**The Use of Human Shields and International Criminal Law**

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**Introduction**

The recent hostilities between Israel and Hamas have attracted a great deal of media and public attention. However, while a number of media reports have alluded to the legality *vel non* of certain actions committed by both sides, they have thus far contained little in-depth legal analysis.

One practice that has attracted significant attention is the purported use of “human shields” by Hamas. This post will present a legal analysis of such practices, and examine the possible implications of that analysis on the current situation in Gaza. Although it would be interesting to examine as well the possible criminal responsibility for statements endorsing or encouraging this conduct, that question will not be examined in the framework of this post.

**The Use of Human Shields under International Law**

In international humanitarian law (IHL), the term [**“human shields”**](http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2111?rskey=jLFmJ6&result=1&prd=EPIL) concerns “civilians or other protected persons, whose presence or movement is aimed or used to render military targets immune from military operations.” The use of human shields both in international armed conflicts (IACs) and in non-international armed conflicts (NIACs) is considered a violation of customary international law ([***von Leeb***](http://justis.com/document.aspx?doc=f7jsrUrxA0LxsKjIo4KJn2yZm1WIivLerIOJij5evmnsm5qdoJqJnZmsm1mYm3yJiSiIs1jxAZrwAJrxAV5wsKjIoW0ha), 15 ILR 395, n.1; [**ICRC, Rule 97**](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule97)). Treaty law directly prohibits such practice in IACs ([**GCIV 28**](http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=732D7EA50DF1A5ECC12563CD0051BBF0); [**API, art. 51(7)**](http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=4BEBD9920AE0AEAEC12563CD0051DC9E)) and indirectly in NIACs (*e.g.*, [**CA 3**](http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=BAA341028EBFF1E8C12563CD00519E66) with [***Category ‘C’ Claims***](http://justis.com/document.aspx?doc=d7jsrUrxA0LxsKjIo4Ktn1aJm5WIivLerIOJij5evmnsm5KJnJqJnZmsmWKZiYatnIWIikvNCPnhzPngDP9MBjrMi6atF&relpos=4), 109 ILR 441).

Post-Second World War tribunals considered the use of human shields – focusing on POWs – to be a war crime ([***Student***](http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-4.pdf), 118-120; [***von Leeb***](http://justis.com/document.aspx?doc=f7jsrUrxA0LxsKjIo4KJn2yZm1WIivLerIOJij5evmnsm5qdoJqJnZmsm1mYm3yJiSiIs1jxAZrwAJrxAV5wsKjIoW0ha),15 ILR 395, n.1). This was codified in the [**Rome Statute**](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf), which explicitly prohibits the use of human shields in IACs in art. 8(2)(xxiii), criminalizing utilization of “the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.” There lacks such a provision concerning the customary prohibition of the use of human shields in NIACs. Yet, considering the famous *Tadić* dicta that the dichotomy between IAC and NIAC crimes “[**should gradually lose its weight**](http://www.icty.org/x/cases/tadic/acdec/en/51002.htm)” and that “[**the current trend has been to abolish the distinction and to have simply one corpus of law applicable to all conflicts**](http://books.google.co.il/books?id=4LSPtqicFUcC&pg=PA82&lpg=PA82&dq=%22the+current+trend+has+been+to+abolish+the+distinction+and+to+have+simply+one+corpus+of+law+applicable+to+all+conflicts%22&source=bl&ots=bJ1tFj8rL9&sig=ag_vSeANYsknOYD208UmI4wbuZI&hl=en),” it could be argued that the analysis of Rome Statute’s provision concerning human shields in IACs is relevant to the analysis of the customary prohibition of the use of human shields in NIACs as well.

The specific elements relevant to the definition of the crime of using human shields in the International Criminal Court’s [**Elements of Crimes**](http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf) document are as follows:

*1. The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict.*

*2. The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations.*

In order to fulfil the required *actus reus* in Element 1 of the crime, it is not necessary to force civilians to relocate close to a military objective. The mere placement of military assets in the vicinity of civilians fulfils this requirement.

Since the *actus reus* of this crime is rather broad, it seems that great emphasis is placed on the *mens rea*. Thus, in order to be considered a crime of using human shields, the *actus reus* must be performed with the intention to “shield a military objective from attack or shield, favor or impede military operations.” Additionally, this crime does not require any result; rather, it focuses solely on the acts and intention of the belligerent fearing an attack. Admittedly, there has not been international jurisprudence when no harm has occurred, which may cast doubts upon the customary nature of this alternative. In this case, the discussion is purely theoretical, since the use of human shields by Hamas has often resulted in actual harm. Nevertheless, it should be noted that some actions involving the use of human shields can also be examined through the prism of other war crimes, such as using children to actively participate in hostilities ([**art. 8(2)(b)(xxvi), (e)(vii)**](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf); [***Norman***](http://www.refworld.org/docid/49abc0a22.html), ¶53) or generally [**Common Article 3 to the *Geneva Conventions* of 1949**](http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=BAA341028EBFF1E8C12563CD00519E66) ([**art. 8(2)(a), (c)**](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf); [***Blaškić***](http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf), ¶176), which have been established as customary international crimes.

