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# The use of human shields in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia

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## Abstract

This article assesses the contribution of the International Criminal Tribunal for the Former Yugoslavia (ICTY) to a clearer understanding of the use of human shields, both as a war crime and as a violation of international humanitarian law (IHL). To date, the ICTY is the only international criminal tribunal to address multiple allegations of shielding conduct. To assess the Tribunal's contribution, the article rigorously analyses ICTY jurisprudence concerning shielding thematically, in line with the offences under which such conduct has been charged. It demonstrates that a combination of prosecutorial policy and a failure by the Tribunal to seize opportunities to further elaborate upon shielding, has resulted in the offence developing almost exclusively through reference to other crimes. Thus, detailed discussion of shielding within the relevant judgments is scarce and there remains work to be done within the fields of IHL and international criminal law to develop the offence and clearly distinguish it from those with which it overlaps. Nevertheless, the article will argue that the Mladić trial judgment does offer a significant contribution to an understanding of human shielding. Additionally, the Tribunal's shielding jurisprudence as a whole, despite its limitations, still proves useful as an indicator of the elements of the act that require further development as an international crime, and for building a fuller understanding of the precise nature of the act as a violation of IHL.

## Introduction

Reports of protected individuals being used as human shields have become a commonplace feature of contemporary armed conflict. It has, for example, been an enduring theme of hostilities between Palestinian and Israeli forces.<sup>1</sup> Both the 2009 Goldstone Report and the

<sup>1</sup> United Nations Security Council (UNSC), *Identical letters dated 12 November 2018 from the permanent representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council* (2018) S/2018/1012, stating that 'to the world, Hamas presents the civilians of Gaza as victims, but then uses them as human shields'; B'tselem, 'Israeli Soldiers Use a Palestinian Man, 'Abd a-Rahim Gheith, as Human Shield During clashes in Jericho' (9 April 2018) <[https://www.btselem.org/video/20180329\\_human\\_shield\\_in\\_jericho#full](https://www.btselem.org/video/20180329_human_shield_in_jericho#full)> accessed 24 May 2020; Anne Barnard and Jodi Rudoren, 'Israel Says That Hamas Uses Civilians as Human Shields Reviving Debate' *The New York Times* (23 July 2014) <<https://www.nytimes.com/2014/07/24/world/middleeast/israel-says-hamas-is-using-civilians-as-shields-in-gaza.html>> accessed 24 May 2022.

2015 report of the Independent Commission of Inquiry established by the Human Rights Council (2015 COI), detailed incidents of forces on both sides utilizing the civilian population to shield military objectives.<sup>2</sup> Similar allegations have arisen in the context of the ongoing conflict that broke out in Gaza in 2023, where Hamas have been frequently accused of potential shielding conduct, ranging from the construction of tunnels beneath Al-Shifa hospital,<sup>3</sup> to forcing civilians to remain in hostile zones.<sup>4</sup> Additionally, in 2024 there have been reports of the Israeli army strapping a Palestinian civilian to the hood of a military vehicle,<sup>5</sup> and forcing civilians to walk in front of soldiers conducting building raids,<sup>6</sup> both in the West Bank. Shielding has also been frequently alleged throughout the conflict in Syria and the broader internationalized fight against the Islamic State of Iraq and the Levant (ISIL) in Syrian and Iraqi territory.<sup>7</sup> In 2023, the periodic UN commission of inquiry into the human rights situation in Syria highlighted that children had been killed while being used by Da'esh as human shields.<sup>8</sup> Shielding has also been a prevalent feature of the conflicts in Sri Lanka,<sup>9</sup> Yemen,<sup>10</sup> and more recently in Ukraine.<sup>11</sup> The UN Secretary General, Antonio Guterres, stated in their June 2023 annual report to the United Nations Security Council (UNSC) on Children in Armed Conflict that in the context of the war in Ukraine, 93 children had been identified as being used, predominantly by Russian forces, as human shields.<sup>12</sup> Evidently, the rule of international humanitarian law (IHL) that prohibits shielding is regularly being called into operation.

The most explicit prohibition of shielding is contained within Article 51(7) of Protocol One Additional to the 1949 Geneva Conventions:

<sup>2</sup> Human Rights Council, 'Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict' (25 September 2009) UN Doc A/HRC/12/48 (The Goldstone Report) paras 1037–63; Human Rights Council, 'Report of the Detailed Findings of The Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1.' (24 June 2015) UN Doc A/HRC/29/52 (2015 COI) paras 321–357.

<sup>3</sup> Al Jazeera, 'Hamas Rejects Claims over Installations Under al-Shifa Hospital' (*Al Jazeera*, October 2023) <<https://www.aljazeera.com/news/2023/10/27/hamas-rejects-israeli-claim-over-installations-under-al-shifa-hospital>> 23 March 2024; Rosenberg and others 'A Tunnel Offers Clues to How Gaza uses Hospitals' *The New York Times* (12 February 2024) <<https://www.nytimes.com/interactive/2024/02/12/world/middleeast/gaza-tunnel-israel-hamas.html>> accessed 30 March 2024.

<sup>4</sup> Chris McQuade, 'On Forcing Civilians to Remain in Hostile Zones: The Prohibition of Shielding and the Corresponding Obligations of an Attacking Party Under International Humanitarian Law' (*Opinio Juris*, 20 December 2023) <<https://opiniojuris.org/2023/12/20/on-forcing-civilians-to-remain-in-hostile-zones-the-prohibition-of-shielding-and-the-corresponding-obligations-of-an-attacking-party-under-international-humanitarian-law/#:~:text=An%20attacking%20party%20must%20treat,in%20Hostilities%3B%20Public%20Committee%20Against%20>> accessed 12 January 2025.

<sup>5</sup> Al Jazeera, 'Human shielding in action': Israeli Forces Strap Palestinian Man to Jeep' (23 June 2024) <<https://www.aljazeera.com/news/2024/6/23/human-shielding-in-action-israeli-forces-strap-palestinian-man-to-jeep>> accessed 16 July 2024.

<sup>6</sup> Reuters, 'Palestinian says Israeli Soldiers used Him as a Human Shield in the West Bank' (*Reuters Online*, 16 January 2024) <<https://www.reuters.com/world/middle-east/palestinian-says-israeli-soldiers-used-him-human-shield-west-bank-2024-01-16/>> accessed 24 July 2024.

<sup>7</sup> Human Rights Watch, 'Iraq: Feared ISIS Use of Human Shields, Executions' (2016) <<https://www.hrw.org/news/2016/11/04/iraq-feared-isis-use-human-shields-executions>> accessed 20 May 2022; Spokespeople for the UNHCHR, 'Press briefing note on Iraq and South Sudan' (2016) <[https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=20753&LangID=](https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=20753&LangID=/)> accessed 20 May 2022; ITV news, 'Human Shields in the Mountains as IS Defend Baghouz Territory' (15 March 2019) <<https://www.itv.com/news/2019-03-15/human-shields-in-the-mountains-as-is-defend-baghouz-territory/>> accessed 19 July 2024.

<sup>8</sup> Human Rights Council, 'Report of the Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (17 August 2022) UN Doc A/HRC/51/45 34–35.

<sup>9</sup> Report of the Secretary General's Panel of Experts into Accountability in Sri Lanka (31 March 2011) <<https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/POC%20Rep%20on%20Account%20in%20Sri%20Lanka.pdf>> accessed 24 May 2020, para 177.

<sup>10</sup> Human Rights Council, 'Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014; Report of the detailed findings of the Group of Eminent International and Regional Experts on Yemen' (3 September 2019) UN Doc A/HRC/42/CRP.1 para 707.

<sup>11</sup> Jeremy Bowen, 'Ukraine War: Russian Soldiers held us as Human Shields' *BBC news* (7 April 2022) <<https://www.bbc.co.uk/news/world-europe-61020565>> accessed 18 July 2022.

<sup>12</sup> Report of the UN Secretary General, 'Children and Armed Conflict' (5 June 2023) UN Doc A/77/895 -S/2023/363.

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.<sup>13</sup>

This builds upon provisions contained within both the Third and Fourth Geneva Conventions of 1949 that prohibit the use of prisoners of war and protected persons<sup>14</sup> to 'render certain points or areas immune from military operations'.<sup>15</sup> Although these provisions only have direct applicability to international armed conflict (IAC), the prohibition is also recognized by the ICRC as forming customary IHL applicable to both IACS and non-international armed conflicts (NIACS).<sup>16</sup>

The text of Article 51(7) does not clearly indicate the range of conduct that may fall foul of the prohibition. Given the frequency of shielding allegations, coupled with the fact that the Rome Statute of the International Criminal Court (ICC) lists the use of human shields as a war crime in IACs,<sup>17</sup> this ambiguity is a concern. It complicates the task of accurately identifying acts of shielding under IHL that could potentially incur individual criminal responsibility.

To address this problem, this article turns to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY has had a clear impact on the development of IHL but its work also carries the potential to influence future international criminal cases.<sup>18</sup> As Zerlich illustrates, the jurisprudence of the ICTY can be used by the International Criminal Court (ICC) both as a means to interpret the principle legal instruments of the Court and to determine other rules of applicable law.<sup>19</sup> Indeed, the judgments of international tribunals have been especially influential in developing IHL, having 'served to clarify the meaning and scope of humanitarian law rules and principles ... and whether criminal liability attaches to individuals for breaches of the relevant laws'.<sup>20</sup> The ICTY is of distinct prominence in this regard, with Antonio Casesse once describing the Tribunal as 'uniquely well positioned to provide authoritative interpretation and clarification as to the current state of international humanitarian law'.<sup>21</sup>

No international criminal tribunal other than the ICTY has heard multiple accusations of the use of human shields. Consequently, no other tribunal has been able to turn to the same breadth of evidential accounts of shielding when seeking to interpret and apply its

<sup>13</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API), Article 51 (7).

<sup>14</sup> See Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV) Article 4 defining 'Protected persons' within the meaning of the Convention those who find themselves 'in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.

<sup>15</sup> Geneva Convention III Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GCIII) Art 23; GCIV Art 28.

<sup>16</sup> Jean-Marie Henckaerts, Louise Doswald-Beck and Carolin Alvermann, *Customary International Humanitarian Law* (Cambridge University Press 2005) Rule 97.

<sup>17</sup> The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 8 (b)(xxiii).

<sup>18</sup> See James Crawford, *Brownlie's Principles of Public International Law* (8 edn, OUP 2018) at 37 stating that '[j]udicial decisions are not strictly a formal source of law, but in many instances they are regarded as evidence of the law. A coherent body of previous jurisprudence will have important consequences in any given case. Their value, however, stops short of precedent as it is understood in the common law tradition'.

