



## **ISRAEL - HAMAS WAR: INTERROGATING THE LEGALITY OR OTHERWISE OF THE ATTACKS ON MEDICAL ESTABLISHMENTS IN GAZA STRIP**

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### **Abstract**

*Various United Nations Conventions and Protocols afford special protection to medical establishments and personnel whose mission is to save lives and provide health care for civilians and combatants alike. However, when medical establishments are used to interfere directly or indirectly in military operations or for military purposes, thereby causing harm to the enemy, the rationale for their specific protection ceased. The allegation of use of hospitals for military purposes in the ongoing war between Israel and Hamas and the consequential attacks on the medical establishments in Gaza Strip displays the contemporaneity of the problem discussed in this study. This study therefore interrogates the legality or otherwise of the attacks on medical establishments in the ongoing war between Israel and Hamas in Gaza Strip, using doctrinal method of legal research and analytical approach. The findings of this study indicates that parties to the war are taking unfair advantage of the flexibility of the exceptions to the protection of medical establishments in armed conflict to deliberately or recklessly violate International Humanitarian Law in particular the prohibition of launching indiscriminate attacks and the principle of proportionality and precautions in attack. This study concludes that nonetheless the use of medical establishments for military purposes which may legally and morally justify an attack against such protected facilities, there are certain precautions expected of the attacking party; and with specific recommendations on how to interpret the law governing such attacks; and proposes adoption of additional international legislation complimentary to the Geneva Convention for the protection of medical establishments in conflicts.*

**Keywords: Armed Conflict; Attacks; Medical Establishments; Military Operations; Special Protection**



## 1.0 INTRODUCTION

Under International Humanitarian Law (IHL), specifically the Geneva Conventions of 1949 and their Additional Protocols of 1977, medical establishments and its personnel are protected and should not be targeted during armed conflicts. Attacks on these facilities or its personnel are generally considered violations of these laws. The special protection granted to medical establishments and medical personnel during armed conflicts is fundamental but not absolute.<sup>1</sup> The special protection afforded medical establishments is forfeited when they are being used to interfere directly or indirectly in military operations or for military purposes or to commit, outside their humanitarian functions, acts harmful to the enemy.<sup>2</sup> The expression “act harmful to the enemy” is not defined in the Geneva Conventions.<sup>3</sup> However, this legal framework specifically identifies certain actions that are explicitly deemed non-harmful to the adversary. These include the carrying or utilization of individual light weapons for self-defense or the protection of the wounded and sick, the armed safeguarding of medical facilities, and the presence of sick and wounded combatants in a medical facilities who are no longer engaged in hostilities.<sup>4</sup>

The notion of “act harmful to the enemy”, although phrased differently, was first articulated in 1906 Geneva Convention, specifying that “the protection due to sanitary formations and establishments ceases if they are used to commit acts injurious to the enemy”.<sup>5</sup> Still in the Geneva Conventions of 1949, the phrase “act harmful to the enemy” was not clearly defined.<sup>6</sup> As was stated at the 1949 Diplomatic Conference: “*The term acts harmful to the enemy is perhaps not very elegant. We endeavoured to find a better wording; but we returned to the traditional expression .... The expression is, perhaps, somewhat elastic, but it seems to us clear. It covers not only acts of warfare proper but any activity characterizing combatant action.*”<sup>7</sup> The

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<sup>1</sup> R. Kolb & F. Nakashima, ‘The Notion of “Acts Harmful to the Enemy” under International Humanitarian Law’, (2019) 101 (912) *International Review of the Red Cross*, 1171, 1178.

<sup>2</sup> N. Melzer, *International Humanitarian Law: A Comprehensive Introduction* (Geneva, Switzerland: International Committee of the Red Cross, August 2016) 114. See also: See Article 21 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (Geneva Convention I).

<sup>3</sup> International Committee of the Red Cross (ICRC), Commentary on the First Geneva Convention of 2016, Art. 21, para. 1840, available at: <<https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-21/commentary/2016?activeTab>> accessed 10 September 2024.

<sup>4</sup> Ibid, Art. 22, para. 1860 – 1883. See also: ‘The Protection of Hospitals during Armed Conflicts: What the Law Says’ (6 November 2023), available at <<https://www.icrc.org/en/document/protection-hospitals-during-armed-conflicts-what-law-says#:~:text=Specific%20protection%20of%20medical%20establishments,act%20harmful%20to%20the%20enemy%22>> accessed 10 September 2024).

<sup>5</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 6 July 1906 (Geneva Convention of 906), art 7.

<sup>6</sup> Y. Sandoz *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987) para. 550, available at <<https://www.legal-tools.org/doc/6d222c/pdf>> accessed 10 September 2024.

<sup>7</sup> *Final Record of the Diplomatic Conference of Geneva of 1949*, (Canadian Partners, 1950) 818–819, available at <<https://www.legal-tools.org/doc/25602e/pdf>> accessed on 10 September 2024.



International Committee of the Red Cross's alternative wording, expressing the same idea for "act harmful to the enemy" in preparation for the Diplomatic Conference, as follows: "*acts the purpose or effect of which is to harm the adverse Party, by facilitating or impeding military operations*".<sup>8</sup> Describing the notion of "acts harmful to the enemy" in 1985, Jean Pictet stated that "*such acts [\"act harmful to the enemy\"] have the aim or effect, by favouring or impeding military operations, of being detrimental to one of the belligerents*".<sup>9</sup> In the perspective of Article 13(1) of Additional Protocol I, the ICRC Commentary explains that "the definition of harmful is very broad. It refers not only to direct harm inflicted on the enemy, for instance, by firing at him, but also to any attempts at deliberately hindering his military operations in any way whatsoever".<sup>10</sup>

Notwithstanding the lack of an agreed definition of the words "act harmful to the enemy", the rationale for a loss of protection of medical establishments is clear.<sup>11</sup> Medical establishments and units are granted special protection due to their role in caring for the wounded and sick in armed conflict. This special protection is compromised when they are employed to participate, either directly or indirectly, in military actions that result in harm to the enemy. For instance, this occurs if a hospital is repurposed as a site for launching attacks; as a reconnaissance point for transmitting military intelligence; as a weapons depot; as a center for liaison with fighting troops; or as a shelter for able-bodied combatants.

