

Israel – Hamas 2023 Symposium – Damage to UN Premises in Armed Conflict: IHL and Beyond

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Does a party to an armed conflict necessarily violate international law if it causes damage to United Nations (UN) premises? Certainly, the UN Secretariat considers that any damage—direct or indirect—caused to UN premises in armed conflict gives rise to an internationally wrongful act. However, on closer examination, after considering rules under international humanitarian law (IHL) and beyond, there are serious reasons to doubt this blanket position.

In any event, the question has once again come under focus, given damage caused to United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) facilities in the latest round of hostilities involving Israel and organized armed groups in Gaza.

This post seeks to answer the abovementioned question. It first considers the legal framework governing damage caused to UN premises under IHL, followed by consideration of the issue under the Convention on the Privileges and Immunities of the United Nations (CPIUN) and the UN Charter more broadly. It should be noted that legal questions also arise

regarding death and injury of persons employed by UN organs and persons seeking shelter in UN premises, as well as damage to other UN vehicles. However, for reasons of space, this post focuses only damage to UN premises.

Damage to UN Premises under IHL

IHL does not contain specific rules governing the protection of UN premises in armed conflict, rendering it necessary to have recourse to general rules which govern the conduct of hostilities in armed conflict. This is indeed reflected in the Rome Statute of the International Criminal Court. While the Rome Statute stipulates specific war crimes concerning attacks against UN facilities “involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations” (see arts. 8(2)(b)(iii), (e)(iii)), the crime can only occur when the facility is “entitled to the protection given to . . . civilian objects under the international law of armed conflict.” In other words, the Rome Statute does not recognize a prohibition going beyond the protections generally accorded to civilian objects.

What rules govern damage to objects, such as UN premises, in the conduct of hostilities in armed conflict? I shall briefly address the key rules in this regard. First, under Article 52 of the First Additional Protocol to the Geneva Conventions (AP I), it is unlawful to attack civilian objects. Rather, as Article 52(2) stipulates, “[a]ttacks shall be limited strictly to military objectives.” These rules reflect customary international law and are applicable in both international and non-international armed conflict.

UN premises are ostensibly civilian objects, save perhaps certain facilities connected to so-called UN peace enforcement missions under Chapter VII of the UN Charter, which are not (presently) occurring in Gaza. In any event, in determining whether a specific UN facility, in the final analysis, is a civilian object—and not a military objective—it is necessary to consider whether it meets the definition of a military objective, as provided in Article 52(2) of AP I,

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Thus, in the final analysis of the present circumstances, it is necessary to determine whether the UN facility is being used or is intended to be used (i.e., “purpose”) by an organised armed group, such as Hamas’s military wing or Palestinian Islamic Jihad, for military purposes.

It should now be apparent that the answer to the question whether an ostensibly civilian object, including a UN facility, is a military objective and thus a lawful target of attack is extremely fact sensitive. Armed forces often rely on (classified) intelligence information to

assess the facts. It is accordingly difficult for an external observer to make accurate assessments as to whether a particular ostensibly civilian object was, in fact, a military objective.

Thus, to the extent UN facilities were in fact the object of IDF attacks, I would not be in a position to determine whether such attacks were conducted against a military objective. However, it hardly seems implausible that certain UN facilities have been rendered military objectives by reason of their use or purpose. It has been reported—and to a certain extent confirmed by the UN’s Board of Inquiry on the matter—that in the 2014 hostilities, projectiles were fired by armed groups from UNRWA facilities. Similarly, in the present hostilities, weapons were reportedly found stored in an UNRWA school.

Second, damage to civilian objects may be lawful if it is incidental to a lawful attack against a military objective. The lawfulness of such damage depends on the rules of proportionality and precautions, as reflected in Article 57 of AP I and customary international law. Thus, it is unlawful to launch an “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Similarly, a party must take feasible precautions to avoid or at least minimise such incidental harm.

Unfortunately, damage to civilian objects is often unavoidable in armed conflict. This reality has not spared UN facilities. Tunnels in Gaza have been found in the vicinity of UNRWA schools, and rocket launch pads have been identified adjacent to UNRWA facilities. In such circumstances, it is plausible that UN premises have been damaged as a result of attacks against military objectives, potentially rendering the said damage lawful under IHL.

