

Caught in Cross-fire:

The ICC and the Challenges of Assessing Human Shields Allegations in the Case of Palestinian Armed Factions

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1. Introduction

The employment of "human shields" has maintained one of the most prominent war crimes allegations during the Israel-Palestine conflict. In light of the ICC Pre-Trial Chamber's decision on jurisdiction over occupied Palestine territories, namely Gaza and the West Bank, including East Jerusalem, this article will analyse the legal criteria for the conviction for the use of human shields under Art 8 (2)(b)(xxiii) Rome Statute. It will first outline how the initially military tactical designation of human shields as "lawfare" frames the ensuing war crimes allegation. Then allegations with regards to Palestinian armed groups falling under the ICC jurisdiction will be outlined. The subsequent section analyses the elements of crime under Art 8 (2)(b)(xxiii). The final section will turn to the issue of "voluntary human shields" and where it is situated within the present discourse.

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2. Human shielding as a form of lawfare

When a party employs civilians to shield its military objects, it forces a contrived decision onto its adversary to either pursue the military target and violate IHL principles or adhere to IHL and give up a legitimate military target. This practice is characterised as "lawfare", the use or rather misuse of the law, as a substitute for traditional military means to achieve a military objective. The exploitation of the ius in bello rules of conduct is referred to as ["battlefield lawfare"](#) or ["compliance leverage lawfare"](#). The parties capitalize on the adversary being compelled to respect IHL, which does not depend on reciprocity. Any violation of its principles by one party does not release the adversaries from their own legal obligations under IHL.

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Determining alleged war crimes of utilization of human shields is complicated by the inevitable presence of civilians in urban warfare conducted in the Israel-Palestine conflict. On the one hand, combatants can exploit the tactical advantages of camouflaging within the "clutter" of cities, because in adhering to the principle of distinction the adversary cannot easily target an enemy moving indistinguishably amidst civilians, as he ["enjoys a legal sanctuary ... that is as secure as any fortress bristling with anti-aircraft guns."](#) On the other hand, they can relativize their IHL obligations by making the case that because combat takes place among the presence of civilians it would not be feasible or next to impossible to adhere to the principle of distinction or precautionary measures, as these requirements factually cannot be met due to the nature of urban warfare.

Combat in a densely populated area, such as Gaza, one of the most densely populated areas in the world, means that a party could risk directing an attack causing collateral damage to civilians. This leads to another lawfare strategy, in which a party asserts post hoc that despite ensuing civilian casualties the principle of distinction was not violated, as these casualties could have been attributed to human shields providing cover for legitimate military targets. Even if the casualties were excessive in relation to the anticipated military advantage, it could be argued that the presence of human shields justifies the ["discounting"](#) of the proportionality principle.

Allegations of war crimes under Art 8 (2)(b)(xxiii) Rome Statute are, thus, commonly framed in terms of these two lawfare strategies: in the first case the “human shielding” effects from the presence of civilians is exploited to immunise legitimate targets or combatants themselves from attacks; in the second case civilians are branded as human shields in hindsight to legitimise an indiscriminate attack or one which resulted in unintended casualties.

3. Allegations of conduct amounting to war crimes Art 8 (2)(b)(xxiii) Rome Statute falling under the ICC’s jurisdiction

On 01.01.2015 Palestine submitted to the Court that it accepted its [jurisdiction from 13.06.2014](#) onwards, thus only alleged crimes committed after this date will be subject to investigation and conviction. The following three instances could be relevant for the ongoing debate on the issue:

(i). The launching of rockets from civilian areas: Alleged points of launch include educational, UN, Red Cross facilities, mosques, power plants, hospitals, hotels. During the 2014 Gaza conflict, [France24](#) aired footage of Hamas rocket launchers outside homes, a U.N. building, and a hotel in which journalists were staying. The IDF claimed that it has a documented log, including video footage of such alleged incidents published by their [Military-Strategic Information Section](#).

(ii). The use of civilian facilities for military purposes: One notable target during the 2014 Gaza War was the [Wafa Hospital building](#), which was deemed by the [IDF](#) as “command center, rocket-launching site, observation point, sniper’s post, weapons storage facility, [and] cover for tunnel infrastructure.” This is an example of allegations of indiscriminate attacks met with equally grave allegations of human shielding. The UN also [reported](#) rockets hidden in three of the schools run by the [UNRWA](#), leading many [outlets](#), to link this finding to Hamas’ strategic weapons storage in civilian facilities.