The allegation of use of medical establishments for military purposes in the ongoing war between Israel and Hamas and the consequential attacks on various medical establishments in Gaza Strip displays the contemporaneity of this study. This study therefore interrogates the legality or otherwise of the attacks on medical establishments in the ongoing war between Israel and Hamas in Gaza Strip.

## 2.0 BACKGROUND OF THE STUDY

Controversy over the legal protection of medical establishments has only deepened since the attack of 17<sup>th</sup> October 2023 on al-Ahli Hospital by the Israel Defense Forces (IDF). The World Health Organization (WHO) claimed that as of 24<sup>th</sup> November, 2023 it had documented 187 attacks on health care facilities in Gaza Strip since 7<sup>th</sup> October, 2023 which damaged 24 hospitals.<sup>12</sup> WHO further asserts that as a result of the ongoing war between the IDF and Hamas, the majority of hospitals in Gaza were no longer functioning. The Washington Post of 21<sup>st</sup> December, 2023 questioned the Israel Defense Forces' (IDF) assertions that Hamas used al-Shifa Hospital as a command and control center and asked whether IDF's operations complied with International Humanitarian Law's rule of proportionality.<sup>13</sup>

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<sup>8</sup> n1, 1185.

<sup>9</sup> J Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht: Nijhoff, 1985) 204.

<sup>10</sup> n6, para. 551.

<sup>11</sup> S. K. Alva, 'The Protection of Healthcare in Armed Conflicts: The Different Kinds of Protection for Medical Persons and Objects in International and Non-International Armed Conflicts' (Master Dissertation, Department of Law, Faculty of Social Sciences, Umea University, 2023) 35, available at <<https://umu.diva-portal.org/smash/get/diva2:1838912/FULLTEXT01.pdf>> accessed 3 August 2024.

<sup>12</sup> Ibid.

<sup>13</sup> L. Loveluck *et al.*, 'The case of al-Shifa: Investigating the assault on Gaza's largest hospital' (21 December 2023) *Washington Post*, available at <<https://www.washingtonpost.com/world/2023/12/21/al-shifa-hospital-gaza-hamas-israel/>> accessed 30 July 2024.



On her part, Israel has repeatedly denied accusations of attacking hospitals without justification and otherwise failing to provide the protection to which IHL entitles medical establishments.<sup>14</sup> To support its arguments, the IDF regularly released evidence of Hamas's misuse of medical establishments for military and other operational purposes<sup>15</sup>, including attacking IDF soldiers, storing weapons, sheltering fighters, command and control, supporting the Hamas tunnel network, human shielding, and detaining hostages.<sup>16</sup> United States (US) also backed the IDF assertions based on classified intelligence, which included Hamas communications intercepts.<sup>17</sup> Concerning the IDF attack on al-Shifa hospital, for instance, US 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.*"<sup>18</sup>

The legality of attacks on medical establishments in Gaza Strip in the ongoing war between Israel and Hamas can be assessed through IHL particularly the Geneva Conventions and its Additional Protocols. The ongoing Israel-Hamas conflict has resulted in numerous civilian casualties and destruction of protected objects in the Gaza Strip. Among the grave concerns is the targeting of medical establishments, which has raised questions regarding the legality of such attacks.

This study delves into the legal framework surrounding the attacks on medical facilities in Gaza in the ongoing war, analyzing the relevant provisions of IHL principles to evaluate the legality or otherwise of the attacks on medical establishments in Gaza and the potential consequences. There is controversy on whether the conflict between Israel and Hamas is international or non-international armed conflict, this study shall also examine, critically, the status of Hamas as a legitimate government in Gaza under international law and the applicability of IHL to the war.

### 3.0 STATEMENT OF PROBLEM AND RESEARCH QUESTIONS

The repeated attacks on medical establishments in Gaza in the ongoing Israel-Hamas war have raised significant concerns regarding the legality of the attacks under International Humanitarian Law. The targeting of hospitals and other medical facilities, which are protected under international law, questions the proportionality of such attacks and the precautions taken to avoid harm to civilians.

These attacks have resulted in substantial harm to patients, medical staff, and infrastructure, severely impeding access to healthcare in Gaza. The devastation of hospitals, such as the

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<sup>14</sup> M. Al-Masri, 'What is Israel's narrative on the Gaza hospital explosion?' (18 October 2023) *Al-Jazeera News*, available at <<https://www.aljazeera.com/news/2023/10/18/what-is-israels-narrative-on-the-gaza-hospital-explosion>> accessed on the 30 July 2024.

<sup>15</sup> n13.

<sup>16</sup> 'Hamas, Palestinian Islamic Jihad used al-Shifa Hospital for military, terrorist purposes, US confirms', (3 January 2024) *Medialine News*, available at <<https://themedialine.org/news/israel-and-hamas-at-war-day-65/>> accessed 31<sup>st</sup> December 2024.

<sup>17</sup> N. Al-Mughrabi and T. Hunnicutt, 'U.S. backs claim Hamas uses Gaza hospitals as military cover amid hopes for hostages' release' (14 November 2023) *Reuters*, available at: <<https://www.reuters.com/world/middle-east/biden-says-gaza-hospitals-must-be-protected-2023-11-14/>> accessed on 07 August 2024.

<sup>18</sup> J. Seldin, 'US Turns to Go-To Tool as Israel Faces Mounting Criticism', (16 November 2023) *Voice of America*, available at <<https://www.voanews.com/a/us-turns-to-go-to-tool-as-israel-faces-mounting-criticism/7358035.html>> accessed on the 30 July 2024.



Indonesian Hospital, the International Eye Hospital, and the Turkish-Palestinian Friendship Hospital, is particularly alarming.

Despite claims by the Israeli government that Hamas has used hospitals and other civilian infrastructure for military purposes, Human Rights Watch found no evidence to support these claims. This situation has not been adequately highlighted as a pressing problem in international law to foster the need for accountability and adherence to IHL in the conduct of military operations, particularly in relation to the protection of medical establishments and its personnel. This paper seeks to bridge this gap in knowledge.