<sup>19</sup> Volker Nerlich, 'The Status of ICTY and ICTR Precedent in Proceedings Before The ICC' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill Nijhoff 2009) 324.

<sup>20</sup> Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (CUP 2014) 14–15.

<sup>21</sup> Antonio Casesse, 'The International Criminal Tribunal for the former Yugoslavia and the Implementation of International Humanitarian Law' 232, cited in *ibid* 63.

prohibition under IHL. This article argues that when the opportunity to elaborate on shielding both as a crime and an IHL violation has been presented, the Tribunal has failed to seize it in the majority of cases convincingly. However, the judgment handed down by the Trial Chamber in *Mladić* represents a significant outlier in this regard. Irrespective of the extent to which the offence was developed during the Tribunal's tenure, the ICTY's treatment of shielding still proves useful as an indicator of the elements of the act that require further development as an international crime, and for building a fuller understanding of the precise nature of the act as a violation of IHL.

After providing an overview of how the use of human shields has been charged before the Tribunal in the section 'Human shielding under international criminal law', this article examines the jurisprudence in relation to the charges under which acts of shielding have been incorporated, focusing on inhuman and cruel treatment, murder and persecution in the sections 'Inhuman and cruel treatment', 'Murder', and 'Shielding as an underlying element of persecution', respectively. These sections not only highlight the extent to which prosecutorial policy has limited the development of human shielding at the Tribunal, but also questions the extent to which the relevant chambers' deliberations can be taken as accurate reflections of the prohibition of the use of human under IHL.

Sections 'The use of human shields as amounting to or in conjunction with forced or unlawful labour' and 'The overlap with hostage taking' explore the crimes of hostage taking and forced/unlawful labour, respectively, crimes that bear distinct similarities with the use of human shields. These sections scrutinize the Tribunal's attempts, or lack thereof, to convincingly distinguish between these offences and the offence of shielding. This article concludes by emphasizing that the examination of evidence potentially indicative of human shielding through the prism of other crimes, has limited the contribution of the ICTY to a fuller understanding of the practice under both IHL and international criminal law. Nevertheless, there are some elements of the Tribunal's jurisprudence that can still be salvaged to advance an appreciation of shielding in its own right.

## Human shielding under international criminal law

The significance of the ICTY's shielding jurisprudence is highlighted by the fact that, prior to its existence, discussion of human shielding by international tribunals was both scarce and limited in its elaboration. The first international criminal tribunal to hear a case involving potential acts of shielding was the British Military Tribunal at Lüneburg, in the *Student* case, where they found the accused not guilty of using civilians, prisoners of war as a 'screen' for German troops.<sup>22</sup> Much of the Tribunal's focus in this case was on the responsibility for the deaths of individuals used in this way, and the case report fails to elaborate on whether such use was distinctly criminal in its own right.

The use of shields would later be alleged before the US Military Tribunal at Nuremberg in *The High Command Trial*.<sup>23</sup> Although once again, the accused in this case was not found criminally responsible for the use of human shields, the Tribunal did provide more reflection than the *Student* case. Significantly, they remarked that 'forcing prisoners of war to go ahead of advancing enemy troops, thereby acting as a shield to the latter, would in itself constitute another type of war crime'.<sup>24</sup> In so doing, they provided the first confirmation by an international tribunal that the use of human shields in itself is internationally criminal.<sup>25</sup>

<sup>22</sup> UK Military Court at Lüneburg *The Trial of Kurt Student (Student case)* (1946), *Law Reports of Trials of War Criminals* vol IV (UN War Crimes Commission 1948) Case no 24 118–19.

<sup>23</sup> *The United States of America v Wilhelm von Leeb et al (High Command Trial)* *Law Reports of Trials of War Criminals* vol XII (UN War Crimes Commission 1948).

<sup>24</sup> Ibid 104–105.

<sup>25</sup> The acts of shielding alleged in the indictment, and the statement that shielding constitutes another type of war crime in this case only refers to the use of prisoners of war in such a way.

Since then, no criminal tribunal other than the ICTY has addressed human shielding. It has however, been raised before the European Court of Human Rights (ECtHR) in both the cases of *Isayeva v Russia* and *Demiray v Turkey*.<sup>26</sup> However, in neither case was there sufficient factual evidence presented for the ECtHR to determine whether human shielding had taken place, nor was this their primary focus as a court charged with assessing potential violations of human rights obligations.<sup>27</sup> The Israeli Supreme Court has, in a domestic context, also notably addressed the use of shields under IHL in both the *Targeted Killings* and *Adalah* cases, but neither are criminal prosecutions, nor do they reflect heavily on the precise nature of its prohibition beyond the commonly drawn distinction between voluntary and involuntary human shields.<sup>28</sup>

Despite the use of human shields now being listed as a war crime in IACS under the Rome Statute,<sup>29</sup> the statute of the ICTY did not list the use of human shields within the crimes it had the power to prosecute.<sup>30</sup> Under Article 3, it had the power to prosecute other violations of the laws and customs of war, which could include acts not provided for within it.<sup>31</sup> The Trial Chamber emphasized in *Mladić* that Article 3 was a residual clause that provided the Tribunal with jurisdiction over any serious violation of IHL not covered by Articles 2, 4, or 5 of that statute.<sup>32</sup> The Appeals Chamber in *Tadić* laid out the requirements for a violation to fall within the jurisdiction of this Article:

- i) the violation must constitute an infringement of a rule of international humanitarian law;
- ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met ...
- iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim ...
- iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>33</sup>

<sup>26</sup> *Demiray v Turkey* App no 27308/95 (ECtHR 21 November 2001); *Isayeva v Russia* App no 57950/00 (ECtHR 24 February 2005).

<sup>27</sup> For a more in depth analysis of the Role of the ECtHR in monitoring compliance with IHL see Andrea Gioia, 'The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict' in Orna Ben-Naftali, *International Humanitarian Law and International Human Rights Law* (OUP 2011) Chap 6; For a more recent analysis see Andreas Piperades, 'Three Aspects of the Relationship Between IHL and the Convention in *Ukraine v Russia* (re Crimea)' (*Opinio Juris*, 25 July 2024) <<https://opiniojuris.org/2024/07/25/three-aspects-of-the-relationship-between-ihl-and-the-convention-in-ukraine-v-russia-re-crimea/>> accessed 2 August 2024.

<sup>28</sup> *Adalah v GOC Central Command* HCJ 3799/02 (23 June 2005); *Public Committee Against Torture v The Government of Israel* HCJ 769/02 (14 December 2006) [36].

<sup>29</sup> Rome Statute (n 17) art 8(b)(xxiii); International Criminal Court *Elements of Crimes* (ICC 2011) 30, defining the war crime of human shielding 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.
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'

<sup>30</sup> The statute of the International Criminal Tribunal for Rwanda additionally does not list the use of human shields as a war crime per se. UNSC *Statute of the International Criminal Tribunal for Rwanda* S/RES 995 (8 November 1994); art 2 of the ICTY statute did provide it with the power to prosecute grave breaches of the Geneva Conventions, yet this was limited to those enumerated therein, excluding human shielding from its remit.

<sup>31</sup> *ibid*, art 3.

<sup>32</sup> *Prosecutor v Mladić* (Trial Judgment) IT-09-92 (22 November 2017) [3008].

<sup>33</sup> *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) [94].

Nevertheless, these conditions were not deployed in order to bring Human shielding under Article 3 in any case heard before the ICTY. The remainder of this section will outline how human shielding was charged within the relevant indictments and how this initially dampened any potential there may have been to fully develop the crime of shielding *per se*.

## Indictments charging shielding

The ICTY's jurisprudence concerning the use of human shields begins with *Aleksovski* and ends with the appeal judgment handed down in *Mladić*. As stated above, no case charged shielding as a crime *per se* before the Tribunal. Rather, it has been incorporated under a variety of different crimes within the power of the Tribunal to prosecute. A review of the indictments demonstrates that prosecutors took a varied approach to charging the use of human shields as an internationally criminal act, which has minimized opportunities to meaningfully develop the offence.

The defendants in the first three cases involving the use of human shields were originally indicted together. The indictment of *Aleksovski, Kordić, Blaškić, Cerkez, Santic, and Sopoljak* (the cases against the latter two were subsequently dropped) charged *Kordić, Cerkez, Blaškić, and Aleksovski* with the use of human shields.<sup>34</sup> The latter was charged with the use of human shields as an outrage upon personal dignity as a violation of the laws and customs of war under Article 3 of the statute, inhuman treatment as a grave breach of the Geneva Conventions and wilfully causing great suffering, again as a grave breach under Article 2. In what was to become a recurring theme for alleged incidents of human shielding, the indictment groups the use of human shields together with unlawful forced labour, the accused being charged with allowing detained persons to be used 'for unlawful forced labour (digging trenches) and human shields'.<sup>35</sup> This connection is stressed once again later in the indictment where both forced labour and the use of human shields are listed as forms of inhumane treatment.<sup>36</sup>

Defendants *Blaškić, Kordić & Cerkez* were tried separately. All three were charged in their respective indictments with shielding as inhuman treatment under Article 2 of the ICTY statute and as cruel treatment under Article 3.<sup>37</sup> Additionally, the amended indictment of *Kordić & Cerkez* charged both accused with the use of human shields in conjunction with hostage taking as an element of persecution.<sup>38</sup> It was charged in the same manner, but in conjunction with forced or unlawful labour, in the indictments of *Karadžić*,<sup>39</sup> *Mladić*,<sup>40</sup> *Naletilić & Martinović* and *Krajisnik*. Again, in the *Naletilić and Martinović* indictment, it was charged under the headings of inhuman treatment and cruel treatment but also as forced labour as a violation of the laws and customs of war under Article 3, and as constitutive of 'other inhumane acts' as a crime against humanity under Article 5 of the statute.<sup>41</sup> In the *Krajisnik* indictment shielding was also incorporated under the heading of murder as a crime against humanity and as a violation of the laws and customs of war.<sup>42</sup>

<sup>34</sup> *Prosecutor v Kordić et al* (Initial Indictment) IT-95-14 (10 November 1995).

<sup>35</sup> *ibid* [21].

<sup>36</sup> *ibid* [31].

<sup>37</sup> *Prosecutor v Blaškić* (Second Amended Indictment) IT-95-14 (25 April 1997) counts 19 and 20; *Prosecutor v Kordić & Cerkez* (Amended Indictment) IT-95-14/2 (30 September 1998) counts 27, 28, 35 and 36.

