that sets the mean and, in turn, regulates the frenzy of war.

Immediately after positing this principle, one which attests to the existence a "more just and better" law, Grotius begins to substantiate its essential precepts. He states: "(t)hat children should always be spared; women, unless they have been guilty of an extremely serious offense;

and old men" (Grotius, 1625: 734). With this statement, Grotius contravenes the laws of nature and the laws of nations for each *allows* killing of children, women, and old men since all pose a potential harm and all may claim a potential right of self-defense: "we shall hold to this principle, that by nature every one is the defender of his own rights; that is why hands were given to us" (Grotius, 1625:164). How does he reason his transgression?

VII.

For one, quoting Seneca, Grotius straightforwardly states: "let the child be excused by his age, the woman by her sex" (ibid). At first, it seems that the sex of woman refers literally to the sex *had* by a woman for not all women are to be spared, only virgins. This is exemplified by the trial of the Midianites that demonstrated that even in a war so just as to be ordained and fought by God, the virgins were spared. Here discourses of gender differentiate not only between men and women, adults and children, but insofar as it grants to specific women, to virgins, the right of protection it equally differentiates among women. (An analysis of structural power risks obscuring this differentiation among women, and among men, by highlighting the opposition rather than the proliferation of subject positions).

In continuing to trace Grotius' reasoning, one discovers that it is not simply the lack of sex that sets women apart, to be spared among their kind. Sparing of women during wars is equally grounded in the belief that women cannot "devise wars" (Grotius, 1625: 734). Recollect that for Grotius because of "the difference in sex the authority is not held in common but the husband is in the head of the wife. . .(t)he woman under the eye of the man and under his guardianship" (Grotius, 1625:234). And, as Schama (1997: 404) details, in the era in which Grotius lived, women were "formally subject to their husband's legal authority." Consequently, women lack the authority and sovereignty held necessary to devise war within a theory in which "the principal author of war is one whose right has been violated" (Yasuaki, 1994: 99).

Grotius also argues that wars are to be waged solely for just cause and for just purposes. As formulated, this contention erects another barrier against women as able to authorize or devise wars for, according to Grotius, women are among those who are constitutionally unable to adjudicate between "just and unjust, lawful and unlawful" (Grotius, 1625:497). Drawing from Aristotle, Grotius explains: "alike children, women and men of dull intellect and bad education are not well able to appreciate the distinction" (ibid). In this phrase, 'women' are a problematic middle term—either like children or stupid and poorly educated men or somewhat akin to both. Although the exact analogue may be inconsistent, the consequences are not. Women are incapable of devising war, one grade above animals, akin to children.

Thus, the substantiation of the first principle is as follows. Absent deliberative and sovereign authority, unable to tell just from unjust, and incapable of receiving injury, women are to be spared for they are constitutionally and constitutively incapable of waging war. Women are 'innocent' of war, and thus should be spared war, because they lack authority, judgment, and sovereignty. In addition to these definitional deficiencies, women may be spared if they have not *experienced* sex itself.

Now, to dwell on the matter of sex. The power of this configuration of sex, in which differences attributed to materiality of the body are presumed as evident and natural foundations for the

opposition of men and women and, in turn, determine the opposition between those who are or are not spared war, is made visible in the central role that temporality plays in the construction of the immunity of children and old men. Grotius posits an analogue between children and women in which the absence of reason, authority, and capacity joins the two. Yet, whereas children may develop, rectifying these deficiencies through education and maturity, women are forever marked as lacking in these regards.[v] Therefore, while children might ever seem the more *'natural'* innocents, in fact it is women who are made innocent as if by *nature*.

It is only women whose innocence is not derived from the sequential and variable attributes of age, choice of religious, pastoral or artistic occupation, or defined by a range of intellect and education. [vi] Old men and children grow in and out of these categories, the cycle of birth, maturity, senility, and death frame their span, women remain forever innocent, forever deficient, because of their sex. What we find in these passages, then, is that in order to enable and stabilize the otherwise indeterminate distinction between those who may and may not be killed, Grotius turns, in the end, to discourses of gender. In this founding work of the laws of war, discourses of gender establish sex as an ontological basis for distinguishing between the two while, simultaneously, affirming a social and political order within which this understanding of sex is given meaning.