Against the background of the foregoing issues, the following research questions come to the fore:

1. What are the international humanitarian law frameworks that govern the protection of medical establishments during armed conflicts, and how have these frameworks been applied in the context of the Israel-Hamas war?
2. To what extent have the attacks on medical establishments in Gaza in the ongoing Israel-Hamas war complied with the principles of distinction, proportionality, and precaution under international humanitarian law?
3. What are the consequences of the attacks on medical establishments in Gaza for the civilian population, including the impact on access to healthcare and the long-term effects on the healthcare system?
4. How have international organizations, human rights groups, and national governments responded to the attacks on medical establishments in Gaza, and what implications do these responses have for accountability and the rule of law in armed conflicts?

#### **4.0 AIM AND OBJECTIVES OF THE STUDY**

The main aim of this study is to interrogate the legality or otherwise of the attacks on medical establishments in Gaza in the ongoing Israel-Hamas war under International Humanitarian Law. Specifically, this study seeks:

1. To identify and analyze the international humanitarian law frameworks that govern the protection of medical establishments during armed conflicts, and their application in the context of the Israel-Hamas war.
2. To assess the extent to which the attacks on medical establishments in Gaza during the Israel-Hamas war complied with the principles of distinction, proportionality, and precaution under international humanitarian law.
3. To investigate the consequences of the attacks on medical establishments in Gaza for the civilian population, including the impact on access to healthcare and the long-term effects on the healthcare system.



4. To examine the responses of international organizations, human rights groups, and national governments to the attacks on medical establishments in Gaza, and their implications for accountability and the rule of law in armed conflicts.

#### 4.0 METHODOLOGY

Since the research questions must be answered by analyzing the prevailing legal rules on the issue of protection of medical establishments in armed conflicts, it is therefore necessary to adopt doctrinal research method. This entails that the law is interpreted in the form of traditional legal sources, namely treaty law, customary law in the form of state practice, preparatory works, and case law.<sup>19</sup> These are supplemented by sources of academic literature that clarify or otherwise reflect on the legal rules in question. Legal texts are not only interpreted by their literal wording, but also in light of their object and purpose.<sup>20</sup> In order to consistently apply this method to the sources in this study, legally binding primary sources take precedence over non-binding and secondary sources.

This study primarily makes use of three types of sources – treaty law, customary law and the non-binding recommendations of the ICRC. The primary sources used in terms of treaty law are the Geneva Conventions and their Additional Protocols, along with their Commentaries. Secondary sources include a number of books, journal articles and reports on the topic of protection of medical establishments in armed conflicts.

#### 5.0 HISTORICAL PERSPECTIVE OF SPECIAL PROTECTION OF MEDICAL ESTABLISHMENTS IN ARMED CONFLICT

Prohibition of attack on medical establishments and medical personnel dates back to the 17<sup>th</sup> century. Article 17, Brussels Declaration of 1874<sup>21</sup>; Article 34, Oxford Manual of 1880<sup>22</sup>; and Article 25, Hague Rules of Air Warfare of 1923<sup>23</sup> were the first set of laws/rules offering special protection to hospitals and medical personnel during Armed conflict.<sup>24</sup> But the first binding treaty on the protection of medical establishments appeared in the Regulations annexed to the 1899 Hague Convention II<sup>25</sup> and 1907 Hague Convention IV<sup>26</sup>. Article 27 of those regulations

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<sup>19</sup> T. Minemura, 'Dogmatic Legal Science and Sociology of Law' (1970) 56 (3) *Franz Steiner Verlag*, 352.

<sup>20</sup> *Ibid.*

<sup>21</sup> "In such cases all necessary steps must be taken to spare, as far as possible, buildings dedicated to . . . hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand."

<sup>22</sup> "In case of bombardment all necessary steps must be taken to spare, if it can be done, buildings dedicated to . . . hospitals and places where the sick and wounded are gathered on the condition that they are not being utilized at the time, directly or indirectly, for defense. It is the duty of the besieged to indicate the presence of such buildings by visible signs notified to the assailant beforehand."

<sup>23</sup> M. H. Hanke, 'The 1923 Hague Rules of Air Warfare: A Contribution to the Development of International Law Protecting Civilians from Air Attack', (1991) 3 (292) *International Review of the Red Cross*, 18, available at <<https://international-review.icrc.org/sites/default/files/S0020860400071370a.pdf>> accessed 03 August 2024.

<sup>24</sup> M. N. Schmitt, 'Israel – Hamas 2023 Symposium – The Legal Protection of Hospitals During Armed Conflict, (Dec 29, 2023) *Articles of War*, available at: <<https://lieber.westpoint.edu/legal-protection-hospitals-during-armed-conflict/>> accessed on 24 July 2024.

<sup>25</sup> Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, 29 July 1899).



provided, “*In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to . . . hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.*”<sup>27</sup> These provisions applied only to military medical units.

Following the carnage of World War II, the Geneva Conventions of 1<sup>st</sup> of August 1949, to which Israel is a party, further developed the prohibition on attack on medical establishments. Article 19 of Geneva Convention I, Article 23 of the Geneva Convention II, and Article 18 of the Geneva Convention IV specifically prohibit attacks against medical establishments and require that they be “respected and protected”. According to the United States Department of Defense Law of War Manual<sup>28</sup>, “respect and protection” means they must not be knowingly be “*attacked, fired upon, or unnecessarily prevented from discharging their proper functions*”.<sup>29</sup> Geneva Conventions and its Additional Protocols form, largely, part of International Humanitarian Law applicable applies in ‘armed conflict’ and imposes constraints on how that conflict may be waged. Its objective is to protect certain persons and objects such as hospital and to limit the methods and means of warfare for the benefit of all.<sup>30</sup>

## **6.0 APPLICABLE INTERNATIONAL LAWS FOR THE PROTECTION OF MEDICAL ESTABLISHMENTS IN ARMED CONFLICTS**

Armed Conflict is governed by body of international law known as International Humanitarian Law (IHL). IHL comprises treaties, customary law, principles and judicial decisions. At the centre of this area of law are the Geneva Conventions and the Hague Conventions. The Hague Conventions regulate and set out the rules of engagement in warfare, while the Geneva Conventions focuses on regulating the protections of victims in armed conflicts. IHL is treaty and customary international law based.<sup>31</sup> Customary International Humanitarian Law is a set of unwritten rules derived from a general, or common, practice which is acknowledged as law. It is applicable in both Non-International Armed Conflict and International Armed Conflict. However, reference to it in this study will only be in respect of Armed Conflict of international status.

