

Israel – Hamas 2023 Symposium – What is and is not Human Shielding?

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by [Michael N. Schmitt](#) | Nov 3, 2023



The use of human shields is looming large in the conflict between Israel and Hamas. President Biden has on numerous occasions charged Hamas with using civilians as human shields, as has European Commission President Ursula von der Leyen. The practice also took center stage at a 24 October UN Security Council meeting on the situation in Gaza. There, Secretary-General Guterres explained bluntly that “protecting civilians can never mean using them as human shields.” Secretary of State Antony Blinken agreed: “Palestinian civilians must be protected, and Hamas must cease to use them as human shields.” The UK Minister of State for Security, Tom Tugendhat, was more direct, charging, “We know that Hamas are using innocent Palestinian civilians as human shields; they have embedded themselves in civilian communities.” So too was Germany’s Foreign Minister, who warned, “We must not be fooled by Hamas’ playbook,” and stressed “their use of women and children in Gaza as human shields, and their hiding of weapons under supermarkets, apartment blocks and even hospitals.” Representatives of Belgium, Luxembourg, and Ukraine echoed such condemnation.

Of course, the Israel Defense Force (IDF) is also underscoring Hamas's use of the technique. For instance, concerning the Shifa Hospital, it accused the group of "using the thousands of patients, doctors and staff in the building to shield its underground headquarters." Similarly, it has highlighted Hamas operations in or near civilian objects. For example, in this round of fighting, the IDF has emphasized that residential neighborhoods are "infested with rocket launchers, entrances to underground attack tunnels, Hamas operational command centers, weapons manufacturing and storage facilities," and "rockets are launched out of kindergartens, weapons are stored in mosques, explosives are smuggled in with humanitarian aid and water pipes are potential rockets." And as to the strike on the senior Hamas commander and other fighters at Jabalya refugee camp that caused extensive incidental civilian loss of life and injury, the IDF explained that the targets were "in an area where there are underground tunnels and operations in between civilian buildings."

Sadly, the use of human shields is an all-too-common phenomenon of warfare (see here and here). Hamas and other organized armed groups in Gaza frequently engage in the practice. As noted in a 2019 report by NATO's Strategic Communications Center of Excellence, Hamas's uses of human shields include:

- Firing rockets, artillery, and mortars from or in proximity to heavily populated civilian areas, often from or near facilities which should be protected according to the Geneva Convention (e.g. schools, hospitals, or mosques);
- Locating military or security-related infrastructures such as HQs, bases, armouries, access routes, lathes, or defensive positions within or in proximity to civilian areas;
- Protecting terrorists' houses and military facilities, or rescuing terrorists who were besieged or warned by the IDF; [and]
- Combating the IDF from or in proximity to residential and commercial areas, including using civilians for intelligence gathering missions.

Hamas is again engaging in these activities and more. But under international law, the fact of operating in a manner that places the civilian population at risk does not, standing alone, amount to the use of human shields. This post accordingly seeks to clarify the *legal* meaning of the notion. It begins with a basic catalog of the law of armed conflict (LOAC) and international criminal law rules regarding human shields. The status of these rules is relatively uncontroversial, and the prohibition on using human shields plainly applies in Gaza. However, in application, they are often misunderstood and, in some regards, controversial. Accordingly, I underscore their nuances in the remainder of the post, particularly those relevant to the war between Israel and Hamas.

The Law of Human Shielding

LOAC Treaty Law

Provisions in numerous LOAC treaties ban the use of human shields. With respect to international armed conflict, Article 23 of the 1949 Geneva Convention III prohibits using prisoners of war to “render certain points or areas immune from military operations.” Geneva Convention IV, Article 28, performs the same function for “protected persons,” a term that refers to those “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals” (art. 4).

The 1977 Additional Protocol I to the 1949 Geneva Conventions likewise forbids the practice. Article 12 bans the use of medical units as shields. However, the most significant and well-known prohibition appears in Article 51(7), which extends to all civilians, not just those who qualify as “protected persons.”

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

There is no comparable treaty provision for non-international armed conflict. However, Common Article 3 to the 1949 Geneva Conventions, which applies in such conflicts, provides, “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.” Subjecting individuals to use as human shields is, in my opinion, encompassed in the notion of inhumane treatment. Similarly, Article 13 of Additional Protocol II to the 1949 Geneva Conventions, applicable in certain non-international armed conflicts for parties to the instrument, similarly provides that “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.” Using human shields would subject them to such dangers and, therefore, be forbidden by the instrument.

