

Israel – Hamas 2023 Symposium – The Legal Protection of Hospitals during Armed Conflict

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by [Michael N. Schmitt](#) | Dec 29, 2023



The murder of Israeli civilians and the taking of hostages, including children, on October 7 provoked widespread outrage, and rightly so. But since then, that outrage has increasingly receded into the background, as some observers and media sources characterize the Israeli response as heavy-handed. One of the issues having this effect involves the impact of the conflict on hospitals.

The trigger was a purported October 17 Israel Defense Forces (IDF) attack on al Ahli Hospital, with Gaza’s [Ministry of Health](#) reporting nearly 500 civilian deaths. But as with many of the allegations and much of the reporting during this conflict, the facts belie the initial reports. As noted by [Human Rights Watch](#), “the count, which is significantly higher than other estimates, displays an unusually high killed-to-injured ratio, and appears out of proportion with the damage visible on site.” The organization concluded that the explosion “resulted from an apparent rocket-propelled munition, such as those commonly used by Palestinian armed groups, that hit the hospital grounds.”

Since then, controversy over the legal protection of medical facilities has only deepened. On one side are claims by the World Health Organization (WHO) of, *inter alia*, “187 attacks [by November 24] on health care in Gaza . . . which damaged 24 hospitals.” The WHO asserts that only nine of the 36 hospitals in Gaza are currently partially functioning. And the *Washington Post* recently published a troubling story questioning IDF assertions that Hamas used al-Shifa Hospital as a command and control center and asking whether its operations complied with international humanitarian law’s (IHL) rule of proportionality.

On the other, Israel has repeatedly denied accusations of attacking hospitals without justification and otherwise failing to provide the protection to which IHL entitles them. To support its arguments, the IDF has regularly released evidence of Hamas’s misuse of medical facilities for military and other operational purposes, including attacking IDF soldiers, storing weapons, sheltering fighters, command and control, supporting the Hamas tunnel network, human shielding, and detaining hostages. U.S. officials have backed the Israeli assertions based on classified intelligence, which included Hamas communications intercepts. For example, concerning al-Shifa, National Security Council Strategic Communication Coordinator John Kirby stated, “We did have intelligence that corroborated the Israeli claims that Hamas was using it as a command-and-control node.”

Such controversy is not new. During previous conflicts in 2008-09 and 2014, similar concerns about the impact of IDF operations on health care in Gaza surfaced (see, e.g., here). But at the same time, it was clear that Hamas and other organized armed groups were systematically exploiting medical facilities. For instance, Amnesty International found that during the 2014 conflict “Hamas forces used the abandoned areas of al-Shifa hospital in Gaza City, including the outpatients’ clinic area, to detain, interrogate, torture and otherwise ill-treat suspects, even as other parts of the hospital continued to function as a medical centre” (see also here and here).

In this post, I set forth the law that governs the legal protection of medical facilities during armed conflict. Because there is disagreement about whether the conflict is international or non-international (I take the latter view), I address the law that applies in them separately. However, as will be seen, the practical effect of the two bodies of law is nearly identical. The piece concludes with my thoughts on factors affecting the characterization of the IDF operations as IHL violations.

The Law

International Armed Conflict

The prohibition on attacking hospitals is of long lineage. For instance, it is found in the 1874 Brussels Declaration (art. 17), 1880 Oxford Manual (art. 34), and 1923 Hague Rules of Air Warfare (art. 25). But the first binding treaty law on the matter appeared in the Regulations annexed to the 1899 Hague Convention II and 1907 Hague Convention IV. Article 27 of

those regulations provided, “In sieges and bombardments all necessary steps should be taken to spare as far as possible . . . [military] hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.” These provisions applied only to military medical units.

Following the carnage of World War II, the 1949 Geneva Conventions, to which Israel is party, further developed the prohibition. Article 19 of Geneva Convention I bans attacks against *military* medical establishments and requires that they be “respected and protected” (Geneva Convention II, Article 23, deals with attacks on medical facilities ashore from the sea). As the U.S. Department of Defense (DoD) Law of War Manual explains, “respect” means they may not be “attacked, fired upon, or unnecessarily prevented from discharging their proper functions” (§ 7.10; see also International Committee of the Red Cross (ICRC) 2016 Commentary, para. 1799; Harvard Manual on the International Law Applicable to Air and Missile Warfare, p. 206-07).