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<sup>26</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907).

<sup>27</sup> n 25.

<sup>28</sup> July 2023 Updated Version available at < <https://media.defense.gov/2023/Jul/31/2003271432/-1/-1/0/DOD-LAW-OF-WAR-MANUAL-JUNE-2015-UPDATED-JULY%202023.PDF>> accessed on 05 September 2024

<sup>29</sup> Ibid, 468.

<sup>30</sup> ICRC, ‘What is International Humanitarian Law?’ Available at <[https://www.icrc.org/sites/default/files/document/file\\_list/what\\_is\\_ihl.pdf](https://www.icrc.org/sites/default/files/document/file_list/what_is_ihl.pdf)> accessed 3st December 2024.

<sup>31</sup> H. Duffy, *The ‘War on Terror’ and the Framework of International Law*, 2<sup>nd</sup> Ed. (Cambridge: Cambridge University Press, 2005) 218.



There are four Geneva Conventions<sup>32</sup> and three Additional Protocols<sup>33</sup> to these conventions, these Conventions and the Additional Protocols are generally called the Laws of War. These different Conventions have been created to minimise the damage that war causes to people and infrastructure.<sup>34</sup> The Geneva Conventions and the Additional Protocols are mainly applied when there is an armed conflict, but there are also parts of it that are applicable in peacetime.<sup>35</sup> Furthermore, the Geneva Conventions are only legally binding on the states that have signed and ratified the conventions and its additional protocols; and same is also applicable in armed conflict involving states that have signed and ratified the conventions, even where one of the warring parties is not signatory to the conventions, signatory party to the conventions shall remain bound by it.<sup>36</sup> In the common Article 1 of the Geneva Conventions the parties to it are called “The High Contracting Parties”. This definition means that only states can be parties to the conventions and non-state actors are not bound according to Article 1. But in common article 3, non-state actors are bound by at least that article and the second Additional Protocol of the Geneva Conventions.<sup>37</sup> Common Article 3 and Additional Protocol II regulate when there is a non-international armed conflict.<sup>38</sup> Because only states can be seen to be a part of the other conventions because they are High Contracting Parties, and non-state parties are not bound by all of the conventions.<sup>39</sup> It is, therefore, of great importance to establish what kind of armed conflict that is ongoing between Israel and Hamas to know which treaties are applicable, and how this affects the protection of the different categories of persons and objects, for instance, how hospitals and its personnel are protected in the ongoing war.

## 7.0 CLASSIFICATION OF ISRAEL – HAMAS CONFLICT UNDER THE LAW OF WAR

The applicable legal framework for assessing the right classification of the armed conflict between Israel and Hamas is the Law of Armed Conflict, also known as International Humanitarian Law (IHL). IHL distinguishes between two types of armed conflict, namely: International Armed Conflict (IAC) and Non-International Armed Conflict (NIAC). Depending on the type of armed conflict, different IHL rules apply. Although the difference between those

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<sup>32</sup> The first Geneva Convention regulates the treatment and protection of the sick and wounded in armed conflicts irrespective of the side of the conflict they are a part of; the second Geneva Convention is about the treatment of wounded, sick and shipwrecked of armed forces at sea; the third Geneva Convention regulates the treatment of prisoners of war; and the fourth Geneva Convention regulates how civilians are to be treated in an armed conflict.

<sup>33</sup> The first Additional Protocol regulates the protection of civilians in wartime; the second Additional Protocol regulates non-international armed conflicts; and the third and final Additional Protocol is about the use of the emblem.

<sup>34</sup> n11, 23.

<sup>35</sup> ICRC, Commentary on the first Geneva Convention of 2016, para. 127-129, available at < <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-1/commentary/2016>> accessed 31<sup>st</sup> December 2024.

<sup>36</sup> See Common Article 2 of the Geneva Conventions.

<sup>37</sup> ICRC, Commentary on the first Geneva Convention of 2016, para. 131-132.

<sup>38</sup> Common article 3, Additional Protocol II and ICRC, Commentary on the first Geneva Convention of 2016, para. 351-356.

<sup>39</sup> n 37.



two legal regimes is diminishing,<sup>40</sup> there are some areas where the gap between them cannot be overcome.<sup>41</sup>

According to the decision of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in the *Tadić* case on the Defence Motion for interlocutory Appeal on jurisdiction<sup>42</sup>, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.”<sup>43</sup> This definition is clearly reflected in the conflict between Israel and Hamas in Gaza Strip. Hamas operates as a highly structured and well-equipped armed organization that employs military force against Israel, viewing such armed struggle as its fundamental objective. The duration of the conflict between Israel and Hamas has been extensive and protracted, lasting for several years and escalating in intensity in the recent times as Hamas has reinforced its illegal control over the Gaza Strip.

The hostilities between the parties having met the definition of armed conflict, classifying the conflict either as IAC or NIAC becomes a desideratum. The applicable legal regime to an armed conflict largely depend on the classification of the armed conflict. Classifying the hostilities between the Israel Defense Forces (IDF) and Hamas appears complicated due to the international legal status of the parties to the hostilities, particularly Hamas. After the Israel military campaign against Hamas, after the latter attacks of 7<sup>th</sup> October 2023, international lawyers have been grappling with the character of the conflict. A number of different theories have been offered by various humanitarian law experts.<sup>44</sup>

Numerous experts in humanitarian law contend that the conflict between Israel and Hamas can be characterized as a non-international armed conflict.<sup>45</sup> This classification aligns it more closely with a civil war, where the military forces of a state confront an armed non-state actor, rather than an international conflict involving two or more sovereign states. Consequently, the conflict would not be subject to the full spectrum of laws of war. Instead, it would be regulated by the more restricted Common Article 3 of the Geneva Conventions, along with various customary law principles that arise from general practices accepted as law. Common Article 3, which is applicable to civilians and combatants who have laid down their arms, prohibits practices such as torture, extrajudicial killing, and denial of fair trial. However, the status of Prisoner of War is only applicable in conflicts between sovereign states and would, therefore, not be applicable in this perspective.