<sup>38</sup> *Prosecutor v Kordić & Čerkez* (Amended Indictment) counts 1 and 2.

<sup>39</sup> *Prosecutor v Karadžić* (Prosecution's Marked-up Indictment) IT-95-5/18-PT (19 October 2009) count 3, [60].

<sup>40</sup> *Prosecutor v Mladić* (Fourth Amended Indictment) IT-09-92-PT (16 December 2011) count 3, [59].

<sup>41</sup> *Prosecutor v Naletilić & Martinović* (Second Amended Indictment) IT-98-34-PT (28 September 2001) counts 2–5.

<sup>42</sup> *Prosecutor v Krajisnik & Plavsic* (Consolidated Amended Indictment) IT-00-39 & 40-PT (7 March 2002) counts 4–6, [24]–[25].



In the initial joint indictment of *Karadžić* and *Mladić*, the accused were charged with the taking of hostages and the use of human shields within the same section of the indictment, drawing a link between the two offences, but charging the former as hostage taking *per se* under Articles 2 and 3 of the statute, and the latter as both inhuman and cruel treatment.<sup>43</sup> In the amended indictments, however, neither accused was charged with the offence of using human shields outside of the context of persecution.<sup>44</sup> The acts upon which the shielding charges in the initial indictment were founded, are incorporated under the crime of hostage taking.<sup>45</sup>

The prosecutorial approach to charging the use of human shields can partially be attributed to the fact that the ICTY statute does not explicitly list the use of human shields as a crime. Nevertheless, given that Article 3 of the ICTY statute brought violations of the laws and customs of war not listed within the statute under the jurisdiction of the Tribunal, where the requirements expressed in *Tadić* had been satisfied, there was no legal barrier to prosecuting the use of human shields should it have been charged in an indictment. Given that the prosecutor was willing to charge other offences under Article 3 in this manner,<sup>46</sup> it is regrettable that they did not similarly charge shielding. Consequently, the Tribunal explored the elements of these offences in greater detail over the course of its jurisprudence, yet the use of human shields was consistently examined through the lenses of other crimes. As noted by Pedrazzi, this restricted the Tribunal from exploring the act of shielding in full.<sup>47</sup>

The remaining sections of this article will explore the crimes under which human shielding has been incorporated and the extent to which, through these charges, the jurisprudence sheds light on the precise nature of shielding as a violation of IHL and as an international crime. It will focus specifically on those crimes through which the use of human shields was further elaborated. The offences of an outrage upon personal dignity and other inhumane acts are thus omitted in this respect, despite human shielding forming part of the underlying conduct in *Aleksovski* and *Naletilić and Martinović*, respectively, as they offer minimal exploration of shielding conduct in its own right.

## Inhuman and cruel treatment

As mentioned, the use of human shields was charged under both headings in multiple cases. The two crimes, although included under separate articles of the ICTY statute, have been recognized as equivalent to each other in their material elements.<sup>48</sup> The two offences can be understood as follows:

Inhuman treatment is defined as a) an intentional act or omission, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity, b) committed against a protected person. Cruel treatment is constituted by a) an intentional act or omission, which causes serious mental or physical suffering or injury or

<sup>43</sup> *Prosecutor v Mladić and Karadžić* (Initial Indictments) IT-95-5-1 (24 July 1995) part III counts 13–16.

<sup>44</sup> *Prosecutor v Karadžić* (Prosecution's Marked-up Indictment) (n 39) count 3, [60]; *Prosecutor v Mladić* (Fourth Amended Indictment) (n 41) count 3, [59].

<sup>45</sup> *Prosecutor v Mladić and Karadžić* (Initial Indictments) (n 43) part III counts 13–16; See also the section 'The overlap with hostage taking' on the overlap with hostage taking.

<sup>46</sup> They did, eg charge the offences of unlawful labour in *Naletilić & Martinović*, hostage taking in *Karadžić* and outrages upon personal dignity in *Kordić et al*, all under art 3 without these offences being explicitly listed within the statute.

<sup>47</sup> Marco Pedrazzi, 'Using Human Shields as a War Crime' in Fausto Pocar, Marco Pedrazzi and Micaela Frulli (eds), *War Crimes and the Conduct of Hostilities* (Edward Elgar 2013) 113.

<sup>48</sup> *Prosecutor v Naletilić & Martinović* (Trial Judgment) IT-98-34-T (31 March 2003) [246]; See also *Prosecutor v Mucić et al* (Appeal Judgement) IT-96-21-A (20 February 2001) at [426], stating that the 'sole distinguishing element stems from the protected person requirement under Article 2 of the Statute'.

constitutes a serious attack on human dignity, b) committed against a person taking no active part in the hostilities.<sup>49</sup>

When the charge is of inhuman treatment, or indeed any other crime, the Court is necessarily required to apply the elements of *that* crime to the facts before it, *not* the elements of shielding. Determining whether the accused is criminally responsible for those actions will not directly entail a consideration of whether they are also guilty of the use of human shields. The Trial Chamber in *Naletilić and Martinović* considered intentionally causing great suffering or inflicting serious injury as capable of amounting to inhuman treatment as well as ‘other acts contravening the fundamental principle of humane treatment, in particular those which constitute an attack on human dignity’.<sup>50</sup> These are the requirements that an alleged act of human shielding would have to meet in order to amount to inhuman treatment.<sup>51</sup>

### Prosecutor v Blaskić

One of the incidents documented in the *Blaskić* trial judgment involved the use of Bosnian Muslims as human shields. In April 1993, following the shelling of the Croatian Defence Council’s (HVO) headquarters at the Hotel Vitez in the Vitez municipality of Bosnia–Herzegovina, hundreds of Bosnian Muslims were said to have been directed to a position just in front of the hotel.<sup>52</sup> Those assembled outside the hotel were persistently observed by soldiers for two and a half to three hours, after which they were returned to their village. One witness recalled being told by a soldier, ‘you are going to sit here now and let your people shell you, because they have been shelling us up to now, and you better sit down and wait’.<sup>53</sup>

Concerning this incident, the Trial Chamber concluded that it constituted inhuman treatment, and consequently cruel treatment, as it ‘inflicted considerable mental suffering upon those involved’.<sup>54</sup> Establishing that the persons used as shields had ‘suffered’ was in this instance necessary to establish the charge levelled at the accused,<sup>55</sup> but it is not a requisite element of human shielding as a violation of IHL or as a war crime.<sup>56</sup> As a result, the Chamber did not need to determine whether, by placing the Bosnian Muslims around the hotel, the HVO forces had moved or otherwise taken advantage of civilians or other persons protected under IHL to shield their headquarters.<sup>57</sup> On the facts outlined above, there is clear room to suggest that shielding would have been established, had this been the specific charge. This is further evidenced by the Chamber’s explicit recognition of this incident as human shielding, although no explanation was provided to indicate why they had drawn this conclusion.<sup>58</sup> This possibility is clearly evidenced in the Trial Chamber’s rejection of the second alleged incident of shielding as inhuman or cruel treatment:

<sup>49</sup> *Prosecutor v Naletilić & Martinović* (Trial Judgment), *ibid* [246].

<sup>50</sup> *ibid*.

<sup>51</sup> *Prosecutor v Kordić & Čerkez* (Trial Judgment) IT-95-14/2-T (26 February 2001) [256].

<sup>52</sup> *Prosecutor v Blaskić* (Trial Judgment) IT-95-14-T (3 March 2000) [714].

<sup>53</sup> *ibid*.

<sup>54</sup> *ibid* [716].

<sup>55</sup> Beth Van Schaack, ‘The Law & Policy of Human Shielding’ in in Ford CM and Williams WS (eds), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (Lieber Institute for Law and Land Warfare 2017) 818.

<sup>56</sup> Neither the EoC, Geneva Conventions or their Additional Protocols refer to the ‘suffering’ of the person so used with respect to the crime or prohibition of shielding; see generally, Michael N Schmitt, ‘Human Shields in International Humanitarian Law’ (2008) 38 *Israel Yearbook on Human Rights* 17, 25–34; Stéphanie Bouchié de Belle, ‘Chained to Cannons or Wearing Targets on Their T-shirts: Human Shields in International Humanitarian Law’ (2008) 90 *International Review of the Red Cross* 883, 889.

<sup>57</sup> EoC (n 29).

<sup>58</sup> *Prosecutor v Blaskić* (Trial Judgment) (n 52) [716].

[T]he Trial Chamber recalls that on 19 and 20 April 1993, many Muslim civilians were detained at Dubravica school, also the billet of the Vitezovi, and at Vitez cultural centre, the headquarters of Mario Cerkez. Nonetheless, although it is conceivable that a military force might seek to protect its headquarters unlawfully by detaining members of the enemy there, the Prosecution did not prove beyond all reasonable doubt that the detainees in question were aware of a potential attack against which they were allegedly used as protection. Unlike for the Hotel Vitez, it was not established that the detainees at Dubravica school and Vitez cultural centre suffered as a result of being used as human shields.<sup>59</sup>

The Chamber, in premising their rejection of the charge of cruel and inhuman treatment on the failure of the prosecution to prove the detainees' awareness of an attack against which they were being used as protection, invites consideration of victim awareness as an element that must be demonstrated for conduct to violate the prohibition of human shielding. However, they fall short of definitively clarifying as such and given the emphasis placed by the Chamber on the necessity of proving 'suffering' for a charge of cruel or inhuman treatment to succeed,<sup>60</sup> their reasoning should be read as being limited to these offences. Indeed, if the Bosnian Muslims detained at the listed sites had not suffered physically then awareness of their use as a human shield would be necessary to show that they had suffered mentally, at least to a degree that would satisfy the required threshold for successfully proving the charge at hand. This scenario, however, presented the Chamber with an opportunity to further elaborate upon human shielding in its own right, an opportunity that was not taken. No treaty provisions indicate that the 'awareness' of the shields is an essential component of the prohibition, and thus it seems unlikely the Chamber would have gone on to conclude that it was. Indeed, the provisions that prohibit and criminalize shielding suggest the opposite. Article 57(1) of API, for example, states that '[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations',<sup>61</sup> with the ICRC commentary to API claiming that the term 'movements' was intended to cover situations where civilians have moved of their own accord.<sup>62</sup> Quéguiner has argued that '[a]t least in spirit, this provision implies that the civilian population ... have acted under duress or, at minimum, without knowledge of the way in which they are being manipulated to shield a military objective.'<sup>63</sup> This indicates that an act could be representative of shielding where a perpetrator has taken advantage of the voluntary movement of the civilian population even where the civilians have no knowledge of how they are being used, such as where military units infiltrate a column of refugees to mask a military operation.<sup>64</sup> This is consistent with the ICC's Elements of Crimes (EoC), which, in defining the use of shields as a war crime, indicates that a perpetrator must have 'moved or otherwise [taken] advantage of the location of one or more civilians'.<sup>65</sup> Nevertheless, it would still have been beneficial for the Trial Chamber to address this issue directly. An authoritative declaration of the significance of victim awareness to the offence of shielding, would have resolved the residual confusion created via the juxtaposition of one crime on top of another. The failure to grasp

<sup>59</sup> *ibid* [715].