The prohibition on attack applies only to operations qualifying as such under IHL, in other words, “acts of violence against the adversary, whether in offence or in defence” (art. 49, Additional Protocol I). By contrast, the duty to “respect” extends to all military operations, such as searches. In this regard, the ICRC’s 2016 Commentary to Article 19 of Geneva Convention I acknowledges that,

temporary entry by armed forces or law enforcement officials that falls short of taking control of the medical establishment or unit may be conducted for legitimate purposes based on military necessity. Such purposes include interrogating or detaining wounded or sick military personnel, verifying that a medical unit is not used for military purposes, or searching for suspects alleged to have committed a crime in relation to an armed conflict.

The DoD Law of War Manual makes the same point (§ 7.10.1.2). This is a fair reading of the law, one that would extend to searching for Hamas fighters, weapons, or hostages.

Article 21 of Geneva Convention I provides that this protection is not absolute. It ceases if the enemy uses a military medical unit for military purposes. The ICRC’s Commentary cites as examples “firing at the enemy for reasons other than individual self-defence, installing a firing position in a medical post, the use of a hospital as a shelter for able-bodied combatants, as an arms or ammunition dump, or as a military observation post.” It also states that “transmitting information of military value” or being used “as a centre for liaison with fighting troops” results in loss of protection.

Geneva Convention IV, Articles 18 and 19, expanded these treaty-based protections to *civilian* hospitals. In relevant part, they provide:

Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict (art. 18).

. . .

The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded (art. 19).

The 2016 *Commentary* to Geneva Convention I cited above applies *mutatis mutandis* to the text of these articles. As to the respect obligation, the ICRC's 1958 Commentary to Geneva Convention IV further points out that because intentional attacks against hospitals are rare, the duty of respect is a crucial protection. By it, "the belligerents are under a general obligation to do everything possible to spare hospitals." This is a reasonable interpretation as long as "possible" is understood as operationally feasible.

As to Article 19 of Geneva Convention IV, the *Commentary* explains, "Civilian hospitals must observe, towards the enemy, the neutrality which they claim for themselves and which is their right under the Convention. Standing outside the struggle, they must steadfastly refrain from any interference, direct or indirect, in military operations." And regarding the requisite warning, it "must be long enough to allow the unlawful acts to be stopped or for the hospital patients to be removed to a place of safety."

Article 12 of the 1977 Protocol Additional I, to which Israel is not party but which, in my estimation, reflects customary law, likewise prohibits attacks on and requires respect for medical units (see the comprehensive definition of medical unit in Article 8(e)). Significantly, the article emphasizes, "Under no circumstances shall medical units be used in an attempt to shield military objectives from attack."

In terms of applying the Protocol's rules, the 1987 ICRC *Commentary* observes "that even though an attack cannot be lawfully directed against medical units as such, it is not totally out of the question for them to be damaged during attacks on military objectives, even though various precautions must be taken during these attacks" (para. 519). But the *Commentary* also emphasizes that misuse by the enemy does not relieve the attacker of its IHL obligations, especially that requiring the taking of precautions in attack to avoid civilian harm.

Article 13 of Additional Protocol I goes on to reiterate a facility's loss of protection if used in a manner harmful to the enemy (see also *Commentary*, para. 550). The *Commentary* notes that "the definition of 'harmful' is very broad. It refers not only to direct harm inflicted on the enemy, for example, by firing at him, but also to any attempts at deliberately hindering his military operations in any way whatsoever" (para. 551).

The *Commentary* is unequivocal: "If the medical unit is used to commit acts which are harmful to the enemy, it actually becomes a military objective which can legitimately be attacked, and even destroyed." But it also cautions,

Before resorting to this extreme action it is of paramount importance that the fate of the legitimate occupants of the medical unit is guaranteed. This is the aim of the warning referred to in the principle laid down here. Moreover, the warning may take various forms. In most cases it would simply consist of an order to cease the harmful act within a specified period. In the most serious cases there may be a time-limit for evacuating the unit which will be attacked after this time-limit (para. 555).

Sometimes, it may be impossible to set a time limit, as in the case of “a body of troops approaching a hospital being met by heavy fire” (*Commentary*, para. 556). In this regard, the *Harvard AMW Manual* experts emphasized that unlike warnings pursuant to the precautions in attack requirement, the obligation to warn medical facilities is an “absolute one” not subject to the “unless circumstances do not permit” caveat (p. 215). Yet, in my view, there are extreme circumstances where a warning would not be required at all, such as taking fire in circumstances requiring instantaneous self-defense or in hostage rescue situations. This is the position taken in the DoD *Law of War Manual* (§ 7.10.3.2).