(iii). The [2018-2019 Gaza Border Protests](#) (“The Great March of Return”) were a series of demonstrations near the Gaza-Israel border from 30 March 2018 and onwards.

During peaceful demonstrations, in which no armed action from the Palestinian side took place, protestors demanded that displaced Palestinian refugees be allowed to return to lands as well as protesting the Gaza blockade and US's recognition of Jerusalem as capital of Israel. While the initial demonstrations were organized by independent activities, they were subsequently [endorsed by Hamas](#), making these protests subject to [allegations by the IDF](#) of being a front of “voluntary human shields” for Hamas to launch attacks against Israel. However, the [UN Commission of Inquiry on these protests](#) was clear that the cases where a confrontation took place between Hamas and Israel and involved rockets firing, were “outside the context of the demonstrations”.

4. Criteria for conviction for war crimes under Art 8 (2)(b) (xxiii) Rome Statute

4.1. Standard of proof and the constitutive elements of the crime

Pursuant to Art 66 (3) a conviction for crimes under the Rome Statute requires that each constitutive element of the crime is proven beyond reasonable doubt. The ICTY in [Prosecutor v Stakić](#) held it was fulfilled when the inference drawn from the evidence presented was the “only reasonable inference” possible. The standard, however, as underlined by the [Prosecutor commenting](#) on the Trial Chamber’s verdict in [Prosecutor v Mathieu Ngudjolo](#), does not require proving guilt “beyond any doubt”, meaning that all competing hypotheses on guilt or innocence be proven or disproven.

The [constitutive elements](#) of Article 8 (2)(b)(xxiii) are:

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.
3. The conduct took place in the context of and was associated with an international armed conflict.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

4.2. Asymmetric warfare in occupied territory as an international armed conflict?

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The third and fourth elements are common constitutive elements of war crimes under Art 8 Rome Statute. Given that war crimes sanction serious violations of IHL, the constitutive elements under article 8 (2) of the Statute must be interpreted within the established framework of the international law of armed conflict. Regarding the fourth element, there is [no requirement for a legal evaluation](#) by the perpetrator as to the existence of an armed conflict or its character as international or non- international, i.e. the perpetrator only needs to be aware of the factual circumstances that would establish the existence of an armed conflict.

However for the third element of the more objective element of the conduct having taken place in the context of and was associated with an international conflict, more intricate considerations need to be examined. The first question which arises is whether asymmetric conflicts between a state and non-state groups, in our case between Israel and Hamas, in occupied territory, such as in Palestine, could be characterized as an “international armed conflict”. The second is whether IHL is applicable equally on both sides to asymmetric wars on occupied territory. These questions are critical, because without establishing the existence of an international armed conflict, any alleged conduct of human shielding would not be punishable under Art 8 (2)(b)(xxiii), which specifically sanction war crimes in international armed conflicts.

According to Judge Cassese, the former President of the ICTY and STL, “An armed conflict which takes place between an Occupying Power and rebel or insurgent groups ... in occupied territory, amounts to an international armed conflict.” ([Cassese 2005, 420](#)). The ICJ also observed in its [Wall Advisory Opinion](#) (paras 90-101), that the law of international armed conflict apply to occupied Palestinian territories. [Art 1\(4\) Additional Protocol \(AP\) I](#) to the Geneva Conventions furthermore extends the meaning of international armed conflicts to include “armed conflicts in which peoples

are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination”. However, some still argue whether the occupation of Gaza has continued since the Israeli withdrawal of 2005, with others pointing to Israel’s “sufficient control” of air space and borders, thus of humanitarian supplies. Within the international community, including in the UNGA resolutions, the reports of the UN fact finding missions to Palestine in 2009, 2014, and 2019, and in the reports of the ICRC, [Gaza still considered as an occupied region](#).