<sup>60</sup> Van Schaack (n 55) 818.

<sup>61</sup> API art 51(7).

<sup>62</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) para 1988.

<sup>63</sup> Jean-François Quéguiner, 'Precautions Under the Law Governing the Conduct of Hostilities' (2006) 88 *International Review of the Red Cross* 793, 815.

<sup>64</sup> Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2 edn, CUP 2010) 153; See also Bouchié de Belle (n 56) 886; Schmitt (n 56) 26–27.

<sup>65</sup> EoC (n 29) 30.

this opportunity, rather than developing the offence of shielding, attaches to it an unwelcome ambiguity.

The *Blaškić* Appeal Chamber provided further insight into the use of human shields as a violation of IHL in their assessment of the Hotel Vitez incident. When considering the appellant's appeal against their conviction of inhuman and cruel treatment via the use of human shields, the Chamber stated that '[u]sing protected detainees as human shields constitutes a violation of the provisions of the Geneva Conventions regardless of whether those human shields were actually attacked or harmed.'<sup>66</sup> Furthermore, they indicated that the prohibition is intended to protect individuals from being exposed to the risk of harm in addition to the actual harm itself.<sup>67</sup> This demonstrates that a finding of human shielding is not dependent on the existence or intensity of an attack, but on the act of shielding itself. From the Chambers reasoning, it also follows that individuals used as human shields do not have to be aware of how they are being used for such conduct to represent an act of shielding. This would operate against the intention to protect individuals from being exposed to the risk of harm regardless of whether such harm comes to pass. It would lead to situations where persons are unknowingly used as a shield and suffer no harm as a result, but because they lack an awareness of this usage the protection described by the Appeal Chamber would never be engaged, despite such conduct clearly exposing them to a *risk* of harm.

## Murder

In *Krajišnik*, the use of human shields was charged as amounting to murder. It was alleged that several Muslim detainees were killed while being used as human shields in two incidents. The first is described as taking place in the Municipality of Vogošća in the Sarajevo region. Throughout 1992, Serb forces detained an increasing number of men, women and children at a detention facility named 'Planjo's house'.<sup>68</sup> In August of that year, Serb military personnel began to remove detainees at this facility to dig trenches, carry ammunition, remove bodies killed in battle and at times to be used as human shields, all on the front lines.<sup>69</sup> It was alleged that in September '[a]t least 15 Muslim detainees were killed while performing labour at the front lines or being used as human shields',<sup>70</sup> although it is not made clear exactly how many were killed specifically while being used as a human shield. The second incident took place in the Rogatica municipality in the South-Eastern Region of Bosnia and Herzegovina. Following the Shelling of Rogatica town, 28 Muslims surrendered to Serb forces and were taken to another village where they were alleged to have been used as human shields by a Serb paramilitary unit, with 24 of them, all civilians, killed as a result.<sup>71</sup>

For these actions, the defendant was initially indicted under the heading 'extermination and killing'.<sup>72</sup> These alleged acts were charged as extermination as a crime against humanity, with murder as a crime against humanity or murder as a violation of the laws or

<sup>66</sup> *Prosecutor v Blaškić* (Appeal Judgment) IT-95-14-A (29 July 2004) [654].

<sup>67</sup> *ibid*; Van Schaack (n 55) 819.

<sup>68</sup> *Prosecutor v Krajišnik* (Trial Judgment) IT-00-39 (27 September 2006) [600]; The trial judgment does not explicitly mention the legal status of the detainees, but the description of many of them as villagers suggests that the majority were civilian in character as opposed to combatants no longer taking part in hostilities/prisoners of war.

<sup>69</sup> *ibid* [601].

<sup>70</sup> *ibid*; It should be noted that not all of the detainees at Planjo's house were Muslim, but a distinct majority were. The judgment describes the ethnic makeup of the detainees in August 1992 as mostly 'Muslim, but with some Croats and one Serb'—[600].

<sup>71</sup> *ibid* [681], [685].

<sup>72</sup> *Prosecutor v Krajišnik & Plavsic* (Consolidated Amended Indictment) IT-00-39 & 40-PT (7 March 2002) Counts 4, 5 and 6, Schedule B.

customs of war in the alternative. Murder as a crime against humanity, for the purpose of Article 5 of the ICTY statute, requires that:

- a) the victim died;
- b) an act or omission of the perpetrator caused the victim's death; and
- c) the act or omission was committed with intent to kill or in the reasonable knowledge that it might lead to death.<sup>73</sup>

For murder as a violation of the laws and customs of war to have been charged as a crime before the Tribunal, it must have been established that it came within the 'residual jurisdiction' afforded to the Tribunal via Article 3 of its statute.<sup>74</sup>

The Tribunal's jurisprudence demonstrates that the same elements are required to be proven for murder as violation of the laws and customs of war as they are for the crime against humanity, with the caveat that the victim must have been taking no active part in hostilities.<sup>75</sup> This latter condition, for the war crime of murder, is necessary to distinguish civilians, prisoners of war and persons *hors de combat* from combatants or civilians directly participating in hostilities. The Trial Chamber ultimately convicted the accused in relation to both described incidents of shielding under the heading of murder as a crime against humanity under Article 5, neither as extermination nor as violation of the laws or customs of war.<sup>76</sup> Concerning the latter offence, the Chamber indicated that as it was charged in the alternative, and since it had already been established that the alleged incidents constituted murder under Article 5 of the statute, that it would make no legal findings in relation to charges under Article 3.<sup>77</sup>

Given the stated elements of the offence of murder under either Article 3 or 5 of the Tribunal's statute, an act of shielding would clearly amount to the offence where the shields themselves are killed due to being used in this manner. Treating such acts of shielding as synonymous with murder, as both the indictment and the Trial Chamber did, fails to draw a distinction between two individual crimes, the first of which is the use of an individual as a human shield, the second being the killing of the shield. Premising individual criminal responsibility for one offence upon conduct potentially indicative of another may offer an effective route to justice, and thus is defensible from a pragmatic prosecutorial perspective. However, any related analysis warrants acknowledgement of the criminal nature of the underlying act, regardless of whether it has been charged specifically. A failure to do so risks weakening the development of the underlying act as a crime in its own right.

This is clearly showcased throughout the *Krajišnik* judgment in relation to shielding. Throughout the Trial Chamber's analysis, it was not mentioned at any stage that the use of human shields is a violation of IHL capable of incurring criminal responsibility. Consequently, nor was it explored whether the facts presented to them would in fact satisfy the constitutive elements of shielding as an isolated offence. This is the unfortunate result of charging acts of shielding as murder as a violation of the laws or customs of war in the alternative to both murder and extermination as crimes against humanity. This leaves the option to dispense with the analysis of these charges as war crimes under Article 3 of the ICTY statute open, an option which was taken by the Trial Chamber in *Krajišnik*. This meant that the incidents depicted in the judgment, because they were being assessed as crimes against humanity, did not have to satisfy the requirements of the same act as a violation of the laws or customs of war. Treated and described, however, as acts of shielding, it is not immediately clear from reading the judgment that this is the case. It was not proven

<sup>73</sup> *Prosecutor v Krajišnik* (Trial Judgment) (n 68) [715].

<sup>74</sup> *ibid* [842]; Also see the section 'Indictments charging shielding' on the *Tadić* requirements for jurisdiction under art 3.

<sup>75</sup> *Prosecutor v Kvočka* (Appeal Judgment) IT-98-30/1-A (28 February 2005) [261].

<sup>76</sup> *Prosecutor v Krajišnik* (Trial Judgment) (n 68) [1181]–[1182].

<sup>77</sup> *ibid* [849].

that those incidents are representative of human shielding as articulated in API, merely that conduct described as ‘shielding’ satisfied the necessary elements of the offence of murder.<sup>78</sup>

The ICTY’s treatment of shielding within the context of the charge of murder does not provide much insight into the underlying acts of shielding *per se*. The convictions of factual accounts of shielding before the Tribunal under the headings of inhuman and cruel treatment, other inhumane acts and outrages upon personal dignity would support the view that killing is not an essential element of the use of human shields.<sup>79</sup> It is more accurate to claim that the jurisprudence demonstrates shielding can amount to murder if the necessary elements of the offence are proven, but that murder itself is not necessarily linked to whether shielding as a violation of IHL has taken place and consequently whether the war crime of shielding has been committed. This is supported by the judgment in the *High Command Trial*, which states that ‘forcing prisoners of war to go ahead of advancing enemy troops, thereby acting as a shield to the latter, would in itself constitute another type of war crime’, suggesting that killing is not an essential element of the offence.<sup>80</sup>

## Shielding as an underlying element of persecution

As previously noted, a number of cases charged the use of human shields as an underlying element of ‘persecutions on political, racial or religious grounds’.<sup>81</sup> A notable difference between the treatment of human shields as a war crime and as an element of persecution as a crime against humanity, is that crimes against humanity require a context of widespread and systematic commission.<sup>82</sup> Additionally, all crimes against humanity need to be committed against a civilian population in general rather than requiring a nexus to armed conflict.<sup>83</sup> This being said, while persecution can occur without a connection to armed conflict, any act of shielding as an element of persecution cannot occur in the absence of an armed conflict as it is predicated on taking advantage of the protection afforded to civilians, prisoners of war and persons *hors de combat* under IHL. Any isolated act of shielding that occurs outside of a conflict remains governed by domestic criminal law.<sup>84</sup>

Persecution typically involves the ‘intentional and severe deprivation of fundamental rights, against an identifiable group or collectively on prohibited discriminatory grounds’.<sup>85</sup> The test established at the ICTY for persecution was defined by the Trial Chamber in *Kupreškić*:

... the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.<sup>86</sup>

<sup>78</sup> Ultimately, it should be noted that on appeal, the defendants’ convictions for these charges were reversed. However, rather than the Appeal Chamber finding errors in the Trial Chamber’s legal analysis of these incidents, and those others that fell under the same counts in the indictment, the conviction was reversed because the trial Chamber was deemed to have made a legal error in imputing these crimes to the defendant on the basis of a joint criminal enterprise (JCE). The JCE via which the defendant was originally convicted, for the Appeal Chamber, had not been convincingly demonstrated to include these crimes, amongst others, within its ‘common objective’ and as such the convictions under counts 3, 4 and 5 of the indictment were reversed, see *Prosecutor v Krajisnik* (Trial Judgment) (n 68) [1181]–[1182].