As to the application of these provisions, Israel is not a party to Additional Protocol I or II; they do not apply in the conflict. Further, there is uncertainty as to the classification of the conflict. Although I find it to be non-international, reasonable colleagues in the field style it as an international armed conflict. This complicates direct application of the Geneva Conventions provisions.

LOAC Customary Law

Despite such obstacles, it is irrefutable that the prohibition on using civilians and other protected persons as human shields applies in the conflict between Israel and Hamas. This is because the ban reflects *customary* international law in both international and non-international armed conflict. The International Committee of the Red Cross (ICRC) came to this conclusion, with which I agree, in Rule 97 of its *Customary International Humanitarian Law* study. It succinctly states, “The use of human shields is prohibited.” The ICRC has gathered an impressive catalog of evidence in support of its conclusion. Moreover, it is essential to recall that the four 1949 Geneva Conventions generally reflect customary international law (see my discussion [here](#)).

Experts in the field are in accord. For instance, Rule 44 of the *Harvard Air and Missile Warfare Manual* is textually similar to Article 51(7), while Section 2.3.8 of the San Remo *Manual on the Law of Non-International Armed Conflict* states, “The use of civilians (as well as captured enemy personnel) to shield a military objective or operation is forbidden. It is also forbidden to use them to obstruct an adversary’s operations.” The United Nations has repeatedly condemned shielding as unlawful (see, e.g., [here](#), [here](#), [here](#), [here](#), and [here](#)).

Finally, I would point out that the United States, which is not a Party to Additional Protocol I, is of the view that Article 57(1) reflects customary law (Matheson [presentation](#); DoD *Law of War Manual*, § 5.16)). Israel shares this view (see [here](#), p. 116), and I am aware of no State that has expressly disagreed.

International Criminal Law

The Rome Statute of the International Criminal Court includes “utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations” as a war crime ([art. 8\(2\)\(b\)\(xxiii\)](#)). The elements of the crime 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.

Numerous criminal cases have confirmed that using human shields amounts to a war crime (see, e.g., U.S. Military Tribunal at Nuremberg, *von Leeb* (High Command Trial); ICTY, *Blaškić*, *Karadžić and Mladić*, and *Naletilić and Martinović*; Israel Supreme Court’s *Public Committee against Torture*). Although no express provision in the Rome Statute bans the use

of human shields in non-international armed conflict, the practice can be characterized as unlawful “cruel treatment” (art. 8(2)(c)(i)), especially in situations where the protected person is aware of being used as a shield.

Finally, some States, including the United States, have criminalized human shielding in their domestic law (10 U.S.C. § 950t).

Nuances in the Prohibition

Using Civilian Objects to Shield

The *general* prohibition on using human shields does not extend to using civilian objects, such as civilian residences or schools, to shield from attack. Only if there are civilians or other protected persons in them, and it is the intention that their presence be used to shield against attack, is there a violation of the rule.

Instead, this conduct would violate the defender’s obligation to take feasible precautions to protect civilians and civilian objects under its control from the effects of attack (so-called passive precautions). Codified for parties in Article 58 of Additional Protocol I for international armed conflict, the ICRC characterizes the obligation, correctly in my estimation, as customary in both international and non-international armed conflict (*Customary IHL study, Rule 22*).

It should be cautioned that, as noted, medical units enjoy *special* protection from being used to shield under Additional Protocol I, Article 12(4). This provision develops Article 19 of Geneva Convention I, which imposes an obligation to situate, “as far as possible,” medical units and establishments “in such a manner that attacks against military objectives cannot imperil their safety” (see also DoD Law of War Manual, § 5.16). Cultural property enjoys similar protection. As noted in the DoD Law of War Manual (§ 5.18.3), “it is prohibited to use deliberately the threat of potential harm to cultural property (including some places of worship, such as mosques) to shield military objectives from attack, or otherwise to shield, favor, or impede military operations. There is no waiver of this obligation in cases of imperative military necessity” (citing Hague Cultural Property Convention, art. 4). In some cases, therefore, using religious or cultural property to shield would violate both the general prohibition (by leveraging the presence of civilians inside), and the special protection that attaches to the facility itself.