If Israel is still considered an Occupying Power past the cut-off date of 13.06.2014 for the Court’s temporal jurisdiction over occupied Palestinian territories, then the rules of international armed conflicts would apply pursuant to Common Art 2 (2) of the Geneva Conventions, which covers occupation after an international armed conflict. The unclear status of a territory does not prevent the applicability of the Fourth Geneva Convention. Occupation exists as soon as a territory is under the effective control of a State that is not the recognized sovereign of the territory, thus the applicability is not contingent on the subjective considerations of the Occupier (see 2016 [Commentary on the Geneva Conventions, Art 2, para 324, 327](#)). Thus, if hostilities occur between Israel and the Palestinian Authority or Hamas, rules of international armed conflict would apply (cf [Paulus and Vashakmadze](#) 2009, 113-115).

It is worth noting that the Pre-Trial Chamber has explicitly held in its February 2021 [decision](#) that the Occupied Palestinian Territories, namely Gaza and the West bank, including East Jerusalem, fell within its jurisdiction (paras 114 et seq, see esp. 121-123). The decision recognized Gaza, the West Bank, and East Jerusalem as “the occupied Palestinian territories” that compose together the State of Palestine. This was an indication of the court consideration of Israel’s continued status as an Occupying Power, thus the existence of an international armed conflict. This would open the scope of application of war crimes under Art 8 (2)(a) and (b) for conduct in said territories, which would encompass allegations of human shielding.

4.3. The tension between allegations of human shielding and combat in densely populated areas

The *actus reus* of Art 8 (2)(b)(xxiii) involves either the direct “*moving*” of civilians or “*taking advantage*” of their presence in order to shield a military objective from attack or shield, favour or impede military operations. The first *modus operandi* of moving civilians can more easily be correlated with an aim to achieve a military advantage, thus be identified as conduct which could constitute the *actus reus* of Art 8 (2)(b)(xxiii). However, it is difficult to identify acts of the second *modus operandi*, the “*taking advantage*” of the presence of civilians, when the combat takes place in a densely populated urban area, such as Gaza, where members of armed forces or armed groups are operating in the proximity of or amongst civilians

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The [UNHRC Report](#) of the detailed findings of the Commission of Inquiry for the 2014 Gaza War could serve as a starting point for both factual and legal analysis on this conflict, which has been made available to the international community. The Commission noted regarding the launch of rockets from densely populated areas and use of civilian facilities for military purposes that the obligation to avoid to the maximum extent possible locating military objectives within densely populated areas was not always complied with (para 478). On the urban warfare conducted in Gaza the UNHRC Report makes a pertinent observation:

“473. [...] parties to the conflict should take all feasible precautions to protect the civilian population and civilian objects under their control from the effects of attacks and to the maximum extent feasible avoid locating military objectives within or near densely populated areas.[...] Gaza’s small size and its population density makes it particularly difficult for armed groups always to comply with these requirements. The ICRC [...] notes that several delegations [...] commented that for densely populated countries, the requirement to avoid locating military objectives within densely populated areas would be difficult to apply.”

It is important to note that these are observations of the hazard of parties on both sides engaging in the practice of using human shields. The report does not come to any findings or conclusions that human shields were in fact employed by Palestinian factions. Various reports and outlets have expressed that these allegations of Palestinian, i.e. Hamas [usage of human shields are a “myth”](#) and that there is no concrete evidence to support such allegations.

The obligation to take precautions in attack is set out in Art 57, while the obligation to take precautions against the effects of attacks is set out in 58 AP I. Both provisions lay down the parameters for targeting or other combat operational decisions to comply with the fundamental rule of distinction. The 1987 Commentary on the AP I underlines that *“It is clear that the precautions prescribed here will be of greatest importance in urban areas because such areas are most densely populated.”* However, the obligation set out in Art 57 and 58 refers to “feasible” precautions, which is a criteria, which could be exploited by parties, especially in urban warfare to relativize their obligation. In respect of targeting decisions some military manuals outline an additional duty to obtain the best possible intelligence, including information on concentrations of civilian persons, specifically protected objects, the natural environment and the civilian environment of military objectives ([Rule 15 Customary IHL](#)).

While Art 57 sets out the precaution of the attacker in its targeting decision, Art 58 in complementary to Art 57 ([Jensen 2016, 155](#)) sets out the obligation of the defender to remove civilians and civilian objects from the vicinity of military (targeting) objectives (lit a), to avoid locating military objectives within or near densely populated areas (lit b) and to take “other necessary precautions” to protect civilians and civilian objects under one party’s control against the dangers from military operations. Lit c would indicate that the strategic designation of civilian or otherwise protected objects as a “chameleon”, i.e. a target changing its appearance from civilian to military or the vice versa could also be considered as a “taking

advantage”, given that civilian objects would likely entail the presence of civilians, e.g. hospitals, schools, places of worship (*cf* 1987 [Commentary AP I, Art 58](#), para 2254).