<sup>79</sup> See *Prosecutor v Naletilic & Martinovic* (Trial Judgment) (n 48) [245]–[334]; *Prosecutor v Aleksovski* (Trial Judgment) IT-95-14/1-T (25 June 1999) [229].

<sup>80</sup> *The United States of America v Wilhelm von Leeb et al (High Command Trial)* Law Reports of Trials of War Criminals vol XII (UN War Crimes Commission 1948) 104–05.

<sup>81</sup> ICTY Statute art 5(h).

<sup>82</sup> Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (4th edn, CUP 2019) 233; International Law Commission, *Draft Articles on Prevention and Punishment of Crimes Against Humanity* (2019) UN Doc A/74/10 art 2(1).

<sup>83</sup> Cryer and others, *ibid* 233–35.

<sup>84</sup> See *ibid* 234.

<sup>85</sup> *ibid* 259; ILC (n 82) art 2(1)(h).

<sup>86</sup> *Prosecutor v Kupreškić* (Trial Judgment) IT-95-16-T (14 January 2000) [621].

As noted by Cryer, the test ‘remains somewhat open’ regarding which acts may constitute persecution, with it being impossible to decipher the precise modes it may take in the future.<sup>87</sup>

By acknowledging that shielding can constitute an element of persecution, the Tribunal provided an indication of its severity as an internationally criminal act, indicating that it is to be recognized as equal in gravity to the other crimes explicitly set out in Article 5. However, just as when charged as amounting to the other crimes discussed in this article, when charged as an element of persecution there is little incentive for the Tribunal to explore the constitutive components of shielding in of itself. The prosecution in any given case would not be required to definitively prove that the evidence demonstrates that shielding has taken place. Alternatively, they are charged with demonstrating that the act or acts referred to as shielding amounted to the denial of a fundamental right and had achieved the required level of gravity.

In *Karadžić*, the Trial Chamber did make explicit reference to what was required of the prosecution to successfully demonstrate that the use of human shields, as an underlying act of persecution, had occurred. Drawing specifically on Article 51(7) and the EoC,<sup>88</sup> they went on to state that ‘the perpetrator must intend to shield a military objective from attack or shield, favour or impede military operations’.<sup>89</sup> Subsequently, it was found that the accused was criminally responsible for the use of human shields as an element of persecution in a number of different municipalities.<sup>90</sup>

A specific incident discussed in the judgment evidences how attention shifts away from the precise components of shielding when it is charged in this way. It was alleged that in Rogatica, a group of Bosnian Muslim detainees had their hands tied behind their backs and were forced to walk towards the frontlines by Bosnian Serb forces.<sup>91</sup> Soldiers, along with the detainees, then marched towards the frontlines with a number of Muslim detainees compelled to walk in front of them, with two of the detainees injured when opposition forces began firing.<sup>92</sup> The discussion of this incident within the judgment did not draw on whether the facts demonstrated that there had been an intent to shield, favour or impede a military target, or military operations, but revolved around whether these acts had been intended as an act of persecution, with it being characterized as having been carried out with a deliberate intent to discriminate on the basis of the identity of the human shields.<sup>93</sup> Although the judgment does not assess whether the elements of shielding the Chamber had earlier outlined had been satisfied, it can be presumed that the Trial Chamber’s lack of commentary on this demonstrates their belief that they had. This is further reinforced by their continued reference to the Bosnian Muslims who had been persecuted in this instance as ‘human shields’.<sup>94</sup> It would have proven useful, for the purpose of identifying shielding conduct in the future, if the Trial Chamber had elaborated upon *why* these acts were first indicative of human shielding and then why they satisfied the requirements of persecution. The primary charge, however, is always likely to occupy a court’s attention in situations like this, and in regard to the above-mentioned incident the conduct of the Bosnian Serb forces clearly indicates an intent to shield military forces from attack, in addition to a finding that it was done so with intent to discriminate on the basis of the identity of those

<sup>87</sup> Cryer and others (n 82) 253.

<sup>88</sup> *Prosecutor v Karadžić* (Trial Judgment) IT-95-5/18 (24 March 2016) fns 1677 and 1690

<sup>89</sup> *ibid* [526].

<sup>90</sup> *ibid* [2534]–[2536].

<sup>91</sup> *ibid* [1025]—The judgment does not make it entirely clear whether the detainees were civilians, prisoners of war or both, but it does indicate, at [1021], that they were taken from the Rasadnik Detention centre which had been shown to house both Civilians and soldiers from the army of Bosnia—Herzegovina (ABiH) at roughly the same time this incident took place and thus there is a significant chance that it may have involved the use of both.

<sup>92</sup> *ibid* [1025].

<sup>93</sup> *ibid* [2536].

<sup>94</sup> *ibid* [2534], [2536].

shields. The Trial Chamber may have understandably felt that these facts spoke for themselves, but they did not make this explicitly clear.

As will be elaborated in the section ‘The use of human shields as amounting to or in conjunction with forced or unlawful labour’, the true significance to be drawn from cases that charged human shielding as an element of persecution, particularly the *Mladić* trial decision, lies in the coupling of shielding with acts of forced or unlawful labour.

## The use of human shields as amounting to or in conjunction with forced or unlawful labour

As demonstrated above, the use of human shields was regularly charged before the ICTY as amounting to other crimes enumerated within the Tribunal’s statute. A recurring theme amongst the charges is the grouping of shielding together with either forced or unlawful labour.<sup>95</sup> Human shielding and forced labour share a compulsive essence; they are both offences that ‘force’ protected persons to perform an action and thus there is a clear overlap. They are also both detention-related, but the material similarities come to the fore when unlawful labour is performed at the frontlines, or in areas of hostilities. The use of human shields involves the utilization of protected persons to shield, favour or impede military targets or operations. When forced labour is performed at the front lines, the individuals used are exposed to the effects of hostilities in place of combatants. This poses a question as to whether using protected persons to perform labour in dangerous areas can carry the intent to prevent soldiers from being exposed to such danger, thus shielding them from the effects of hostilities. If this were to be the case, it would also have to be questioned which elements of each offence distinguish them from one another, as they remain two distinct violations of IHL and two distinct international crimes. The consistent coupling of the two within relevant indictments suggests that ICTY prosecutors also recognized the shielding/labour overlap.

Most of the judgments tasked with assessing allegations of both unlawful forced labour and human shielding address the two offences within the same section, or under the same heading, with factual accounts of conduct often common to both. This invites clarification of how the two offences each map onto the same set of facts, which would in turn lead to greater elaboration of shielding in its own right. For the most part, however, the jurisprudence does not convincingly demonstrate where the boundaries of the individual offences lie, or whether one may be a more specific iteration of the other. This being said, the judgment handed down by the Trial Chamber in *Mladić* corrected the course of the Tribunal to a limited extent, choosing to elaborate upon why certain incidents are indicative of shielding specifically. The remainder of this section will initially lay out the requirements of unlawful labour as an offence before the Tribunal, before considering specific incidents drawn from cases in which unlawful or forced labour was charged and/or assessed in conjunction with human shielding. Finally, it will consider the effect of the Trial Chamber’s approach in *Mladić*.

### Unlawful/forced labour

Like shielding, unlawful labour is an offence not specifically set out within the ICTY statute. It is prohibited by virtue of the Third Geneva Convention in relation to prisoners of war and under the Fourth in relation to civilians.<sup>96</sup> The Trial Chamber in *Karadžić* stated that ‘not all forms of forced labour are *per se* unlawful’<sup>97</sup> referring to Appeal Chamber’s

<sup>95</sup> See the subsection ‘Indictments charging shielding’; The terms ‘unlawful labour’ and ‘forced labour’ are used interchangeably throughout the jurisprudence of the Tribunal.

<sup>96</sup> GCIII art 50; GCIV art 40. art 40 does not prohibit forced labour, but limits the forms of labour which civilians can be compelled to perform. Those that fall outside of this list are thus unlawful.

<sup>97</sup> *Prosecutor v Karadžić* (Trial Judgment) (n 88) [525].



assertion in *Krnojelac* that '[t]here is a principle which states that the work required of a person in the ordinary course of lawful detention is not regarded as forced or compulsory labour'.<sup>98</sup> However, they are required in such circumstances to be provided with working conditions and safeguards similar to those of the general civilian population.<sup>99</sup> The perpetrator must have intended the labour to be performed involuntarily,<sup>100</sup> but it is the role of the Tribunal to determine whether the victims had a 'real choice' in the face of a suggestion that it was done so voluntarily.<sup>101</sup>

The fact that, throughout the relevant judgments, shielding is rarely discussed in the absence of unlawful or forced labour is largely due to the way the two offences have been grouped together in the indictments. It follows that where they amount to the same charge, or represent different elements of an overall charge, that they are assessed in connection with each other. This, in turn, limits the scope for elaboration upon human shielding as a specific offence, as evidenced by the approach of the Trial Chamber in *Blaskić* when assessing the allegation of a widespread HVO policy of 'using the detainees forced to dig trenches in front line positions as human shields'.<sup>102</sup> They reiterated their finding from earlier in the judgment that the use of protected persons for forced labour in frontline positions constituted inhuman or cruel treatment, and that 'the motives of their guards is of little significance'.<sup>103</sup> In doing so, they indicate that it does not matter if the individuals forced to dig trenches at the front lines were used as human shields in the course of their labour, as the charge of inhuman or cruel treatment had already been demonstrated by virtue of the trench digging. The result being that for that particular allegation, whether an act of shielding had occurred was not established.

In *Aleksovski*, as both offences were charged as amounting to an outrage upon personal dignity, the Trial chamber did not elaborate upon the limits of shielding and unlawful labour nor identify the points at which they overlap. However, this is something that has occurred when overlapping offences are charged separately, or when the same facts yield multiple different charges. In considering potential cumulative convictions with respect to elements of persecution, and their status as a separately charged crime against humanity under Article 5 of the ICTY statute, the Appeal Chamber in *Kordić* stated that, '[i]t must be considered whether each offence charged has a materially distinct element not contained in the other; that is, whether each offence has an element that requires proof of a fact not required by the other offence',<sup>104</sup> highlighting the distinct elements of murder as crime against humanity and as an element of persecution.