VIII.

I do recognize that Grotius does begin with the statement that women shall be always spared "*unless* they have been guilty of an extremely serious offense" (Grotius, 1625: 734). This makes it tempting to read Grotius' modification of the protection of women as an argument against mine. But, in fact, it underscores the importance of analyzing gender as productive of sex and sex difference.

Grotius writes that women should not be spared from war if "they commit a crime which ought to be punished in a special manner or unless they take the place of men" (ibid: 735). This is a radical claim for one who equally holds that women are the "sex which is spared wars" (ibid: 736). What, then, is the crime for which women ought to be punished in a special manner? Grotius does not say. However, the crime that is given a name, that is, taking the place of *men*, suggests the tenor of the crimes that degrade his defense of women. Moreover, among those who write before him, and upon whom he relies, the serious crime for which women would be specifically punished *is* taking the place of men. For example, Grotius's most favored predecessor, the Italian jurist A. Gentili (1612:256), argues that as a rule the "age of childhood is weak, and so is the sex of women, so that to both an indulgence may be shown." Yet he, like Grotius, makes "an exception of those women who perform duties of men which are beyond the power of the sex in general (ibid)."[vii] What is the substance of this crime that makes its commission so exceptional?

For one, men are "not accustomed to wage war" against women. Quoting the same Roman authorities, both Grotius and Gentili underscore that women are a "sex untrained and inexperienced in war." Due to this, there is little honor to be gained in fighting against such callow foes. Instead, those who do fight women receive only the epitaphs of cruelty and savagery, the reputation for inhumanity and impiety, as well as the scorn of those who do not fight women.

Consider, further, how this distinction among men founded upon the pursuit and practice of honor, secured in the sparing of women, differentiates among the commonality of men who wage war. As with the chivalric tradition that precedes Grotius (and which is by no means unfamiliar to him), the honor *of* men is intimately linked to their identity *as* men. It may become good men to respect the strictures on war, but it is also the primary means by which men become good. Women in war confuse and contradict the assignation of men as men—and men as good and just among all other men. Warring women disrupt the order of things. Consequently taking the place of men must be punished.

Yet, notice how both Grotius and Gentili propose to do so. Grotius simply states that " When Nero in the tragedy calls Octavia a foe, the prefect replies: Does a Woman receive this name?" Likewise, Gentili (1612:257), also quoting Seneca, writes "a woman does not take the name of the enemy," continuing in his own words, "for in so far as women play the part of men they are men and not women." Therefore, Gentili concludes, "if women are guilty, then it will be said that the *guilt* is destroyed rather than woman" (ibid: 257). Or, as he elaborates, it will be that the "abomination" which is destroyed—not the woman, but her crime of acting like man.

To restate, even when women transgress the boundaries of sex, it is *they* who are rendered suspect and not that boundary itself. It is not woman who receives the name of foe, it is not women who play the part of men, and it is not women who are destroyed—it is the "guilt" and the "abomination" which is so destroyed. Here, both Grotius and Gentili attempt to defend against the evident disruption of the dichotomy of sex that is said to found the social order and, in turn, enable the distinction between those who are and are not 'innocent' of war. What this disruption demonstrates, however, is the very plasticity of sex upon which these differences are founded.

IX.

In the work of Grotius, we see, then, how discourses of gender produce the difference between those who fight and those who do not. The effects of these discourses of gender are not relegated to the past, but echo in our present. It is not that the meanings of 'gender' remain the same from the 17^{h} to the 20th century. Rather, discourses of gender persist in producing differences of sex as natural and normal, differences that are then taken as paradigmatic for legislating and legitimating the distinction of 'combatant' and 'civilian.'[viii] To demonstrate, I turn now to the 1949 IV Geneva Convention Relative to the Protection of Civilian Persons in Times of War, whose purpose was to rectify, in light of the past World Wars, the neglect of the 'civilian' within the laws of war.