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<sup>40</sup> E. Crawford, “Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts”, (2007) 20 (2), *Leiden Journal of International Law*, 43.

<sup>41</sup> ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, (September, 2007) 89 (867) *International Review of Red Cross*, 725, available at <<https://international-review.icrc.org/sites/default/files/irrc-867-10.pdf>> accessed 11 September 2024.

<sup>42</sup> *Prosecutor v. Duško Tadić, IT-94-1-AR72, (ICTY) 2 October 1995*, available at <<https://casebook.icrc.org/case-study/icty-prosecutor-v-tadic>> accessed 06 August 2024.

<sup>43</sup> *Ibid*, para. 70.

<sup>44</sup> A. Malik, ‘Classification of the Israel-Palestine Conflict under the Laws of War’, (24 November 2023) *OpinioJuris*, available at <<http://opiniojuris.org/2023/11/24/classification-of-the-israel-palestine-conflict-under-the-laws-of-war/>> accessed 4 September 2024.

<sup>45</sup> *Ibid*.



Certain other international observers, including the United Nations, also perceive Israel as effectively occupying Gaza.<sup>46</sup> This perspective is predicated on the fact that Israel control Gaza's borders and airspace and it supplies most of its electricity. If this perspective is correct, then the hostilities between Hamas and Israel would definitely trigger the full spectrum of International Humanitarian Law. However, it is important to note that, under a strict legal interpretation, Israel cannot be classified as an occupying power in Gaza, as it ceased governing and pulled its forces out of Gaza in 2005. Effectively, Hamas has been the *de facto* governing authority in Gaza after ousting Palestinian Authority in 2007.

The discourse surrounding the application of various branches of international law to non-state actors, such as Hamas, remained continuous among scholars and governments. This debate, including questions about the legal obligations of states that these actors come into conflict with.<sup>47</sup> A notable instance occurred in the United States when former President George W. Bush administration proposed a “legal black hole” theory in the aftermath of the September 11, 2001 attacks on the United States, asserting that *al-Qaeda* and the Taliban, as non-state actors, were exempt from the protections afforded by the 1949 Geneva conventions.<sup>48</sup> However, this theory was ultimately discredited by the U.S. Supreme Court in 2006 when it ruled in *Hamdan v Rumsfeld*<sup>49</sup> that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al-Qaeda. The Court found that the military commissions as constituted by the Department of Defense are not consistent with Common Article 3.<sup>50</sup>

Israel and the state of Palestine, acknowledged by most countries as comprising the West Bank, Gaza, and East Jerusalem, are signatories to the four Geneva Conventions of 2<sup>nd</sup> August 1949.<sup>51</sup> Israel has not ratified the Additional Protocols to the Geneva Conventions of 1949, particularly the first and second protocols which further regulated protection of civilians and property in armed conflict. Article 75 of First Additional Protocol stands out as a key provision, regarded as an integral part of Customary International Law, and consequently,

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<sup>46</sup> Y. Verbruggen, ‘The Israel-Hamas Conflict’, (30 November 2023) *International Bar Association*, available at <<https://www.ibanet.org/The-Israel-Hamas-conflict>> accessed 15 September 2024. See also: S. Yaseen, ‘Israel’s illegal occupation of Palestinian territory, tantamount to ‘settler-colonialism’’, (27 October 2022) *Peacekeeping News*, available at <<https://news.un.org/feed/view/en/story/2022/10/1129942>> accessed on the 15 September 2024.

<sup>47</sup> S. Mustafa, ‘Navigating the Israel-Palestinian Quagmire: Toward a Peaceful Future’ (September 2024) *Police East*, available at <<https://policyeast.com/navigating-the-israeli-palestinian-quagmire-toward-a-peaceful-future/>> accessed 13 September 2024.

<sup>48</sup> S. Borelli, ‘Casting light on the legal black hole: International law and detentions abroad in the “war on terror”’ (March 2005) 87 (857), *International Review of Red Cross*, 41, available at <<https://www.corteidh.or.cr/tablas/a21948.pdf>> accessed 13 September 2024.

<sup>49</sup> [05-184], 548 U.S. 557 (2006).

<sup>50</sup> ICRC, ‘How does the Law Protect in War?’, (May 2012) available at <<https://casebook.icrc.org/case-study/united-states-hamdan-v-rumsfeld#:~:text=The%20Supreme%20Court%20has%20determined,consistent%20with%20Common%20Article%203>> accessed on 13 September, 2024

<sup>51</sup> D. J. Scheffer, ‘What International Law has to say about the Israel-Hamas War’ (19 October, 2023), available at <<https://www.cfr.org/article/what-international-law-has-say-about-israel-hamas-war>> accessed on 27 July 2024.



its provision binds Israel.<sup>52</sup> According to Article 75, individual captured by a combatant power shall be treated humanely in all circumstances, and provides an extensive list of conducts that are explicitly prohibited.<sup>53</sup> In *Hamdan v Rumsfeld*, a plurality of Supreme Court justices stressed Article 75's customary application.<sup>54</sup> Palestine has officially ratified all the three Additional Protocols to the Geneva Conventions of 1949 which automatically signifies its status as a state party, thus creating an undeniable obligation to comply with the terms set forth in these protocols.<sup>55</sup> Hamas<sup>56</sup>, particularly as a *de facto* governing authority in Gaza with control over its own militant forces, is obligated as part of the State of Palestine to comply with the Geneva Conventions and its three protocols.