It is not entirely clear why the Tribunal did not seize the opportunity to consider unlawful forced labour and human shielding as materially distinct offences when predicated on the same facts, when the Appeal Chamber in *Kordić* so clearly demonstrated that for murder this is the approach that should be taken. The key distinction here might be that, in *Kordić*, it was a situation of the same offence (murder) under different charges (murder as a crime against humanity and as an element of persecution). In most cases, that group shielding together with unlawful forced labour, it is a situation of different offences under the same charge. The former requires the approach suggested by the Appeal Chamber in *Kordić* to clearly establish the extent of permitted cumulative convictions, whereas the latter does not. That being said, there is nothing that would prevent a relevant chamber from taking this route in the absence of such a dynamic, and it would only serve to further clarify the law. In fact, while earlier cases failed to do so, in *Mladić* and, to an extent, in *Karadžić*,

<sup>98</sup> *Prosecutor v Krnojelac* (Appeal Judgment) IT-97-25-A (17 September 2003) [200].

<sup>99</sup> *Prosecutor v Karadžić* (Trial Judgment) (n 88) [525].

<sup>100</sup> *ibid* [526].

<sup>101</sup> *Prosecutor v Krnojelac* (Trial Judgment) IT-97-25-T (15 March 2002) [372].

<sup>102</sup> *Prosecutor v Blaškić* (Trial Judgment) (n 52) [711].

<sup>103</sup> *ibid* [713].

<sup>104</sup> *Prosecutor v Kordić & Cerkez* (Appeal Judgment) IT-95-14/2-A (17 December 2004) [1040].

this approach *was* taken by the Trial Chamber, indicating that the Tribunal had recognized prior neglect of such an analysis.

### Prosecutor v Naletilić & Martinović

The *Naletilić & Martinović* trial judgment provides a potent example of how these offences can overlap with each other in relation to one example of conduct. The indictment in this case charged the defendants with shielding incorporated under a series of charges, including inhuman treatment and cruel treatment, in addition to unlawful labour as a violation of the laws and customs of war.<sup>105</sup> All of these charges relate to a singular event, referred to as ‘the wooden rifles incident’.<sup>106</sup>

Evidence presented to the Trial Chamber indicated that on 17 September 1993 the HVO launched an offensive against the Army of Bosnia–Herzegovina (ABiH).<sup>107</sup> That morning, approximately 30 prisoners were transferred to the headquarters of the Vinko Skrobo ATG.<sup>108</sup> Out of these detainees, four were selected, given camouflage uniforms to wear and wooden rifles to hold.<sup>109</sup> The judgment describes the incident as it subsequently unfolded:

Witness J testified that after the four selected prisoners were given camouflage uniforms and wooden rifles, they were ordered to clean the soldiers’ weapons. A while later, Ernest Takac took them to the building called the “first aid post”. Vinko Martinović met them there and told them about a combat operation, which was to take place at noon and during which, after a short shelling, a tank would come from the Rondo and stop in front of the building. It would fire a few times and the prisoners would have to take position around the tank facing the ABiH, supposedly to find out where their positions were. Vinko Martinović promised the prisoners that they would be freed within 48 hours if they succeeded. A while later, a tank arrived from the Rondo as planned and the prisoners started to walk toward the ABiH positions. They lay down as soon as they heard shots, and witness J was wounded while lying on the ground. However, the prisoners managed to take shelter in the basement of the building where the ABiH was positioned.<sup>110</sup>

Witnesses claimed that they were also informed that they were to jump into trenches and disarm enemy soldiers, and that they were ‘pushed [ ... ] to walk aside the tank that opened fire’.<sup>111</sup> One of the three witnesses also claimed that he had been instructed to ‘put on a uniform and go across the street to bring back any wounded prisoners’, that some prisoners were ‘instructed to remove the bodies of injured or dead soldiers’, and that prisoners had been ordered to remove sandbags from two locations in order to unblock the road that the tank was to pass through, during which they ‘were directly exposed to gunfire’.<sup>112</sup>

Before analysing the Chamber’s assessment of this event, it is worth highlighting the potential overlaps between different violations of IHL involved in this incident. First, the act

<sup>105</sup> *Prosecutor v Naletilić & Martinović* (Second Amended Indictment) (n 51) counts 2–5.

<sup>106</sup> *Prosecutor v Naletilić & Martinović* (Trial Judgement) (n 47) [274]–[291].

<sup>107</sup> *ibid* [275].

<sup>108</sup> *ibid* [276]; It was accepted by the Chamber that the prosecution had failed to establish the precise status of the detainees involved in this incident, but also indicated that it was their opinion that all those involved met the requirements to be treated as ‘protected persons’ under either Geneva convention III as POWs or Geneva convention IV as civilians. Given that the prosecution had failed to establish this clearly, and that rules prohibiting unlawful labour specifically were more favourable under Geneva Convention III, they chose to treat all victims as if they were indeed protected persons under this convention, and thus apply only those rules relating to the treatment of prisoners of war—*ibid* [252]; The Vinko Skrobo ATG was a sub-unit of the HVO under the command of Vinko Martinović.

<sup>109</sup> *ibid*.

<sup>110</sup> *ibid* [752].

<sup>111</sup> *ibid* [274]–[291].

<sup>112</sup> *ibid* [279]–[280].

of surrounding the tank with detainees suggests a possible intent to shield the tank as a military target, thus violating the prohibition of the use of human shields. There is also a question of whether this would be representative of shielding if it was done so to prevent soldiers from being exposed to the dangers that arise in such a scenario. Secondly, compelling detainees to take part in military operations in this way is likely to be considered a breach of the prohibition of unlawful labour under the Third Geneva Convention.<sup>113</sup> This act of compulsion could also have been regarded as a grave breach of the Geneva Conventions, as per Article 2 of the ICTY statute, if it was deemed that the HVO had forced detainees to serve in the forces of a hostile power. Finally, these actions clearly demonstrate the deliberate exposure of protected individuals to the effects of hostilities, which is a violation of IHL and thus could have been charged under Article 3 of the ICTY statute.<sup>114</sup>

These acts were charged cumulatively as inhuman treatment, cruel treatment, unlawful labour, and other inhumane acts. The Trial Chamber were satisfied that the events so described had occurred and that the offences had been proven.<sup>115</sup> In confirming these charges, they did not specifically refer to the use of human shields. As to whether unlawful labour had occurred, the Chamber focused on the requirement that the labour itself must have been compelled and they were convinced in this instance that the prisoners were forced to perform the labour, the promise of release not enough to amount to genuine evidence of consent on their part.<sup>116</sup>

In assessing the responsibility of Vinko Martinović under Article 7 of the ICTY statute, the Chamber additionally confirmed that they were satisfied he had directly ordered those detainees to be used as human shields in the 'wooden rifles incident'.<sup>117</sup> This is a clear statement of belief that this incident involved the use of human shields yet, unlike the crimes specifically charged, they did not elaborate as to why the relevant conduct was constitutive of shielding. Had they done so, it may have shed light on where the overlaps between these offences begin and end, and on the extent to which the conduct as described could be simultaneously representative of shielding, unlawful labour and forcing detainees to serve in the forces of a hostile power. There is also doubt looming over how the HVO could be guilty of violating the prohibition of shielding in this scenario. As explained earlier in this article, both API Article 51(7) and the EoC emphasize an intent to shield, favour or impede military operations or to render certain points or areas immune from attack. Surrounding a tank with protected persons could, hypothetically, demonstrate such an intention, but the fact that the detainees in the above incident were dressed to look like soldiers suggests there was no intention to utilize their protected status to shield the tank from attack. In fact, the stated purpose of the operation was to identify the positions of enemy forces. It was left unanswered by the Trial Chamber how this intent could be established, or indeed, if there were another military target that they believed the detainees were shielding by being used in this way. As will be discussed in the following sub-section, an answer to this question appears to have been provided by the Trial Chamber in *Mladić*.

## Prosecutor v Mladić

The *Mladić* trial judgment provides not only the most recent example of acts of human shielding forming an element, or being incorporated under the heading of, another offence,

<sup>113</sup> GCIII art 50 lists the forms of labour that may be compelled of prisoners of war. A number of those forms so listed are restricted where they have a 'military purpose'. The official commentary additionally mentions that 'The participation of prisoners of war in such work is prohibited, however, whenever it is done for the sole or principal benefit of the military, to the exclusion of civilians'; See also Jean S Pictet and Oscar M Uhler, *The Geneva Conventions of 12 August 1949 Commentary Volume III: Geneva Convention Relative to the Protection of Prisoners of War* (International Committee of the Red Cross 1958) 268; *ibid* [253]–[259].

<sup>114</sup> GCIII art 23.

<sup>115</sup> *Prosecutor v Naletilić & Martinović* (Trial Judgement) (n 48) [288]–[289].

<sup>116</sup> *ibid* [288].

<sup>117</sup> *ibid* [290].

but it also provides the most in-depth reflection by the Tribunal on the nature of shielding as an international crime. Where departing from the approach shown in prior cases, they make direct reference to the necessary elements of human shielding as a violation of IHL and clearly articulate why the conduct in question satisfies these elements. In this respect, the *Mladić* trial judgment does more to unpack shielding as an international crime, and to indicate how the related provisions of international law should be understood and applied, than that of any other international criminal case to date.

As was the case in *Karadžić*, the final amended indictment in *Mladić* removes any specific mention of human shielding with respect to the alleged incidents of hostage taking. This significance of this will be discussed in greater detail in the section ‘The overlap with hostage taking’, but for the purposes of the present section it is enough to highlight that under count 3 of the fourth amended indictment, which relates to persecution as a crime against humanity, shielding is charged as an underlying element. Count 3(h) details this underlying element as involving ‘forced labour including digging graves and trenches and other forms of forced labour at front lines and the use of Bosnian Muslims and Bosnian Croats as human shields’,<sup>118</sup> yet another example of the grouping of unlawful forced labour together with shielding.

The judgment covers these incidents in relation to the regions in which they were allegedly committed under the repeated heading ‘forced labour and human shields’.<sup>119</sup> While grouped together in this manner, the majority of the content contained beneath each use of the heading addresses only alleged incidents of forced labour explicitly, offering little information pertinent to shielding. The judgment differs with respect to the incidents alleged to have taken place in the municipalities of Kalinovik,<sup>120</sup> and Rogatica,<sup>121</sup> which contain direct references to shielding.