The task of the development of the laws of war in 1949 was one similar to that to which Grotius set himself in the midst of his contemporary crisis: to regulate and moderate war through the refinement of its rules and requirements while, simultaneously, to produce the distinction between those who fight and those who do not upon which the possibility of moderation depends. The outlook was no less grim. For, even, as the Judge Advocate General of the United States War Department wrote that while humanity itself demands the preservation of the distinction of combatant and civilian, that distinction is one "more apparent than real" (Nurick, 1945: 680). Only a year earlier, the eminent lawyer H. B. Wheaton decried the very distinction

as "illusory" and, as a result, described any efforts to retain its use as "immoral" (ibid: 681). Echoing this position, the legal scholar Lauterpacht dismissed it as a "hollow phrase" (Rosenblad, 1977: 57).

Nonetheless, the destruction or dissolution of this distinction was said to betray the promise of 'civilization' and jeopardize humanity itself. For "barbarity abounds when "belligerents strike army and civilian population alike without any distinction between the two" (Best, 1994: 103, quoting the Greek delegate to the preparatory conference). Legal scholar Kunz declared that the two World Wars exemplified the "the total crisis of Western Christian culture, a crisis which threatens the very survival of our civilization" for each demonstrated that the "cultured man of the 20th century is no more than a barbarian under a very superficial veneer of civilization" (1999: 103). To repair the veneer, if not to rehabilitate the man, the necessity of the further development of the laws of war could not be denied. It guaranteed the "survival of our whole civilization" (ibid).

Thus the question was not how to *distinguish* between combatant and civilian, but how to *produce* the difference between the two. Moreover, because it is the *observance* of this distinction that demarcates civilized nations from their barbarous brethren, men from "savage hordes," and honorable men from dishonorable, this distinction remains the means by which such differences may be indexed and identified (ibid). Indeed, no better example of the resonance of this claim may be found than in the words of President Bush and his administration in their claim to defend civilization against the existence of lawless violence, of barbarity itself, a primary measure of which is the violation of the principle of discrimination or, in the words of President Bush on October 7, 2001, the killing of the "innocent." This barbarous violence is painstakingly contrasted to measures taken by the United States in defense of civilization against "these outlaws and killers of the innocent." Once again, as we saw with Grotius, the laws of war form a pivotal and *productive* dimension of international order. Not only regulating and legislating conduct among (pre-constituted) entities, the laws of war constitute the subjects it is said to govern.

X.

The States gathered in 1946 to discuss the future of the laws of war were intimately aware of the formidable transformation of the political landscape. The tactics of terror practiced by both Allied and Axis powers, from aerial and atomic bombings to concentration and internment camps, corrupted any facile distinctions of civilization and barbarism. In the midst of this ruin, the "mission" of those gathered at the preparatory conferences, some sixty-two delegations from Western, primarily European states, was to instantiate the distinction between those who fought and those who did not and, in so doing, rehabilitate some measure of civilization itself (Petitpeierre 1949: 9). This was not an easy proposition.

First, as always, within the structural logic of the law the identification and determination of the 'civilian' was intimately related to the identification and determination of the 'combatant.' However, as I noted previously, the experiences of the past World Wars had convinced most that the clarity and coherency of such determinations were 'obsolete,' 'illusory,' 'immoral' and 'more apparent than real'—assuming that they were ever otherwise. The logic of total war in which all individuals were implicated dominated the discussions in the preparatory conferences

requiring that every "enemy national" be treated as a "potential soldier"(Pictet et al., eds., 1958: 232, 372).

Second, the practices of occupation and resistance, as witnessed in both the First and Second World Wars, forced a controversial reconsideration of the conventional category of 'combatant' to provide for the protection and treatment of partisans, or irregulars, upon capture. Underlying this controversy was the fear that any loosening of the standards of organization, appearance, or conduct by which combatants were identified would unfairly benefit irregulars, jeopardize the safety of both regular combatants and civilians, and degrade the standards of conduct, because it would make it *yet more* difficult to distinguish between combatants and civilians. Nonetheless, after much heated debate during the Preparatory conference, a less restricted definition of 'combatant was introduced which rightly acknowledged the participation of partisans, but which further stressed the plasticity of the distinction.