It is incontestable that the aforementioned obligations are now customary in character, a position the ICRC adopted in Rule 28 of its *Customary International Humanitarian Law* study. It has provided extensive State practice and *opinio juris* to support this conclusion. Moreover, the Hague Regulations and Geneva Conventions have long been treated as reflective of customary international law. For instance, the International Military Tribunal at Nuremberg observed that “[b]y 1939 [the Hague Regulations] were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war.” The International Criminal Tribunal for the Far East reached an identical conclusion. And the International Court of Justice, in its 1996 *Nuclear Weapons* advisory opinion, characterized the Hague Regulations and Geneva Conventions as “fundamental rules . . . to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law” (para. 79).

International criminal law reflects these IHL prohibitions. Most notably, the Rome Statute of the International Criminal Court treats intentional attacks on “hospitals and places where the sick and the wounded are collected, provided they are not military objectives” or “medical units . . . using the distinctive emblems of the Geneva Conventions in conformity with international law” as war crimes (art. 8(2)(b)(ix); see also (xxiv)). Note that the crime includes only an attack against the facilities, not a violation of the “respect obligation” found in IHL.

Relatedly, the International Criminal Tribunal for the former Yugoslavia dealt with attacks on the Koševo Hospital in Sarajevo. In its 2006 *Galić* judgment, the Appeals Chamber, applying the law in the context of attacking civilians, found that:

The law is thus clear: a hospital becomes a legitimate target when used for hostile or harmful acts unrelated to its humanitarian function, but the opposing party must give warning before it attacks. In this case, the hospital was used as a base to fire mortars at the SRK forces.

Therefore, the Trial Chamber erred in law in determining that fire on the hospital was “not aimed at any possible military target”, because fire from the hospital turned it into a target.

It is undeniable that the prohibition, and the exception to it, reflect customary law in international armed conflict.

Non-international Armed Conflict

Article 11 of the 1977 Additional Protocol II is the only treaty obligation directly on point. It closely tracks the provisions above applicable in international armed conflict. However, it does not apply in this conflict as Israel is not a party to the instrument.

Nevertheless, Common Article 3 to the 1949 Geneva Conventions, which does apply in non-international armed conflict, can be interpreted as implicitly extending protection to medical facilities. As the ICRC suggests in its *Customary IHL* study, the article’s requirement that the wounded and sick be collected and cared for has that effect “because the protection of medical units is a subsidiary form of protection afforded to ensure that the wounded and sick receive medical care.” This conclusion is supported by the Rome Statute’s treatment of attacks on medical facilities as a war crime during non-international armed conflict (art. 8(2)(e)(ii)); see also (iv)).

Based on these provisions, the condemnation of such attacks as unlawful by States and others during such conflicts, and the treatment of the issue by States in military manuals and other guidance, the ICRC correctly concludes in Rule 28 that the prohibition applies equally in non-international armed conflict. The DoD Law of War Manual (§ 17.15.2) and the San Remo Manual on the Law of Non-International Armed Conflict (rule 4.2.1) take the same position.

Applying the Law in Practice

There is consensus as to the content of the law. Still, disagreement often arises over its application and the impact of other IHL rules on operations affecting hospitals. Concerning the former, the key issues are uncertainty and timing.

As to the former, IHL only requires reasonableness on the part of an attacker. For instance, the *Washington Post*’s after-the-fact investigation at al-Shifa claims that tunnels near the hospital did not appear to be connected to hospital buildings. But the correct *legal* questions are what did the IDF believe about the relationship between the tunnels and the hospital when it planned, approved, and executed its operations, and was that belief of a relationship reasonable based on available information? If so, treating the hospital as a military objective would be lawful, even if factually inaccurate (in any event, Hamas tunnels are themselves military objectives by nature). As I emphasized to the *Washington Post* when interviewed, it

is challenging to assess reasonableness in any particular case without access to the information available to the IDF, particularly that from classified sources like human intelligence reports and communications intercepts.

However, the tunnels were not the only basis for treating this and other military facilities as military objectives under IHL. Concerning the other bases, such as use as a command-and-control center, weapons storage site, shelter for fighters, and location at which hostages were present, a further *legal* issue, assuming a reasonable belief that Hamas is misusing the hospital, is timing, that is, whether it was reasonable to believe Hamas was still misusing a medical facility at the time of the operation's execution. In this regard, past systematic use is relevant, including regular practice in past conflicts. And, as noted, Hamas has a record of systematic use of medical facilities and transports (see, e.g., this [intercept](#)) for military purposes.