Third, customary international law, reflected in Article 23(g) of the Hague Regulations of 1907, also governs the destruction of property in the conduct of hostilities when such is not caused by an “attack.” Under Article 23(g), it is prohibited “[t]o destroy or seize enemy property, unless such destruction or seizure be imperatively demanded by the necessities of war.” The applicability of the rule reflected in Article 23(g) requires determining whether one of the elements of “attack” is missing from the act which causes damage. It is beyond the scope of this piece to consider the scope of the concept of “attack”; it suffices to note that the concept was discussed in detail in the context of the *Ntaganda* proceedings, and was the subject of a detailed symposium on Articles of War. However, it is possible to hypothesize circumstances where damage caused to UN premises would be lawful under the rule reflected in Article 23(g), such as where damage must be caused to the outer wall of such premises for an armoured vehicle to pass through a narrow passage.

In summarizing this section, it should be clear that the question whether damage to UN premises is lawful under IHL is extremely fact sensitive. Nevertheless, the legal framework outlined above is enough to suggest that UNRWA’s blanket assertion that damage to its premises “blatantly contravene[s] the rules of war” is at best misleading.

The Convention on the Privileges and Immunities of the United Nations Framework

Section 3 of the CPIUN stipulates:

The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

Most UN-related facilities in Gaza are affiliated with UNRWA. There is little doubt that facilities used by UNRWA constitute UN “premises.” Indeed, the UN General Assembly established UNRWA, thereby constituting it as a subsidiary organ of the UN pursuant to Article 7(2) of the UN Charter, and thus sharing the UN’s legal personality. Hence, the premises used by UNRWA are UN premises, even if it is possible to ponder whether the drafters of the CPIUN envisioned situations where a UN organ would be extensively engaged in providing social and welfare services.

In any event, under the CPIUN, facilities used by UNRWA are inviolable. Facilities which are no longer in use by UNRWA—or by any other UN organ—would seem to no longer constitute UN premises. However, it seems that temporary UN vacation of premises does not, as such, remove their status as UN premises and thus they maintain their inviolability.

When we are concerned with UN premises, does damage caused thereto in the conduct of hostilities in an armed conflict necessarily violate their inviolability, giving rise to international responsibility? In a UN Security Council meeting on November 29, 2023, Secretary-General António Guterres implied that it does, highlighting “the inviolability of United Nations facilities” and asserting that “UN facilities must not be hit.” This conforms with prior UN Secretariat practice. If correct, this would also reflect a peculiar legal situation, in which UN premises would enjoy absolute protection in armed conflict, thus enjoying greater protection than hospitals, cultural property, or indeed any other object subject to special protection in armed conflict. However, on closer inspection, the Secretary-General’s assertion is highly questionable.

The term “inviolable” is defined in the English language as “that must be respected and not removed or ignored.” As a concept, “inviolability” is well-known in diplomatic and consular law. Thus, for example, under the Vienna Convention on Diplomatic Relations (VCDR), “premises of the [diplomatic] mission are inviolable” (Article 22), “archives and documents of the mission shall be inviolable” (Article 24) and “[t]he person of a diplomatic agent shall be inviolable” (Article 29). In this regard, it has been observed that inviolability under the CPIUN “is, in respect of content, identical to the inviolability of diplomatic premises as expressed in article 22, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations.”

There appears to be conflicting State practice in the diplomatic context as to whether inviolability prohibits a State from taking measures to address (direct) public health and security dangers. Additionally, it has been highlighted that attacks against UNRWA facilities in a previous round of hostilities between Israel and organized armed groups in Gaza were condemned as violations of inviolability by UN General Assembly resolution.

Yet, even if the votes in favour “establish[] the agreement” of States supporting the resolution in that interpretation—a question requiring further study—the abstentions and negative votes of several States to the resolution on this subject prevents it from constituting an authentic means of interpretation of the CPIUN.

Finally, it has been noted that in UN practice, including in agreements between the UN and States, the concept of inviolability was considered “a prohibition on non-consensual entry into UN premises, or search of UN vehicles for any reason or purpose and by any authority of the host country,” rather than extending to damage caused in the conduct of hostilities in armed conflict. This practice appears to be reflected in the Introductory Note to the CPIUN on the UN’s Audiovisual Library of International Law, which explains that inviolability “basically means that they are exempted from any search, requisition, confiscation, or other forms of executive, administrative, judicial or legislative interference.”

Yet, the extent of this practice is unclear, and here too it is doubtful it reaches the necessary threshold to constitute an authentic means of interpretation of the CPIUN. In any event, the absence of uniform practice on the concept of inviolability leads us back to the ordinary meaning of the term, as quoted above, which if applied would seem to prohibit acts causing damage to premises enjoying inviolability.