Third, the identification and determination of civilians rested on "much less solid ground" (ibid: 5). The venerable authors of the Red Cross Commentary worriedly write regarding the IV Convention, the "wounded and prisoners of war are human beings *who have become harmless*, and the State's obligation towards them are not a serious hindrance to its conduct of the hostilities . . . *civilians have not in most cases been rendered harmless*, and the steps taken on their behalf may be a serious hindrance to the conduct of war" (ibid: 5). Besides, while one could reasonably assume that the wounded and sick and prisoners of war were identifiable through their military regalia or presence in specific formations of war, civilians were but "an *unorganized mass* scattered over the whole of countries concerned" (ibid: 5). Thus, the difficulties of identification and determination are compounded by the potential threat posed by this seemingly itinerant mass of individuals.

In responding to these three complicated challenges of identification and determination, one might reasonably assume that the first step would be to define the category under consideration--this was not accomplished. Instead, the formal articles of the IV Convention refer only to the ample concept of 'protected persons.' 'Protected persons' are individuals "taking no active part in the hostilities," including prisoners of war, wounded and sick combatants, detainees and internees, and all others in the hands of the enemy. Article 4 of the 1949 IV Convention attempts to distinguish more clearly among this mix of 'protected persons,' to elucidate the differences among each of these types and subsequently specify to whom the protections of the IV Convention apply. But as the Commentary on the IV Convention ruefully notes, "the meaning does not stand out very clearly" (Pictet, et al., eds., 1958: 45).Thus, Article 4 upon which the identification and determination of 'civilian' rests remains irresolute.

The inability to arrive at a coherent definition was a result of the tension between the preservation of state sovereignty to wage war, relatively unhindered by considerations of civilians and conscience, and the recognition of a responsibility to a common humanity. During the preparatory Conferences arguments for the latter were primarily put forth by the USSR and its allies against a coalition led by the United States and United Kingdom. The USSR accused those states that sought to limit the definition and protection of 'civilians' as being no less than "enemies of humanity" (Best, 1994: 110). In fact, it was the USSR which decried the scope and definition of 'protected persons' found in Article 4, taking it to betray the promise of "conscience

and honor of nations, and the traditional standards of conduct generally recognized throughout the civilized world" (Final Record of Conference of Geneva, 1949: Vol. II, 376). What precisely were those standards generally recognized? What exactly did the civilized world require? It is here that discourses of gender sound again.

XI.

Part II, Article 13, of the Geneva Conventions attempts to restore this promise by broadening the definition of those so protected under the IV Convention to *all* populations in countries of conflict. In its short formulation, Article 13 simply states that general protections outlined in Part II cover the "*whole* of the populations of the countries in conflict." In Article 13, nationality and being in the power of the enemy are *no longer* necessary markers for the protections as they were in Article 4. What the Commentaries on the Convention inform us is that the extension of protection to all populations is premised upon binding "belligerents to observe certain restrictions in their conduct of hostilities by erecting protective barriers to shield certain categories of the population who, by definition, take no part in the fighting" (Pictet et al., eds., 1958: 118). Grotius would agree for temperance in war is the responsibility of those who wage it while the practice of prudence demands the determination of who shall be spared. He would also assent to the selection of those who shall be spared, as the categories that, by definition, take no part in the fighting are "children, women, old people, the wounded and the sick" (ibid).

Take note most immediately of two moves. The first is that the extension of protection to *all* populations has just been reduced to *specific* categories. It is not difficult to imagine the consequences of this delimitation of protection to *only* children, women, old people, the wounded, and the sick, for we have too many examples. Most starkly, we see it in the round up and disappearance of the men from the safe haven of Srebrenica as presumptive combatants regardless of the fact that they were taking no part in the fighting (ICRC 1998; Carpenter 2003). However, this is a pattern of presumption common to armed conflicts from Chechnya to Israel-Palestine and now the United States repeats this selective logic in its requirement that only Muslim men register in the United States.