Beyond the question of whether a hospital facility is a military objective due to misuse, the customary law (as the IDF is not party to Additional Protocol I) [proportionality rule](#) and the requirement to take [precautions in attack](#) to minimize harm to civilians and civilian objects are central to the evaluation of the IDF operations. The former prohibits 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." The latter requires an attacker to take "feasible precautions . . . to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects," so long as doing so does not sacrifice military advantage. These rules are unrelated to the special protection to which medical facilities are entitled. Instead, under them, damage to the hospital (if it does not qualify as a military objective) or civilians inside it is treated like other civilian collateral damage.

Thus, even if a medical facility qualifies as a military objective due to misuse by the enemy, medical staff and civilian patients in it must be factored into the proportionality determination and precautions in attack analysis. If the facility does not amount to a military objective, it may not be attacked, and harm to it and civilian personnel within it are likewise to be considered as civilian collateral damage in these assessments. This would be the case, for instance, during an IDF attack on a rocket launcher that Hamas has placed next to a medical facility.

But, again, as I [noted](#) in the *Washington Post* piece, "the law is about what was in the mind of the attacker at the time the attacker planned and executed the mission with respect to both the collateral damage they expected to cause and the military advantage they anticipated gaining." In other words, before an operation that incidentally might harm a medical facility or those inside it can be characterized as unlawful, it is necessary to understand what the attacker was hoping to achieve, what harm to civilians and the hospital was believed likely, and the basis for those conclusions. Whether the sought-after advantage

was achieved and whether the resulting harm exceeded what initially was expected bears only on the reasonableness of the proportionality and precautions determinations when made based on available information.

As in characterizing a medical facility as a military objective, the key is reasonableness. Making such a determination would generally require access to information currently unavailable in open sources. With respect to the requirement to take precautions, for instance, what alternatives to minimize incidental civilian harm were operationally feasible in the circumstances? To illustrate, if the target is a tunnel in the vicinity of a hospital, how else could the IDF terminate its use without assuming increased risk to one's own forces or diminishing the likelihood of denying its continued use? Absent a known alternative, characterization as an IHL violation is unfounded.

Such questions raise the issue of whether Israel must reveal the basis upon which it acted. For example, in the *Washington Post* interview, one expert asked, "What was the urgency? This is not yet being demonstrated." However, the IDF bears no legal obligation to provide such information, and this is so for good reasons, like protecting human assets and keeping technical capabilities secret to avoid enemy countermeasures. These and other sources of information are essential to the continuing conduct of lawful IDF operations, including hostage rescue. In fact, the IDF has shared a great deal of information. Of particular note is its *Interactive Compilation of Hamas Abuse of Hospitals*.

Finally, the IDF's obligation to respect medical functions looms large in the Gaza campaign due in particular to the closed geography of the situation and the reality of urban warfare, where treatment of injured civilians occurs near ongoing fighting. The IDF appears to have taken numerous measures to fulfill the obligation, such as by providing the requisite warnings, including medical teams and Arabic speakers when operating near hospitals, facilitating the evacuation of medical facilities, and maintaining dialogue with hospital authorities. Israeli authorities also note that Israel has facilitated the establishment of field hospitals and a hospital at sea, the movement of people out of Gaza for medical treatment, and the entry of medical supplies into Gaza, while also providing medical supplies at hospitals located where the IDF is operating (see also here). Whether these and similar measures suffice to meet its respect obligations is beyond the scope of this post, but it cannot be said that Israel is ignoring the requirement to respect.

Concluding Thoughts

The law governing the protection of hospitals during armed conflict is unambiguous, including the obligation to "respect" their medical functions. So is the fact that Hamas has systematically misused them for military purposes. But whether the IDF has violated this law in conducting operations at or near hospitals in Gaza cannot be established with any

certainty, for although the IDF has released an unprecedented amount of information about its operations, key facts upon which such a determination would have to be made are unavailable for valid operational reasons. Nor is there any legal obligation for Israel to do so.

This does not necessarily mean every IDF operation is lawful. No prolonged armed conflict is ever free of IHL violations. In this regard, it merits note that Israel shoulders a legal obligation to investigate possible war crimes promptly. However, the point I am making is that the legal situation concerning hospitals in Gaza is complex and uncertain. It merits closer examination than has often been the case.

Michael N. Schmitt is the G. Norman Lieber Distinguished Scholar at the United States Military Academy at West Point. He is also Professor of Public International Law at the University of Reading and Professor Emeritus and Charles H. Stockton Distinguished Scholar-in-Residence at the United States Naval War College.

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