Even if the application of the rule on inviolability would prohibit acts which cause damage to UN premises in armed conflict, it is necessary to consider the relationship between the rule of inviolability and the rules governing the conduct of hostilities under IHL, which were analysed in the previous section. As Judge Anzilotti famously wrote, “in the same legal system, there cannot at the same time exist two rules relating to the same facts and attaching to these facts contradictory consequences.” International law contains various principles and rules which clarify the applicable law when a perceived conflict between different legal rules arises.

One such principle is *lex specialis derogat legi generali*; in other words, “whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific.” It goes without saying that IHL was “designed to regulate the conduct of hostilities.” The same cannot be said of the CPIUN. Indeed, the fact that the above quoted Section 3 refers expressly to “executive, administrative, judicial or legislative action” infers that the provision was drafted with the ordinary functions and conduct of the State in mind,

rather than the exceptional circumstances of armed conflict. Accordingly, the IHL rules governing damage to objects appear to constitute *lex specialis*, and thus supersede the application of Section 3 of the CPIUN.

Contrary to an argument made previously, while the ICJ recognised the applicability of the VCDR in armed conflict in its *Democratic Republic of the Congo v Uganda* judgment of 2005, including the VCDR's provisions governing inviolability, this hardly rules out the possibility of a *lex specialis* IHL rule superseding rules on inviolability, whether rules in the VCDR or elsewhere. Indeed, the Democratic Republic of the Congo does not appear to have alleged that Ugandan diplomats and diplomatic premises constituted a security threat in any way, but alleged (unsuccessfully) that Uganda's claims were inadmissible and factually baseless. Thus, the ICJ did not need to—and did not—consider the relationship between rules governing inviolability and those governing damage to objects in armed conflict.

As a side note, inviolability is not a one-way street. The UN Secretariat has recognised that its obligation to prevent abuse of its immunities and privileges extends to its property. To this effect, the Board of Inquiry established by the UN Secretariat following the 2014 hostilities issued recommendations to prevent future use of UNRWA facilities by armed groups. If weapons were indeed placed in UNRWA facilities, or these facilities were otherwise used by organised armed groups, questions may be asked whether the UN has met its obligations to prevent abuse of its inviolability.

Article 103 of the United Nations Charter?

An interesting argument has been made that, regardless of whether IHL rules constitute *lex specialis*, the rule of inviolability of UN premises supersedes IHL rules due to Article 105 of the UN Charter, in conjunction with Article 103 of the Charter. Article 105(1) stipulates that the UN “shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.” Article 103 provides that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” In other words, as the argument goes, the obligation to respect the inviolability of UN premises is an obligation under the UN Charter, thereby superseding rules arising elsewhere under international law.

It is beyond the scope of this post to consider relevant intricacies of Article 103 of the Charter, such as its applicability when the conflict of law is not between the Charter and obligations *stricto sensu* or is between the Charter and rules of customary international law. Rather, it suffices to make two points regarding Article 105. First, by the very terms of Article 105, its geographical scope of application is the territory of UN members. The Gaza Strip is clearly not in the territory of a UN member. Therefore, Article 105 of the Charter is not, as such, applicable to UN premises in Gaza.

Second, more generally, as Hersch Lauterpacht observed, by omitting mention of the nature and scope of the immunities concerned—in contrast to the explicit references to “diplomatic” immunity in the Covenant of the League of Nations—Article 105(1) of the Charter “leave[s] room for a substantial measure of elasticity.” Given the abovementioned controversy regarding the scope of inviolability, it can hardly be said that the Charter recognises inviolability even in the quite extreme circumstances of armed conflict. Moreover, at least in the context of UNRWA premises, it should be noted that most of these premises do not serve typical diplomatic, consular, or special missions functions, but rather provide social and welfare services, further rendering it doubtful that such premises are covered by Article 105(1) of the Charter.

Conclusion

The lawfulness of damage caused to UN premises in armed conflict depends on whether the causing of such damage is lawful under IHL. Any analysis seeking to determine the legality of damage caused to UN premises must be highly fact sensitive. While UN premises—including facilities used by UNRWA—benefit from inviolability under the CPIUN, the IHL rules governing conduct of hostilities constitute *lex specialis* to the rules governing inviolability. Hence, the inviolability of UN premises does not constitute a legal impediment to causing damage to UN premises in an armed conflict when such damage is governed by IHL rules.

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