Further, while this delimitation may have appeared sensible in light of the almost universal conscription of men during the World Wars, it is contradictory on at least two counts. The first is that women *took part* militarily in these wars. In the Soviet Union the participation of women is estimated in excess of 8% of the total armed forces—at least eight hundred thousand women in the army, and many thousands in partisan forces. In Greece, Italy, and France women were active and public partisans and members of resistance movements, while the German and British forces had women working in reserve and support units. Additionally, the status of women as combatants is specifically addressed in the 1949 III Convention on Prisoners of War. In fact, the only time the International Committee of the Red Cross was able to invoke the this Convention was after one of its delegates visited a prisoner of war camp in Poland where both men and women were being held. Finally, the logic of total war dispenses with such discrimination between those who fight and those who do not—that is what makes it is so horrifying. Total war presumes that *all* are considered combatants. Thus, just as Grotius was bound to do, the Commentaries are compelled to produce a distinction that does not exist before its very institution.

This brings us to the second move. In so instituting this distinction between those who take part in the fighting and those who do not, the Commentaries simultaneously substantiates the definition of the 'civilian' never accomplished within the formal articles of the IV Convention, but consistently referred to in the body of the Commentaries. For civilians are those who "*by definition*" "do not bear arms," are "outside the fighting," and "take no active part in the hostilities" (Pictet: 1958:22) Accordingly, civilians are said to be children, women, old people, and the wounded and sick. This is no small triumph, for the essential challenge of the IV Convention was to isolate and identify a category of 'civilians' as distinguishable from that of combatant.

Furthermore, because this distinction is confirmed by the shared "suffering, distress, or weakness" of those who take no part in the fighting, the anxious concern over the potential *threat* posed by civilians is easily relieved(1958: 119). In terms of their shared suffering, distress, and weakness, there are now three distinct categories of individuals that function as a synchedoche for civilian.

XII.

There is a familiar logic of equivalence posited by the Commentaries among these disparate and otherwise distinct categories of individuals. Most immediately it should remind us of Grotius for it is only women who are said to always already possess these varied attributes (not bearing arms, outside of the fighting, weak, suffering or in distress) as matter of sex. The others, children, old people, wounded and sick, all bear these essential attributes as a result of unfortunate circumstances and transient conditions—that is *temporally or chronologically*. And, in fact, the debates in the preparatory conferences were over precise ages by which the categories of children and old people would be known and their "faculties" of judgment and strength could be assessed. There were no corresponding inquiries into the exact criteria by which women would be known, their sex alone (for it is only women that appear to be marked by sex) would be sufficient.

Unlike Grotius, the Commentaries do not argue that women, like children, suffered from diminished powers of reasoning and judgment that render them 'innocent' of war. Instead, the Commentaries hold that it is the matter of women's sex itself—defined as reproductive capability and sexual vulnerability. As a result, it is only women out of these other distinct categories (children, old people, wounded and sick) that both *materialize and stabilize* the distinction of combatant and civilian. In other words, women—like children, old people, and the wounded and sick— are harmless, but unlike children, old men, and the wounded and sick, women pose no *potential* harm. It is only women whose suffering, distress, and weakness, derived from her reproductive capability and sexual vulnerability, is a *constant* and natural marker of their very sex and, in turn, of the 'civilian.'

Most unmistakably, the chorus of appeals to a 'warrior's honor,' a "proud vision of male identity," as a primary means of protection could only be heard within this orchestration (Ignatieff, 1998). Yet contrary to common presumptions, the very weakness and harmlessness of the 'civilian' does not *necessarily* result in an assurance of protection. It certainly did not during World War I or II, nor does it in any of our contemporary wars. As Forsythe (1977:173) argues, because the "civilian is frequently viewed as nothing: weak. . old. . .female. . .there is nothing to

command respect" and, consequently, combatants have less reason to abide by injunctions to protect and respect civilians. In other words, there is no *necessary* compulsion to do so. Among combatants, protection and respect derives from a sense of collective recognition and collective honor—a sort of ol' boys network of equals, which is absent between combatants and civilians. Moreover, even as women are produced as the paradigmatic civilian, the protections afforded to them are couched in prescriptive rather than prohibitive language. Thus, even if discourses of gender produce the distinction of combatant and civilian, the 'civilian' produced is not worthy of much protection at all! Disrupting the presumed correspondence between protection and harmlessness illuminates the multiple dimensions of power at play in producing and protecting the 'civilian;' power whose effects are not solely benign.