Intention to Shield

There is no violation of the prohibition on human shielding absent an intention to use the protected persons to shield against the enemy’s attack or otherwise impede its operations. As the DoD Law of War Manual notes, “In the absence of purposeful action to put protected persons and objects at risk of harm from enemy military operations, there would be no violation” (§ 5.16.2). Indeed, in many situations, operating near civilians may be unavoidable,

especially during urban operations like those in Gaza City. But operating in their vicinity or bringing protected persons into military objectives in the *hope* that the enemy's operations will be affected is a flagrant violation.

It should be emphasized that LOAC prohibits human shielding irrespective of whether the shields are harmed, or the shielding affects the enemy's operations. The violation lies in their mere use for the intended purpose. Moreover, the requisite intention includes both shielding and impeding. To illustrate, placing a rocket launcher in a heavily populated residential area with the intent that the presence of civilians will protect it from attack is shielding. Directing civilians to move down a road that the enemy needs to travel on in order to impede that movement likewise violates the prohibition.

Some cases are clear, as with Hamas's taking of hostages into Gaza, which is separately a LOAC violation and war crime (see here). While they might have been seized as bargaining chips in future prisoner trades, there is little question that they are also being used as human shields. Placing fighters or equipment next to, in, or under facilities where there are many civilians when there appears to be no military need to do so or reasonably available alternatives exist, as in the case of a hospital or a school, is a powerful indicator of intent. As the DoD Law of War Manual observes, "An adversary's intention to violate this rule is likely to be clear because that adversary normally would make it apparent to the opposing party that attacks against the military objective being shielded would risk harming protected persons or objects" (§ 5.16.2).

Other cases are less clear. For instance, Hamas and other fighters are likely among those civilians fleeing Gaza City. If the fighters are on the evacuation routes solely to retreat from the area into which the IDF is striking, there is no human shielding even though civilians are using the same route. However, if they choose to retreat on that route *because* of the presence of civilians, they are using human shields. The difficulty would lie in determining their motivation.

Although a particular action by Hamas may not qualify as using human shields, the customary requirement to take passive precautions would still apply. As explained in Article 58 of Additional Protocol I, the defender must "avoid locating military objectives within or near densely populated areas" and has to take "other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations." Thus, operating in the vicinity of civilians and civilian objects, and thereby placing them at significant risk of being harmed incidentally during attacks when doing so is clearly avoidable, violates the requirement. This is a customary law rule applicable in this conflict (see ICTY, Kupreškić, para. 524; ICRC, Customary IHL study, rule 22).

Impact of Human Shielding on the Enemy

Article 51(8) of Additional Protocol I provides that a violation by the enemy of the human shielding prohibition does not release the attacker from its “legal obligations with respect to the civilian population and civilians, including the obligation to take precautionary measures provided for in Article 57.” This means that the human shields continue to factor fully into proportionality calculations and that the attacker must do everything feasible in the circumstances to avoid harming them (so-called active precautions). For instance, an attacker must consider alternative tactics, weapons, and targets that would yield a similar effect on the enemy while placing the shields at less risk of harm.

I believe this provision reflects customary law (see also ILA Study Group Report, p. 360). However, this view is not universal. In particular, the UK Manual on the Law of Armed Conflict asserts, “Even where human shields are being used, the proportionality rule must be considered. However, if the defenders put civilians or civilian objects at risk by placing military objectives in their midst or by placing civilians in or near military objectives, this is a factor to be taken into account in favour of the attackers in considering the legality of attacks on those objectives” (§ 2.7.2). As Yoram Dinstein explains, “the general practice of States has traditionally stamped with approval the approach that, should civilian casualties ensue from an illegal attempt to shield combatants or a military objective, the ultimate responsibility lies with the Belligerent Party putting the civilians at risk” (p. 211-12). Notably, he does not suggest that the human shields should be disregarded altogether but instead that their inclusion in the proportionality calculation can take account of the enemy’s unlawful conduct.

Of course, from a practical perspective, a party violating LOAC by using shields can effectively bar its enemy from attack if there are enough human shields to render the attack “excessive” under the rule of proportionality. But in my view, a malevolent party to the conflict should not be able to deprive civilians of the protections they enjoy from attack. Such an interpretation appears to skew the military necessity-humanitarian considerations balance of LOAC too far in the direction of the former.

Voluntary Human Shields

There is also a long-standing debate among LOAC experts over whether civilians who voluntarily shield military objectives need to be considered in the attacker’s proportionality and precautions in attack assessments. The ICRC and many respected scholars believe they do not sacrifice their full protection as civilians through their actions (ICRC Interpretive Guidance, p. 56-57; Sassoli, para. 8.345).