Examples of active measures demonstrating adherence to Art 58 include evacuation service, coordination of the emergency services and taking other adequate civil defence measures or the broadcasting of warnings such as air raid warnings ([Rogers 1996, 76](#)). Advancing technology, such as communication devices, sensors and markings are also proposed to be factored in as “feasible” precaution (*cf* Jensen 2016, 170-170). All the acts laid out in Art 58 AP I, if adhered to would negate the taking advantage of civilian presence, as these rules were designed to avoid or minimize incidental civilian losses on the basis of their assessment of the information from all sources which is available to them at the relevant time (*ex ante* assessment). Thus, establishing conduct or military decision-making in adherence to Art 58, would constitute exonerating circumstances against allegations for human shielding, especially if such can be proven despite the factual difficulty of adherence in urban warfare.

In respect of “feasibility” under Art 58, the Rapporteur of the Working Group at the Diplomatic Conference leading to the adoption of the Additional Protocols reported that it reflected the concern of states with small and/or densely populated areas, which stressed that they would find it difficult to separate civilians and civilian objects from military objectives and that even large countries would find such separation difficult or impossible to arrange in many cases (see [Rule 22 Customary IHL](#)). The concept of “feasibility” itself was thus conceived with urban warfare densely populated specifically factored in, meaning the fact of Gaza’s densely populated area would not only preclude the applicability of Art 58, but rather strongly warrant the applicability of Art 58. Given the history behind Art 58, it is more likely that failures to adhere to Art 58 could be taken as suspect deliberate tactical “taking advantage” under Art 8(2)(b)(xxiii) [*e contrario*, why else would armed forces eschew their duties to “segregate and protect” civilians from the battlefield, (*cf* Jensen 2016, 148)]. From the above, the inherent “difficulty” of taking such precautions in densely populated

areas would not likely carry weight in justifying non-compliance. However, for a thorough discussion on how the spatial specificity of Gaza, and asymmetric capabilities of the parties prove or deny the limits of the extent practicable under Art 58, see the following [previous article](#).

4.4. The specific intent to use human shields vs failure to take precaution

For the second element, the *mens rea* the perpetrator must carry intent in relation to the conduct and its consequences. Given that military conduct is a strategy-based endeavour, which inherently involves exploiting tactical advantage of the terrain, this challenges the assessment of where failure to adhere to IHL ends and the intent to exploit the presence of civilians begins. Incidents such as the Hamas spokesperson calling for civilians to act as human shields by standing on their roofs during airstrikes or the finding of military manuals advocating for such practices in the UNHRC Report (para 472, 483) are indications of intent, however do not solidify the existence of intentional decision-making to exploit civilian presence linked to conduct that can be considered an execution of that military strategy. Establishing specific intent under Art 8(2)(b)(xxiii) will most likely be linked to proving a deliberate violation of Art 58, e.g. intentional decision to eschew precautions, which can be traced by in decision making or plans by members in command positions in the face of or in the knowledge of a potential attack or initiation of operations from the other side.

4.5. Case-law on human shields

The case-law on human shields is limited to an indirect analysis by the ICTY which considered the use of human shields as a form of inhumane or cruel treatment or hostage-taking in the [Blaškić](#) (paras. 711, 714, 716, 750):

“711. [...] allegedly engaged in [...] using the detainees [...] on the front-line [...] as human shields. The detainees thus placed in a dangerous situation around (or in) buildings constituting military objectives [...]

714. Witness Hrustic was seated in a shell crater opposite the Hotel: [...] One of the soldiers said, [...] “you are going to sit here now and let your people shell you, because they have been shelling us up to now[...].”