The first incident, described to the Trial Chamber through multiple witness statements and testimonies, is summarized in the judgment as follows:

Two detainees at the KP Dom were taken by troops to Kalinovik in an army truck and were then separated from twelve other detainees and taken to the police station. Witness RM-012, who was one of the two detainees, stated that this happened on 18 September 1992. Boško Govedarica was the chief of the police station and Neđelko Zeljaja was the police commander. The two detainees were kept in the police station and at least one of them was required to drive vehicles for the detection of landmines. Govedarica told the detainees that they had requested some drivers for this purpose but the decision that these two should be the drivers had been made ‘in Foča’. The witness was taken out about eight times to drive ahead of ‘Serb’ cars and vehicles to detect mines. While the two detainees never hit a mine, on one occasion a car behind them hit a mine causing one death.<sup>122</sup>

The description of this incident is intriguing as it does not represent what one might consider to be a paradigmatic use of human shields, much like the ‘wooden rifles incident’ addressed in the section ‘*Prosecutor v Naletilić & Martinović*’. The detainees in this instance, whom the Chamber later determined to be civilians,<sup>123</sup> were not used to immunize a target in a comparable way to those in *Blaskić* were, for example, when they were forced to surround a military headquarters.<sup>124</sup> Forcing civilians to drive cars to detect mines appears to be more obviously an act of unlawful forced labour given the military purpose

<sup>118</sup> *Prosecutor v Mladić* (Fourth Amended Indictment) (n 40) [59].

<sup>119</sup> *Prosecutor v Mladić* (Trial Judgment) (n 32) for examples see [468], [581], and [706].

<sup>120</sup> *ibid* [793].

<sup>121</sup> *ibid* [1457].

<sup>122</sup> *ibid* [793].

<sup>123</sup> *ibid* [3386].

<sup>124</sup> See the section ‘*Prosecutor v Blaskić*’.

underscoring it.<sup>125</sup> The Chamber, however, in a step not taken in any previous case, assessed this incident directly against what they considered the necessary elements of human shielding. They first stated that they understand 'human shields to mean the placement or detention of persons in areas where they may be exposed to combat operations, for the purpose of rendering certain areas or activities immune from military operations or armed attack'.<sup>126</sup> They subsequently argued, in respect to the above incident, that:

[D]etainees were brought to a mined area and forced to drive in front of other cars. The Trial Chamber considers the area where these mines were located amounted to a combat operation that the detainees were exposed to for the purpose of detecting mines. The Trial Chamber considers the laying of mines, under these circumstances, to constitute a military operation or armed attack. Based on the foregoing, the only reasonable inference for moving the detainees in this manner was to render the area, and/or the activities of those in the cars, or future Bosnian-Serb soldiers going through that area, immune from this military operation or armed attack.<sup>127</sup>

This clarification on how the Chamber viewed human shielding is significant on a number of levels. At the most basic level, this indicates that using civilians to search for landmines, or demine an area, can amount to the use of human shields. In prior cases before the ICTY, evidence of the use of civilians in a similar manner had been presented to the Tribunal, but there had been little in the way of information or opinion delivered to indicate whether the respective chambers viewed this conduct as forced labour, shielding or as amounting to both offences. For example, the trial judgment in *Karadžić* describes an incident in which '50 detainees ... were selected ... divided into groups, and taken to Žuč in order to look for mines, dig trenches and serve as human shields'.<sup>128</sup> The judgment does not make clear whether these three modes of conduct are based on the same facts, meaning one seamless incident that demonstrates all three simultaneously, or whether there were three separate incidents or a series of recurring incidents that demonstrated each respectively and in isolation from one another. Following the reasoning displayed in *Mladić*, it is clear that where there is an identifiable military target that is being shielded from a potential attack, through the use of civilians or other persons protected under IHL, that the intent to use those persons as a human shield can be inferred where it is the only 'reasonable inference' to be made.

The reasoning applied by the Trial Chamber in *Mladić* may also fill the gap left unaddressed by the same Chamber in relation to the 'wooden rifles incident'.<sup>129</sup> In particular, in suggesting that the detection of mines is capable of amounting to the use of human shields because it renders 'future Bosnian-Serb soldiers' immune from the effects of the attack constituted by the laying of mines, they indicate that an act of forced labour, if it is carried out with the purpose of rendering a target immune from the effect of military operations, can amount to the use of human shields. In the 'wooden rifles incident', if the detainees were used precisely so Bosnian-Serb Soldiers were not exposed to the risks of such an operation, then following the reasoning of the Trial Chamber in *Mladić*, the requirements of shielding may well have been satisfied. The use of this line of reasoning to retrospectively inform an understanding of the Trial Chamber's thought process in *Naletilić and Martinović* is further supported by the text of the relevant indictment:

The detainees were forced, at great risk to their lives, to perform various dangerous military support task benefiting the HV and HVO; including: digging trenches, building

<sup>125</sup> See n 101.

<sup>126</sup> *Prosecutor v Mladić* (Trial Judgment) (n 32) [3245].

<sup>127</sup> *ibid* [3382].

<sup>128</sup> *Prosecutor v Karadžić* (Trial Judgment) (n 88) [2432].

<sup>129</sup> See the section '*Prosecutor v Naletilić & Martinović*'.

defences with sandbags, carrying wounded or killed HV or HVO soldiers, carrying ammunition and explosives across the confrontation line, and placing them in front of ABiH positions. These tasks were often performed by the detainees, under conditions which exposed them directly to hostile fire, and thereby served the purpose of protecting HVO soldiers. Consequently, the detainees were turned into human shields.<sup>130</sup>

Clearly the prosecution felt that acts of unlawful labour amounted to the use of human shields because they prevented HVO soldiers from being exposed to the dangers of performing such tasks. The failure of the Trial Chamber to address this directly, coupled with their acknowledgment that detainees were used as human shields during the 'wooden rifles incident', suggests that they agreed with the prosecution on this point.

Another element of shielding potentially clarified in *Mladić* is that the military target being protected does not necessarily have to maintain a close geographical proximity to the shields, as long as the shielding effect is achieved or attempted. This was a question previously posed before the ECtHR in *Demiray v Turkey*.<sup>131</sup> The applicant claimed that their husband, a detainee under the control of Turkish security forces, had been killed by a booby-trapped arms cache while being used as a human shield.<sup>132</sup> The detainee was shown to have been 1m away from the cache at the time of the explosion, while the gendarmes accompanying him were 30m away.<sup>133</sup> Much like the incident described in *Mladić* above, this differs from the shielding paradigm of forcing civilians to surround a military target. The ECtHR, however, did not go much further than hinting towards these facts representing human shielding. Additionally, a lack of clear factual evidence meant that they never explicitly questioned whether shielding could take place when the shield (the detainee) and the shielded target (the soldiers) were not present in the area due to come under attack. The Trial Chamber in *Mladić*, however, do specifically address this question in holding that the detection of mines served to shield the 'activities of those in the cars', who were physically present at the time of the incident, and those soldiers who may come into contact with the mined area in the future. In doing so, they indicate that close geographical proximity is not a necessity for shielding to occur.

The *Mladić* judgment also describes a second incident of shielding, described under the heading of 'forced labour and the use of human shields':

A Serb soldier named Dragoje Paunović, a.k.a. Špiro, ordered other soldiers to tie the hands of the detainees behind their backs. Then, some of the detainees were ordered to walk down an alley two by two in order to be used as human shields. According to Baždar, two of the detainees, Mustafa Tanković and Hamdija Jašarević, were injured as a result. According to Witness RM-037, also a third detainee was injured during this incident.<sup>134</sup>

In regard to this alleged act of shielding, their analysis is more straightforward, but nevertheless further confirmation that the intent to shield can be inferred from the nature of the conduct:

[A]t least two detainees were wounded, Serb soldiers were present and that the Trial Chamber found that these detainees were used 'as a human shield'. Based on the foregoing, the Trial Chamber finds that the detainees were placed in an 115550 Case No.: IT-09-92-T 22 November 2017 ' 1733 area where they were exposed to combat operations.

<sup>130</sup> *Prosecutor v Naletilić and Martinović* (Second Amended Indictment) (n 37) [37].

<sup>131</sup> *Demiray v Turkey* (n 26).

<sup>132</sup> *ibid* [38].

<sup>133</sup> *ibid* [20].

<sup>134</sup> *Prosecutor v Mladić* (Trial Judgment) (n 32) [1457].

The Trial Chamber finds that the only reasonable inference for moving these detainees to the front line was to render the area and/or the activities of the Bosnian-Serb soldiers present immune from military operations or armed attack.<sup>135</sup>

It should also be noted that the detainees involved in both incidents were determined by the Chamber to be civilians.<sup>136</sup>

## The overlap with hostage taking

ICTY jurisprudence clearly illustrates the overlap and similarities between the offences of human shielding and hostage taking, which bears a distinct likeness to shielding in both its constituent elements and in the conduct that amounts to it. The trial judgments delivered in *Karadžić* and *Mladić* provide both the most recent and clearest examples before the tribunal, with respect to where the two offences overlap. Both of the accused were indicted on the charge of taking hostages as a violation of the laws and customs of war punishable under Article 3 of the Tribunal's statute.<sup>137</sup> In their *Karadžić* judgment, the Chamber defined the *actus reus* of the offence of hostage taking as 'the detention of persons and the use of a threat concerning the detained persons, including a threat to kill, injure or continue to detain, in order to obtain a concession or gain an advantage' and the *mens rea* as 'the intention to compel a third party to act or refrain from acting as a condition for the release of the detained persons'.<sup>138</sup> In *Mladić*, the Trial Chamber elaborated further upon the elements of the offence:

The crime of hostage taking requires proof of the following elements:

- a) the unlawful confinement or deprivation of liberty of another person;
- b) the issuance of a threat to kill, injure or continue to detain another person; and
- c) the threat is intended to obtain a concession or gain an advantage.<sup>139</sup>

It is not initially clear how, at least in substance, to distinguish between a paradigmatic act of human shielding and one of hostage taking given the definitions above. The forcible placement of civilians around a military target for the purpose of immunizing said target, for example, clearly involves the 'deprivation of liberty' and is intended to 'obtain a concession or advantage'. However, it is less apparent whether such actions can be seen as equivalent to a conditional threat, or indeed amount to the issuance of a threat to 'kill, injure or continue to detain'. Certainly, a threat of this nature is implied by such conduct, but it remains unclear whether this amounts to an issuance. The Trial Chamber's treatment of the conduct alleged to amount to hostage taking in both cases provides some guidance in this respect, particularly in its implicit recognition of acts of shielding amounting to hostage taking. It does not, however, expressly delineate the two offences, despite numerous explicit references to human shielding within the discussion of conduct allegedly representative of hostage taking.