**The Use of Human Shields by Hamas**

It is widely reported that the acts of Hamas clearly fall within the *actus reus* of the crime, through the placement of ammunition, rocket launchers and other military assets in [**civilian homes**](http://www.nytimes.com/2014/07/24/world/middleeast/israel-says-hamas-is-using-civilians-as-shields-in-gaza.html?_r=0), [**mosques**](http://www.washingtonpost.com/world/gaza-residents-scramble-to-make-most-of-five-hour-truce/2014/07/17/e5485fce-0d7e-11e4-8341-b8072b1e7348_story.html), [**hospitals**](http://www.washingtonpost.com/opinions/the-us-should-push-for-the-disarming-of-hamas-in-gaza-israel-cease-fire/2014/07/23/7c2d1d9e-1284-11e4-8936-26932bcfd6ed_story.html) and [**schools**](http://www.unrwa.org/NEWSROOM/PRESS-RELEASES/UNRWA-CONDEMNS-PLACEMENT-ROCKETS-SECOND-TIME-ONE-ITS-SCHOOLS). While this practice has been the focus of widespread condemnation (see [**here**](http://online.wsj.com/articles/kerry-condemns-hamas-rocket-attacks-1405427841) a statement by the US Secretary of State), Hamas has openly and explicitly endorsed this policy. For example, a [**Hamas spokesperson called on**](https://www.youtube.com/watch?v=eQ6S0-o3uFI) Palestinians in Gaza to “oppose the Israeli occupation with their bodies alone,” explaining that this was an effective way to thwart Israel’s attacks. This was followed by other, similar statements, such as [**this one by Hamas’s Interior Minister**](http://in.reuters.com/article/2014/07/13/us-palestinians-israel-idINKBN0FI0WW20140713). These are all examples of the ways in which Hamas “took advantage of the location of one or more civilians.” The particular intent behind these acts is also easily established. In these statements, Hamas officials admit openly and explicitly that their intention is to use the civilian population in Gaza in order to shield their rockets and operatives. Such statements raise interesting questions regarding the criminal responsibility of senior Hamas officials that go beyond the scope of the present post.

The definition of the crime as one that does not require any specific result is an indication that the rationale behind the criminalization of using human shields may go beyond the protection of the civilian population. While the use of human shields obviously endangers those being used in this manner, it also greatly threatens respect for and adherence to the law, and undermines the most basic foundations of IHL. As [**stated**](http://www.marshallcenter.org/mcpublicweb/mcdocs/files/college/hshlds-schmitt.pdf) by Prof. Michael Schmitt, the use of human shielding turns the “military necessity-humanitarian considerations balance on its head through use of the former to achieve the latter.” In this regard, the use of human shields is an abuse of the legal protection awarded to civilians. This practice unfairly shifts the burden of consequences for the harm caused to the civilians acting as human shields to the law-complying party to the conflict. Thus, it is crucial that the international community strive to deter this practice.

**Reducing the Incentives for the Use of Human Shields**

Deterrence from the use of human shields can be achieved in two ways. One, which is not the focus of this post, is to interpret the law in a way that reduces the legal advantages that a belligerent could expect to achieve from using human shields. In that vein, [**Prof. Yoram Dinstein**](http://www.cambridge.org/us/academic/subjects/law/humanitarian-law/conduct-hostilities-under-law-international-armed-conflict-2nd-edition) (153-55), for example, opined that some human shields should be discounted during proportionality analysis. Under that approach, and according to the [**British Manual**](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf) (§5.22.1) “the enemy’s unlawful activity may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage expected” (for an even more lenient approach under customary law, see: [**Parks**](http://heinonline.org/HOL/LandingPage?handle=hein.journals/airfor32&div=4&id=&page=), 162ff). That is to say, the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that – if an attempt is made to shield military objectives with civilians – civilian casualties will be higher.

Another way to reduce the incentive of using human shields is effective enforcement of the prohibitions that IHL imposes on the belligerent. The principle of distinction is one of the “[**intransgressible principles**](http://www.icj-cij.org/docket/files/95/7495.pdf)” of the law of armed conflict, and the building block upon which so many other key provisions and principles of the law are founded. This principle has two parts; the first is the obligation to distinguish between innocent civilians and legitimate targets in the *targeting* process (“distinction in targeting”), while the second is for persons who are fighting to *distinguish themselves* from those who are not fighting so as to ensure and maximize the protection of innocent civilians (“distinction in conduct”). If the international community takes the principle of distinction seriously, it is time, [**as Prof. Laurie Blank argues**](http://scholar.valpo.edu/cgi/viewcontent.cgi?article=2242&context=vulr&sei-redir=1&referer=http%3A%2F%2Fscholar.google.co.il%2Fscholar%3Fq%3Dlaurie%2Bblank%2Btaking%2Bdistinction%2Bseriously%26btnG%3D%26hl%3Den%26as_sdt%3D0%252C5#search=%22laurie%20blank%20taking%20distinction%20seriously%22), to stop focusing solely on the violations of distinction in targeting, and focus as well on the violations of distinction in conduct. Currently, militants benefit both tactically and strategically from the use of the civilian population as a shield and as a disguise. Zero tolerance for such crimes and relentless efforts to hold accountable those responsible for such practices would contribute to the fight against the use of human shields and, eventually, help reduce the suffering of the civilian population.