The State of Palestine deposited its instrument of accession to the Rome Statute with UN Secretary-General on the 2<sup>nd</sup> January 2015. Consequently, the Rome Statute effectively entered into force for the State of Palestine on 1 April 2015.<sup>57</sup> This ordinarily means that Hamas leaders and personnel can be held accountable for committing genocide, crimes against humanity, or war crimes on Israeli territory or in Gaza. Israel, like dozens of other countries, is not a state party of the Rome Statute, but the International Criminal Court (ICC) prosecutor may scrutinize its military actions in Gaza Strip, the territory of a state party.<sup>58</sup> On these premises, this study takes the position that the ongoing war between Israel and Hamas should be classified as International Armed Conflict; therefore, State parties are bound by the provisions of Geneva Conventions and their Additional Protocols. Furthermore, the ultimate of IHL is to protect humanity in armed conflict. A primary obligation in all forms of conflict is the necessity for combatants to consistently differentiate between civilians and military personnel, ensuring that hostilities are exclusively aimed at combatants and designated military objectives.<sup>59</sup> The rules governing the conduct of hostilities in both IAC and NIAC armed conflicts are essentially the same. Therefore, compliance is expected of both warring parties, i.e. Israel and Hamas.

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<sup>52</sup> S. W. Ma'udi, 'Status of Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts' (20<sup>th</sup> October 2020) p. 2, available at < [https://www.un.org/en/ga/sixth/75/pdfs/statements/protocols/12mtg\\_israel.pdf](https://www.un.org/en/ga/sixth/75/pdfs/statements/protocols/12mtg_israel.pdf) > accessed on the 27 July 2024.

<sup>53</sup> R. Vark, 'The Status and Protection of Unlawful Combatants' (2005) *Juridica International Law Review*, 191, 197, available at < [https://www.juridicainternational.eu/public/pdf/ji\\_2005\\_X\\_191.pdf](https://www.juridicainternational.eu/public/pdf/ji_2005_X_191.pdf) > accessed on 13 September 2024

<sup>54</sup> M. Milanovic, 'Lessons for human rights and humanitarian law in the war on terror: comparing Hamdan and the Israeli Targeted Killings case', (June 2007) 89 (866) *International Review of the Red Cross*, 373, 387, available at < <https://www.corteidh.or.cr/tablas/a21908.pdf> > accessed on the 27 July 2024.

<sup>55</sup> n45.

<sup>56</sup> Hamas has an effective government that runs all aspects of life in Gaza and produces reports that many international actors rely on such as the reports of the Ministry of Health regarding the number of casualties in the current conflict.

<sup>57</sup> See: < <https://www.icc.cpi.int/palestine#:~:text=On%202%20January%202015%2C%20The,Palestine%20on%201%20April%202015> > accessed on 13 September 2024.

<sup>58</sup> Report of the Panel of Experts in International Law convened by the Prosecutor of the International Criminal Court, 20 May 2024, available at < [240520-panel-report-eng.pdf \(icc-cpi.int\)](https://www.icc.cpi.int/240520-panel-report-eng.pdf) > accessed on the 10 August 2024.

<sup>59</sup> Customary International Humanitarian Law - Rule 1: The Principle of Distinction between Civilians and Combatants, p. 3, available at < <https://ihl-databases.icrc.org/en/customary-ihl/rules> > accessed on 13 September 2024. See also: R. Goldman, 'What are the Laws of War, and how do they apply to the Israel-Gaza Conflict?' (16 October 2023) *CBS News*, available at < [What are the laws of war, and how do they apply to the Israel-Gaza conflict? - CBS News](https://www.cbsnews.com/news/what-are-the-laws-of-war-and-how-do-they-apply-to-the-israel-gaza-conflict/) > accessed on 13 September 2024.



Arguably, it was on these premises that South Africa instituted proceedings against Israel before the International Court of Justice (ICJ) on the 29<sup>th</sup> December, 2023 concerning alleged violations by Israel of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (Genocide Convention)<sup>60</sup> in relation to Palestinians in the Gaza Strip. In these proceedings, the South African legal team requested the ICJ to issue provisional measures<sup>61</sup> to halt Israel's further violation of the Geneva Convention. In its request before the ICJ, the South Africa indicated nine provisional measures ranging from an order that Israel suspend its military operations in Gaza Strip and desist from the commission of acts of genocide to mandating that Israel desist from and take all measures to prevent expulsions and forced displacement, denial of humanitarian assistance as well as basic goods and services, and the destruction of Palestinian life in Gaza Strip, including by means of rescinding existing orders to this effect.<sup>62</sup>

Consequent upon the oral hearings on the 11<sup>th</sup> and 12<sup>th</sup> days of January, 2024 on the South Africa first request for provisional measures, the ICJ rendered its Order on the 26<sup>th</sup> January, 2024. The ICJ was satisfied that the conditions for the indication of provisional measures have been met, the Court therefore mandated Israel to<sup>63</sup>:

1. Take all available measures to prevent the commission of acts of genocide *vis-à-vis* Palestinian in Gaza;
2. Ensure with immediate effect that its military does not commit any acts of genocide;
3. Take all available measures to prevent and punish the direct and public incitement to commit genocide *vis-à-vis* Palestinian in Gaza;
4. Take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life affecting Palestinians life in Gaza;
5. Take steps to prevent the destruction and ensure preservation of evidence concerning alleged violations of the Genocide Convention; and

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<sup>60</sup> Adopted by the General Assembly of the United Nations on the 9<sup>th</sup> December, 1948.

<sup>61</sup> Provisional measures before the ICJ are similar to what is called interim relief in domestic law. The ICJ has the authority to grant provisional measures 'if it considered that circumstances so require any provisional measures which ought to be taken to preserve the respective rights of either party' (see: Statute of the International Court of Justice, art 41 (1)) and the Court has discretion to issue a set of measures to preserve the positions of the parties until a final judgment is rendered in the case.