XIII.

Thus, to accept as the Commentaries wish us to do, that these interpretations of sex and sex difference offered within are but "normal and natural" is to fail to inquire after the productive discourses of gender which achieve this effect (Pictet, et al. eds., 1958: 119). Recognizing that appeals to what is "normal and natural" consolidate and legitimate specific historical and social norms, should encourage us to trace the production of these ostensibly natural distinctions "in the service of other political and social interests" (Scott, 1999). The formulation of the distinction between combatant and civilian draws upon and contributes to a particular vision of a gendered domestic and international order—as we saw most vividly with Grotius, but is no less evident in the Commentaries and statements quoted above.

There are at least two ways that this is evident. First, in the persistent way in which observance of this distinction sorts states according to degrees of barbarism and civilization, as it did similarly in the work of Grotius. Observance of the distinction, specifically the treatment of women with all due consideration of their sex, remains the hallmark of "every civilized country," whereas transgression conjures the "worst memories of the great barbarian invasions." (Pictet, et al. eds., 1958: 205). The recursive relationship between the combatant civilian distinction and sex and sex difference generates and regulates a particular international order. As the IV Convention and its Commentaries make clear, this international order has as its foundation and future the heterosexual family—the "natural and fundamental group unit of society" (Pictet, et al, 1958:202). It is upon this foundation that an international order can be said to arise.

If it is thought that the attention to women as family is by now outdated, think again. On October 12, 1999, the Director of the International Committee of the Red Cross told the United Nations General Assembly that "when one thinks of "women," one also naturally tends to think of the family."Indeed, a large part of postwar reconstruction was occupied with the reconstruction of a highly particular vision of a heterosexual, nuclear family. Postwar states as varied as the USSR, US, and the UK shared a singular emphasis on the recreation of "traditional gender relationships, the familiar and natural order of families, men in public roles, women at home" (Higonnet et.al 1987,41) The promotion and defense of the conventional family, challenged by widespread participation of women in the work of war, shaped postwar policies and politics. In both the United States and France, for example, "the short lived affirmation of women's independence gave way to a pervasive endorsement of female subordination and domesticity" (May, 1998:89). Indeed, during the last year of war in Britain, "women auxiliaries

were given time off for 'mothercraft' lessons, in order to prepare them for and remind them of their peacetime role" (de Groot, 2000: 15).

These initiatives positioned and governed women as wives and mothers, as sexually available but not sexually adventurous, while instituting men as husbands and providers the defenders of home and hearth. Therefore, the reconstitution and reaffirmation of the *heterosexual* family, the placement of women within that family, and in need of male protection, was of utmost importance for a secure domestic order that in turn, informed the international. Within the ample play of these social and juridical discourses of gender, the salience of reproductive capability and sexual vulnerability as the marker of sex and sex difference is made intelligible. These distinctions of sex that make possible the distinction of combatant and civilian are themselves neither normal nor natural: they are produced by historically particular discourses of gender. And, just as sex and sex difference ensure the self-evidence of the combatant: civilian distinction, so too does that distinction reaffirm the naturalness of sex difference.

XIV.

My reading of both Grotius and the 1949 IV Convention allows us to recognize how these interpretations of sex and sex differences that each accepts as given, and as paradigmatic of the differences of 'combatant' and 'civilian,' are effects of discourses of gender. This, then, is not only where a genealogy of the laws of war serves its purpose, but also where an understanding of discourse of gender as productive reveals its benefits. We are able to identify both as classic examples of what Wendy Brown (1995: 66) calls instances "in which differences that are effects of social power are neutralized through their articulation as attributes."