However, in my opinion, individuals who intentionally leverage their civilian status to impede the enemy’s operations are directly participating in hostilities and, therefore, lose these protections from attack for such time as they so participate. This is the position of the United States, Israel, and many prominent scholars (DoD Law of War Manual, § 5.12.3.4; here, p. 118-19; Dinstein, p. 209). The distinction between involuntary and voluntary shields makes sense, for the latter act to deprive themselves of their LOAC protections, whereas the former

are being victimized. To the extent that voluntary shields can *de facto* (cause the attacker to hesitate) or *de jure* (render the attack disproportionate if they do not lose civilian protections) make an attack impossible, it would seem clear that they are “participating” in the hostilities very directly. However, although attacks on direct participants technically are permissible under the law of armed conflict, Israel does not conduct them. Instead, the direct participation status of voluntary shields only affects the application of the proportionality and precautions in attack rules during Israeli operations (see [here](#), p. 118).

There is an important caveat that bears directly on the situation in Gaza. Many Gazans have ignored the IDF warnings to move south. If they have done so because they are hoping to complicate IDF operations, they qualify as voluntary human shields; the IDF need not consider them when conducting its operations. But everyone else retains full civilian protection regardless of motivation for staying. Some may be unable to move because of infirmity, some may not wish to move (as is often the case with the elderly), and some may sympathize with Hamas. In all these cases, they should, in my opinion, be treated as involuntary human shields by the IDF (accord, ILA Study Group [Report](#), p. 360).

And the IDF agrees. In its 2014 Operation Protective Edge into Gaza, the IDF urged the civilian population to evacuate the area of operations and identified evacuation routes, just as it is doing today. Many did not heed the warning. I later had the opportunity to meet with senior IDF legal advisers and discuss the matter in depth. They uniformly rejected the premise that such individuals should be treated as voluntary shields (see [here](#), p. 119).

When there is reasonable doubt regarding the voluntariness of their shielding, the civilians must be assumed to be acting involuntarily. Some cases are not equivocal. The classic case of obvious voluntariness in Gaza during [past exchanges](#) is that of going to a building that the IDF has warned will be attacked and standing on the roof waving Hamas flags to be visible to the IDF. A key caveat is that children, who lack the mental capacity to be treated as having acted voluntarily, are always involuntary shields as a matter of law.

Hamas’s Efforts to Keep the Civilians in Place

Hamas is actively discouraging civilians from evacuating to the south and is reportedly even [preventing](#) them from leaving, as in the case of blocking roads. Both actions qualify as using human shields. While there may be other motivations for the encouragement, it would be naive to believe that Hamas does not intend the presence of civilians to frustrate IDF operations; indeed, as I have explained [elsewhere](#), Hamas had a duty to encourage the civilian population to evacuate by the IDF warning. After all, the use of civilian shields is a classic technique in asymmetric warfare for militarily weaker forces (see my discussion [here](#)). Of course, given the IDF’s air and ground operations into Gaza, Hamas’s efforts to physically prevent civilians from leaving unambiguously qualify as the use of human shields.

Again, it should be emphasized that passive precautions are meant to prevent or lessen the intermingling of civilians and civilian objects with fighters and military objectives. Therefore, in addition to these actions amounting to the unlawful use of human shields, they violate the passive precautions obligation to take measures to protect the civilian population. Sadly, as the fighting becomes more intense, the possibility of civilians fleeing from the area is diminishing.

Concluding Thoughts

Whether this armed conflict is international or non-international in character, using human shields is strictly prohibited. However, the concept of human shielding in the law of armed conflict is narrower than sometimes characterized. In particular, it does not encompass merely acting in the proximity of civilians without intending to use their presence to affect enemy military operations. Nor does it extend to using civilian property to shield unless that property is subject to special protection, as with medical facilities and cultural property.

Nevertheless, Hamas has violated the prohibition by, among other acts, using hostages as shields and preventing civilians from leaving northern Gaza. It has also violated obligations not to use specially protected facilities as shields. And even when its actions do not amount to unlawful shielding, they are subject to the requirement to take feasible passive precautions to safeguard the civilian population. But it must be emphasized that violations of these obligations by Hamas do not release Israel from its obligations to, *inter alia*, consider involuntary human shields in proportionality calculations and when assessing feasible precautions in attack.

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