Both cases addressed the same factual accounts of conduct, which serve to further evidence the overlap between hostage taking and human shielding. This was demonstrated before the trial even began with the initial joint indictment of both defendants charging hostage taking and the use of human shields under the same section and on the same

<sup>135</sup> *ibid* [3383].

<sup>136</sup> *ibid* [3386].

<sup>137</sup> *Prosecutor v Karadžić* (Prosecutor's Marked-up Indictment) (n 39) Count 11 [83]–[87]; See also *Prosecutor v Mladić* (Fourth Amended Indictment) (n 40); GCIV art 3.

<sup>138</sup> *Prosecutor v Karadžić* (Trial Judgment) (n 88) [468].

<sup>139</sup> *ibid* [3215].

factual grounds.<sup>140</sup> The respective amended indictments removed the charge of human shielding but the material facts upon which the initial indictment was founded remained. They indicate that conduct constitutive of hostage taking could also comfortably amount to a breach of the prohibition of using human shields. The allegations levelled at the accused in this instance related to incidents that took place in May–June 1995 following NATO airstrikes directed at Bosnian Serb forces in various regions of Bosnia–Herzegovina, where numerous United Nations Protection Force (UNPROFOR) and United Nations Military Observer (UNMO) officials were detained in an effort to compel NATO to refrain from conducting further attacks and to secure the compliance of UNPROFOR personnel.<sup>141</sup>

While a number of these incidents constituted hostage taking without a significant overlap with shielding, some demonstrated intent to prevent further NATO operations by placing individuals in areas where they would likely be exposed to the effect of any future attacks. For example, the *Karadžić* trial judgment describes an order issued by VRS main staff:

... stating that based on information that NATO will continue its air strikes on important targets in the RS, captured UNPROFOR personnel were to be disarmed and placed in “the areas of command posts, firing positions and other potential targets that may come under the air strike”. The order provided for the exact number of UNPROFOR personnel to be detained [and] the location where they should be sent.<sup>142</sup>

Furthermore, a group of UNMO officials were dressed up in civilian clothing and transported to the Jahorina Radar Station, being told that they were to be “locked up to protect it”.<sup>143</sup> Their location was purposefully communicated to UNMO headquarters and detainees were taken to sit outside, around the radar station, two at a time in shifts.<sup>144</sup> One of the witnesses involved in this incident claimed he was later taken to a radio communication centre and locked in a room for several days.<sup>145</sup> During this period, he claimed to hear NATO aircraft flying overhead, and at these points, he and another detainee were ordered to go outside until the flights passed.<sup>146</sup> This latter conduct, in particular, demonstrates a clear intent to use the detainees’ presence to shield the communications centre from attack and thus is representative of the use of human shields.

The judgment delivered in *Mladić* provides a further description of the events that took place at the Jahorina radio station that supports the claim that they were representative of shielding. In addition to reiterating that detainees were ordered to sit between two radio antennae at a suspected command post in shifts,<sup>147</sup> one witness also claimed that they had been ‘forced to contact the UNMO headquarters in Sarajevo and were told to say that they were being taken to the Jahorina Radar Station to be used as human shields’.<sup>148</sup> The

<sup>140</sup> *Prosecutor v Mladić and Karadžić* (Initial Indictments) (n 43) part III counts 13–16. Hostage taking was charged as a grave breach of the Geneva Conventions per se under art 2 and again as a violation of the laws and customs of war under art 3. The use of human shields was charged as inhuman treatment under art 2 as a grave breach and as cruel treatment as violation of the laws and customs of war under art 3.

<sup>141</sup> *Prosecutor v Karadžić* (Trial Judgment) (n 88) [5941]; *Prosecutor v Mladić* (Trial Judgment) (n 32) [3221]—Additionally, at [3224], the status of the victims as either combatants or civilians was deemed irrelevant by the trial Chamber in *Mladić*, as the protections of common art 3 clearly apply to any person not taking an active part in hostilities. They claimed that irrespective of their status prior to detention, because they had been disarmed, they had been rendered persons *hors de combat* and thus fell within the protection guaranteed by common art 3.

<sup>142</sup> *Prosecutor v Karadžić* (Trial Judgment) (n 88) [5860].

<sup>143</sup> *ibid* [5875].

<sup>144</sup> *ibid* [5877].

<sup>145</sup> *ibid*.

<sup>146</sup> *ibid*.

<sup>147</sup> *Prosecutor v Mladić* (Trial Judgment) (n 32) [2243].

<sup>148</sup> *ibid* [2243].



*Mladić* judgment also describes an incident that took place in the Banja Luka region, in which a group of detainees were brought to a military barracks and forced to split up into smaller groups.<sup>149</sup> One of the military police commanders involved offered an explanation for this behaviour, stating that the detainees were split into groups ‘to stop NATO air strikes by using them as “human shields” at particularly important facilities which were possible targets of NATO attacks’.<sup>150</sup>

It is evident that these incidents, if charged as acts of human shielding explicitly, would satisfy the requirements of that offence without difficulty. The defendants in both cases were convicted of these incidents as conduct amounting to hostage taking and thus a violation of Common Article 3.<sup>151</sup> While the Trial Chamber did not, in either case, make it clear what the distinguishing factors should be between the two offences, it does indicate that the placement of protected persons in the vicinity of military targets, with the purpose of immunizing that target, amounts to the issuance of a threat. If this were not the case, it would be difficult to see how the Chamber could reason that the events as described amounted to hostage taking.

Arguably, the two key distinguishing criteria are the deprivation of liberty or detention required for conduct to amount to hostage taking, and the intent to shield or render points immune from military operations necessary to satisfy a claim of shielding. It is conceivable that anyone not actively participating in hostilities could be taken hostage in the absence of a clear intent to shield. It is equally possible that an act of shielding can take place without the shields themselves being detained or deprived of liberty. As discussed in the section *Prosecutor v Blaskić*, they need not even be aware of the manner in which they have been used. Acts of ‘passive shielding’, where a military objective is moved to a civilian area, are unlikely to involve detention of civilians or their deprivation of liberty.<sup>152</sup> This is further supported by the fact that the EoC definition of shielding does not limit the war crime to simply moving civilians or protected persons but states that the perpetrator must have ‘moved or otherwise took advantage of the location’ of those persons.<sup>153</sup> Following the conclusion of both the *Karadžić* and *Mladić* cases, however, judicial interpretation of these likely distinguishing factors is still sorely lacking.

## Conclusion

The contribution of the Tribunal’s jurisprudence to a clearer understanding of the use of human shields is limited. This is largely because of the varied approaches to charging shielding as an internationally criminal act. As a result, the Tribunal, for the most part, was not provided with an obvious platform to test factual accounts of shielding against the rules of IHL prohibiting it, and thus interpret and apply them appropriately. The incorporation of human shielding within other offences instead led to a consistent examination of evidence that could be indicative of shielding through the prism of alternative offences. Therefore, throughout the jurisprudence of the Tribunal it developed in the background, almost exclusively through reference to these other crimes.

The reasoning adopted by the Trial Chamber in *Mladić* represents a welcome and important exception in this respect. Significantly, they clarified that where there is an intention to shield, coupled with an identifiable military target benefiting from that intent, a violation of the prohibition will have taken place. The Chamber also indicated that the requisite intent can be inferred from the circumstances, and that the shielded target does not have to

<sup>149</sup> *ibid* [2256].

<sup>150</sup> *ibid*.

<sup>151</sup> *Prosecutor v Karadžić* (Trial Judgment) (n 88) [5951], [6071]; *ibid* [5214].

<sup>152</sup> Schmitt (n 56) 26; Robin Geiß and James G Devaney, ‘Zealots, Victims and Captives: Maintaining Adequate Protection of Human Shields in Contemporary International Humanitarian Law’ (2017) 47 *Israel Yearbook on Human Rights* 11, 20.

<sup>153</sup> EoC (n 29) 30.

be in close geographical proximity to the shields themselves. Their reasoning further suggests that conduct capable of amounting to such a violation can extend to acts such as forcing civilians or prisoners of war to neutralize a minefield and, potentially, other acts of forced labour where the requirements of shielding are established. The Appeal Chamber in *Blaskić* offered an additional contribution when making it clear that for shielding to occur, harm does not have to come to the shields so used nor must there be an attack of significant intensity, it is enough that they are used as protection from attack.

The contributions of the Tribunal in these cases help to alleviate the ambiguity of some shielding allegations raised in the introduction to this article. For example, the reasoning in *Mladić* would suggest the key to determining whether forcing civilians to remain in hostile zones amounts to human shielding, as alleged of Hamas by Israeli officials in late 2023, would be whether the only reasonable inference to be drawn from the circumstances is that it was done so with the intent to shield.<sup>154</sup> Additionally, forcing civilians to search properties suspected of being booby trapped, actions attributed to Israeli forces by the 2015 COI,<sup>155</sup> does not meet the shielding paradigm of surrounding a target for its protection. However, *Mladić* indicates that geographical co-location of shield and target is not a prerequisite; that the beneficiaries of the protection can be spatially or even temporally distant from the shield, if both are identifiable and there is an intent to shield. Viewed in this light, the shielding prohibition can thus comfortably extend to allegations such as those detailed in the 2015 COI report where these elements are present. With accusations of shielding continuing to be made in contemporary conflicts that draw significant legal scrutiny, most notably the ongoing conflict between Israel and Palestine, these contributions can aid the accurate identification of shielding conduct under IHL moving forward.

In 1948, when the US Military Tribunal at Nuremberg remarked that the use of prisoners of war as a screen for German troops ‘would in itself constitute another type of war crime’,<sup>156</sup> it carried an air of foreshadowing. In some respects, the use of human shields has developed within international criminal law since this point, leading, albeit indirectly, to a series of convictions at the ICTY. Yet, while a thin body of jurisprudence has shed some light on the nature of the offence as a violation of IHL, as a distinct war crime it remains lightweight in both content and in interpretation by international tribunals. With the ICTY finished in its analysis of the offence, it remains to be seen whether their contribution to a clearer understanding of human shielding, the *Mladić* judgment in particular, will be approved of or adopted by the ICC should they be afforded the opportunity to address a charge of shielding in the future.

<sup>154</sup> McQuade (n 4).

<sup>155</sup> 2015 COI (n 2).

<sup>156</sup> *High Command Trial* (n 23) 104.

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