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In [Aleksovski](#) (para. 129) the use of human shield was considered an outrage upon personal dignity, while in [Naletilić and Martinović](#) (para 283) the tribunal found that prisoners were forced to carry wooden rifles as human shields. In [Kordić&Čerkez](#) the Appeals Chamber reversed a count of inhumane treatment for the use of prisoners human shields, who were forced to dig trenches, on the grounds that the conviction was based on witness’ testimony which merely confirmed seeing freshly dug trenches (para 919), thus there were no factual findings on the actual use of human shields in the Trial Chamber’s judgement (para 940). These ICTY findings indicate that witness testimony, but only when firsthand account of actual use of persons as shields, could satisfy Art 8 (2)(b)(xxiii).

4.5. A note on distinguishing between human shielding and perfidy

The taking advantage of the presence of civilians, from a dogmatic point of view, should be distinguished from the taking advantage of combat amongst civilians through “blending in” by feigning civilian, non-combatant status through eschewing the usage of combatant emblems or feigning protected status by actively using signs and emblems of the UN, Red Cross or similar entities. This is known as the prohibition of perfidy under Art 37 AP I, however only when perfidy is resorted to in order to kill, injure or capture an adversary, which constitutes a war crime for “treacherous” killing or wounding under Art 8(2)(b)(xi) in international armed conflicts as well as under Art 8(2)(e)(ix) in non-international conflict (unlike human shields).

5. Voluntary human shields

When civilians voluntarily position themselves to create a physical obstacle to military operations of a party to the conflict, they could be considered as directly participating in hostilities, for which a threshold of harm must be met, a direct caution and a belligerent nexus between conduct and harm must be present. As human shields are employed to force self-imposed restraint of the adversary to ensure compliance to IHL, diminishing the effectiveness of their conduct, it is contested if the adverse effect must be a physical obstacle or if [additional legal constraints qualify as adverse effects](#).

An [ICRC Report](#) on direct participation in hostilities held that there was general agreement during the expert meetings that involuntary human shields could not be regarded as directly participating in hostilities, the experts were unable to agree on the circumstances in which acting as a voluntary human shield would, or would not, amount to direct participation in hostilities. This is a crucial question, given that voluntary human shields do not have combatant status, if captured as “de facto” participants they will not be considered prisoners of war and therefore would not enjoy immunity from legal proceedings under domestic law for acts committed during hostilities. Ultimately the ICRC Report concludes that voluntary human shields in practice are considered to pose a legal, rather than a physical obstacle to military operations, thus their conduct does not amount to direct participation in hostilities. The fact that some civilians voluntarily and deliberately abuse their legal entitlement to protection against direct attack in order to shield military objectives does not entail the loss of their protection and protected status as civilians (see ICRC 2009, 56). A comprehensive analysis of IHL scholarship on voluntary human shields in Gaza can be found in this [previous article](#).

Turning to the voluntary human shield allegations regarding the demonstrators during the 2018/2019 Gaza border protests. In this regard a TWAIL perspective has emerged and refers to such situations as “[proximate human shields](#)”, whereas “proximity does not refer to civilian populations trapped in a besieged city or near state military forces within a war zone, but rather to civilians trapped in proximity to

irregular fighters [in the present case Hamas], who are usually cast as terrorists [...] manipulation of 'proximate shielding' that has the capacity to render entire urban areas as legitimate targets [...] the framework of "shielding" effectively subsumed the concept of "people's war" to the detriment of anti-colonial struggles". This falls within the considerations on the legal framework that applies to asymmetric warfare in occupied territories briefly touched upon above, given that this constellation is unique to civilians living under and resisting through civil unrest an armed conflict and occupation.

6. Conclusion

In assessing the alleged use of human shields or exploitation of the presence of civilians for military advantage constitutes a war crime there must be an awareness of what kind of warfare is at play: the immunisation of legitimate targets or post hoc legitimisation of indiscriminate attack. In the present discourse the UNHRC Report on 2014 Gaza War and the ICTY's case law on the use of human shield as inhumane treatment provide two anchoring points guide the reconstruction of the facts and collection of evidence to prove war crimes under Art 8 (2)(b)(xxiii) Rome Statute. In doing so, establishing the *actus reus* and *mens rea* under Art 8 (2)(b)(xxiii), esp. regarding the element of "taking advantage", requires careful considerations of whether combat in a densely populated area such as Gaza legitimately constrains combatants' ability to adhere to IHL principles of distinction in attack and conduct, as well as adhere to obligations to take feasible precaution and whether combatants are in fact gaming the parameters of urban warfare for their military advantage.