<sup>62</sup> Application Instituting Proceedings and Request for the Indication of Provisional Measures (SOUTH AFRICA v. ISRAEL), filed in the Registry of the International Court Justice on 29 December 2023, para. 144 at p. 109 – 192, available at < <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf> > and < <https://www.courthousenews.com/wp-content/uploads/2023/12/South-Africa-v-Israel.pdf> > accessed on 11 October, 2025. <https://www.courthousenews.com/wp-content/uploads/2023/12/South-Africa-v-Israel.pdf>

<sup>63</sup> Application Instituting Proceedings and Request for the Indication of Provisional Measures Order rendered on the 26<sup>th</sup> January, 2024 (SOUTH AFRICA v. ISRAEL), para. 86.



6. Submit a report to the Court detailing the steps taken to give effect to the order within one month from the date it was rendered.<sup>64</sup>

The ICJ deemed it necessary to emphasize that all parties to the conflict in the Gaza Strip are bound by the International Humanitarian law. Furthermore, it is inferable from the Order of ICJ in *South Africa v Israel*, particularly on the Provisional Measures granted on the 26<sup>th</sup> January, 2024 (which are not identical to those requests made by South Africa in its application before the ICJ<sup>65</sup>) that the who essence of the case is to ensure that parties to the ongoing war in Gaza Strip comply with IHL in their conduct of hostilities to protect and preserve humanity.

## **8.0 THE LEGAL PROTECTION OF MEDICAL ESTABLISHMENTS DURING ARMED CONFLICT**

The Geneva Conventions, adopted in the aftermath of the Second World War in 1945, form the core of International Humanitarian Law and are particularly protective of medical establishments. In armed conflict, whether international or non-international armed conflict, medical establishments are to be respected and protected at all time by the parties to the conflict.<sup>66</sup> This protection extends to the wounded and the sick and the medical personnel alike. This rule is fundamental, however, not absolute; the law avows the protection and then disavows it. The rule comes with few exceptions. The enjoyment of this special protection is subject to the condition set out in Article 21 of First Geneva Convention i.e. if they are used to commit, outside their humanitarian functions, acts harmful to the adversary.

Successive attacks on medical establishments and other protected objects in the ongoing war in Gaza have raised questions about the legality of the attacks on several medical establishments. Despite the prohibition set out in Article 19 of the First Geneva Convention, Israel has continued to target hospitals and medical workers, premised on their perception that such facilities harboured Hamas.

A significant number of attacks on medical establishments has occurred in the ongoing war. During the first week of the war, there were 94 attacks on medical establishments in Israel and Gaza, killing 29 healthcare workers and injuring 24 persons.<sup>67</sup> The attacks on medical establishments contributed to a severe humanitarian crisis in Gaza Strip.<sup>68</sup> By 30 November, 2023 the World Health Organisation (WHO) documented 427 attacks on hospitals in the West

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<sup>64</sup> *Ibid*, p. 24-26.

<sup>65</sup> For instance, the Court did not order Israel to suspend its military operations in Gaza Strip. Furthermore, the Court mandated Israel to take all available measures to prevent genocide rather than to desist from committing such acts, which would have suggested that genocide has already been committed by Israel.

<sup>66</sup> 'The Implementation of Rules Protecting the Provision of Health-Care in Armed Conflicts and other Emergencies: A Guidance Tool', available at < <https://healthcareindanger.org/wp-content/uploads/2017/05/hcid-guiding-tool-icrc-eng.pdf> > accessed on the 11 January, 2025.

<sup>67</sup> *NBC News*, 'Attacks on health care facilities have increased in past decade, human rights groups say', ( 19 October 2023), available at: < <https://www.nbcnews.com/health/health-news/attacks-health-care-facilities-increased-decade-human-rights-groups-sa-rcna121042> > accessed on the 15 August 2024.

<sup>68</sup> United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), 'Gaza healthcare crisis: urgent action required to address alleged unlawful Israeli attacks', (14 November 2023), available at: < <https://reliefweb.int/report/occupied-palestinian-territory/gaza-healthcare-crisis-urgent-action-required-address-alleged-unlawful-israeli-attacks> > accessed on 15 August 2024.



Bank and Gaza Strip, resulting in 566 fatalities and 758 injuries.<sup>69</sup> By February 2024, it was reported that "every hospital in Gaza is either damaged, destroyed, or out of service due to lack of fuel."<sup>70</sup> By April, WHO had verified 906 attacks on medical establishments in Gaza, the West Bank, Israel, and Lebanon.<sup>71</sup> As of June 2024, according to WHO, Israel has attacked 464 medical facilities, killed 727 health care workers, injured 933 health care workers, and damaged or destroyed 113 ambulances.<sup>72</sup>

Each side has been accused of committing war crimes in their attacks. A prominent aspect of the Hamas led attacks on Israel carried out on 7<sup>th</sup> October 2023, was the assault on medical personnel and facilities. During the attacks, emergency teams were prevented from reaching the wounded, while some of those attempting to provide care were killed.<sup>73</sup> In its retaliatory campaign, Israel is alleged to have broken medical neutrality, a war crime under the Geneva Conventions.<sup>74</sup> It was reported that the Israel Defense Force (IDF) deliberately targeted ambulances and health facilities with airstrikes.<sup>75</sup>

The IDF, on 27 October 2023, claimed that Hamas used hospitals as terror infrastructures, publishing footage alleging that Hamas was operating from Gaza's largest hospital, al-Shifa Hospital. Israel also alleged that Hamas was using the Indonesian Hospital to hide an underground command and control center, and that they had deployed a rocket Launchpad 75 meters from the hospital.<sup>76</sup> Though, these claims are contested.<sup>77</sup>

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<sup>69</sup> Al-Jazeera News, 'Over 420 attacks on healthcare in occupied Palestinian territories since start of war: WHO', available at: [https://military-history.fandom.com/wiki/Attacks\\_on\\_health\\_facilities\\_during\\_the\\_Israel%E2%80%9393Hamas\\_war](https://military-history.fandom.com/wiki/Attacks_on_health_facilities_during_the_Israel%E2%80%9393Hamas_war) > accessed on the 15 August 2024.