Therefore, I maintain my claim that the distinction between combatant and civilian which founds and governs the laws of war and, indeed, contributes to its formative power, is an effect of particular, historically rooted formations of sex and sex differences. Further, I argue that this remains even in the case of the 1977 Protocols, which formally define the concept and category of the civilian in the laws of war. The very definition of the civilian in the Protocol draws directly from Article 13 of the IV Convention that, as I just argued, relies upon discourse of gender for its very possibility. As each treaty of the laws of war is responsive such that "every new instrument can only have a purely cumulative or supplementary (but no destructive) effect," by it own terms it would be impossible to negate the continuing influence of the discourse of gender in instituting the possibilities of the distinction itself (Abi-Saab,, G. 1984:276). The contemporary characterization of women who fight as "de-sexed" is but one indication of the continuing force of gender in the maintenance of this distinction (Lindsey 2001:24; Farr 2004)

When the difference of combatant and civilian is legitimated by reference to putatively biological differences of men and women, sexual difference is established not only as a natural fact but as an ontological basis for political and social differences as well. In other words, discourses of gender *produce* the distinctions of sex and sex difference we are now accustomed to identifying as the *ground* of those differences. Consequently, we can see how the very distinction of combatant and civilian is dependent upon, not merely described by, discourses of gender. Thus, understanding of the discursive power of gender opens the *entirety* of the laws of war, its structure, its effects and its role in global governance to analysis—not simply those areas in which women are its explicit subjects. Finally, an analysis of discourses of gender at work in

both Hugo Grotius and in the 1949 IV Convention assists us in tracing the ways in which gender is pivotal not only to the establishment of differences of sex and of the civilian, but also to the production and governance of international (civilized) and domestic (familial) orders.

Denaturalizing sex and sex difference, while tracing its prodigious effects, certainly opens the possibilities for transformation while, simultaneously, reminding us of the enormous responsibilities entailed in so doing. For if we are to denaturalize sex and sex difference, thus overturning the foundation of the distinction of combatant and civilian, how shall we re-imagine the formulation of this distinction upon which lives depend? How shall we answer who is a civilian, how do we judge, and upon what grounds? Contemplating these questions anew leads us to recognize how an analysis of modes of power necessarily involves an analysis of ethical possibilities; for in seeking to answer them we cannot help but imagine different orders and new forms of governance.

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[i] I thank Lisa Disch and Adam Sitze, as well as Michael Barnett and Bud Duvall, for their incisive comments.

[ii] See the decisions of the ICTY judgments in Tadic (1999) Celebici, (1998) Furundzija, (1998) and Foca (2001) and the ICTR judgments of Akayesu (1998) and Musema (2000)

[iii] This construction is eerily echoed by the envoy from the Russian Federation during the October 24, 2000 Security Council debate (S/PV.4208). He states that: "the words 'women, peace, and security' were a harmonious and natural combination. An unnatural combination was 'women and war' as was 'women and armed conflict'"

[iv] "This maintenance of the social order. . . is the source of law properly called (Grotius, 1625: 12, 17)."

[v] Here the influence of Aristotle comes to the fore. Differences of sex are translated into moral, social, and political distinctions that, in turn, are taken as legitimating, and demonstrating the existence of, putative *biological* differences upon which these social distinctions are premised.

[vi] The third group is those who "also should be spared" because their occupations are solely religious or concerned with letters"" or farming, mercantile and, finally, prisoners of war.

[vii] For Grotius's acknowledgement of his debt, see "Prolegomena" page 22. See also van der Molen (1968), Borschberg (1994),Meron (1998), and Haggenmacher (1990).

[viii] I draw my analysis from the final records of the preparatory conferences for the IV Convention and the official Commentaries, produced under the auspices of the International Committee of the Red Cross, which paraphrase and explicate the meanings of the treaties. These documents, often written by the participants in the preparatory conferences, are of utmost significance and importance in interpreting the treaties of the laws of war and are highly "useful for clarifying the intended scope and operation of the provisions" (Gardam. and Jarvis, 2001: 258). The Commentaries (Sandoz 1987:xxv) state that "if the interpretation of the texts gives rise to some uncertainty the opinions put forward are *legal* opinions, and not opinions of principle."