<sup>70</sup> A. Sparrow & K. Roth, 'Destroying Gaza's Health Care System Is a War Crime', (9 February 2024) *Foreign Policy*, available at: < <https://foreignpolicy.com/2024/02/09/israel-gaza-health-care-hospitals-genocide-icj/> > accessed on the 15 August 2024.

<sup>71</sup> G. Abdul, 'They're targeting healthcare workers': airstrikes a constant fear for UK doctors in Gaza', (7 April 2024) *The Guardian*, available at: < <https://www.theguardian.com/world/2024/apr/07/targeting-healthcare-workers-airstrikes-constant-fear-uk-doctors-gaza> > accessed on the 15 August 2024.

<sup>72</sup> P. Vijay, 'Remember the Palestinian Doctors Killed by Israel', (24 June 2024), *CounterPunch*, available at: <<https://www.counterpunch.org/2024/06/24/remember-the-palestinian-doctors-killed-by-israel/>> accessed on the 15 August 2024.

<sup>73</sup> 'The Harming of Medical Personnel and Facilities during the October 7, 2023 Hamas Attacks', (November, 2023), *Physicians for Human Rights Position Paper*, available at: < [https://www.phr.org.il/wp-content/uploads/2023/11/5746\\_Harming\\_Medica\\_paper\\_Eng.pdf](https://www.phr.org.il/wp-content/uploads/2023/11/5746_Harming_Medica_paper_Eng.pdf) > accessed on the 15 August 2024.

<sup>74</sup> O. Le Poidevin *et al.*, 'Hundreds of Palestinians Killed in Israeli Airstrike on Gaza Hospital: Day 11 of the Hamas-Israel War' (19 October 2023), *L'Orient Today*, available at: < <https://web.archive.org/web/20231019201203/https://today.lorientjour.com/article/1353474/biden-to-visit-israel-wednesday-iran-threatens-possible-pre-emptive-action-day-11-of-the-israel-hamas-war.html> > accessed on 15 August 2024.

See also: 'Doctors observe Black Day against Israeli Atrocities in Gaza', (19 October 2023) *The Express Tribune*, available at: < <https://web.archive.org/web/20231019201447/https://tribune.com.pk/story/2441900/doctors-observe-black-day-against-israeli-atrocities-in-gaza> > accessed on 15 August 2024.

<sup>75</sup> B. Basu, 'Health-Care and Relief Workers Killed in Gaza as Humanitarian Groups Navigate Full Blockade', (13 October 2023), *CBC News*, Available at: < <https://www.cbc.ca/news/world/health-workers-gaza-killed-1.6992828> > accessed on 18 August 2024.

<sup>76</sup> The Time of Israel News, 'IDF says Hamas using Indonesian Hospital to Hide Terror Base; Jakarta pushes back', (November 7, 2023), available at: < <https://www.timesofisrael.com/jakarta-pushes-back-as-idf-says-hamas-using-indonesian-hospital-to-hide-terror-base/> > accessed on 15 August 2024.



### 5.0.1 *Loss of Protection of Medical Establishments and Units*

Specific protection to which medical establishments are entitled shall not cease unless they are used by a party to the conflict to commit, outside their humanitarian functions, an “act harmful to the enemy”.<sup>78</sup> Article 21 lays down the conditions under which medical establishments covered by Article 19 of the First Geneva Convention lose their protection. It also regulates the stringent criteria that must be met before such a loss of protection becomes effective: a warning which provides, in all appropriate cases, a reasonable time limit has to be given. Protection ceases only ‘after such a warning has remained unheeded’. These specific conditions are reiterated in several provisions of the Geneva Conventions and their Additional Protocols. The requirement of a warning, coupled with an appropriate time limit, sets a higher threshold for the loss of protection of medical establishments. In case of doubt as to whether medical unit of establishments are used to commit an “act harmful to the enemy”, they should be presumed not to be so used.<sup>79</sup> The bar for losing protected status is very high.<sup>80</sup>

### 5.0.2 *Duty to give Prior Warning*

It is essential to issue a warning before launching an attack on a medical establishment that has lost its protected status. This warning, when deemed appropriate, should include a designated time limit, which must go unheeded before an attack is permitted.<sup>81</sup> The ultimate intent of issuing warning is to enable those committing an “act harmful to the enemy” to halt the unlawful act, or, if they persist, to ensure the safe evacuation of the wounded and the sick who are not culpable for such actions and should not be made the victim of the pending attack.<sup>82</sup>

Where such a warning has remained unheeded, the enemy is no longer obliged to refrain from interfering with the work of a medical establishment or unit, or to take positive measures to assist it in its work.<sup>83</sup> Even then, humanitarian considerations relating to the

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<sup>77</sup> Middle East Eye News, ‘Indonesia denies Israel’s claim hospital sits atop Hamas tunnels’ (7 November 2023), available at: <<https://www.middleeasteye.net/live-update/indonesia-denies-israel-claim-hospital-sits-atop-hamas-tunnels>> accessed on 14 September 2024.

<sup>78</sup> See: Article 21, First Geneva Convention

<sup>79</sup> T. K. Brown, ‘How Israel turned Hospitals into ‘Military Targets’ by lying about International Law’, (10 May 2024), available at: <<https://mondoweiss.net/2024/05/how-israel-turned-hospitals-into-military-targets-by-lying-about-international-law/#:~:text=The%20International%20Committee%20of%20the,longer%20any%20that%20are%20fully>> accessed on the 10 September 2024.

<sup>80</sup> n1, 1194.

<sup>81</sup> International Committee of the Red Cross (ICRC), Commentary on Article 21 of the First Geneva Convention of 2016 (Discontinuance of Protection of Medical Establishments and Units), available at: <<https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-21/commentary/2016>> accessed on the 15 September 2024.

<sup>82</sup> ‘Compendium: IHL Pertaining to Wartime Medical Care’, *Program on International Law and Armed Conflicts*, available at <<https://pilac.law.harvard.edu/mcac-report/compendium-ihl-pertaining-to-wartime-medical-care>> accessed on 11 January, 2025.

<sup>83</sup> P. S. Baruch & N. Neuman, ‘Warning Civilians Prior to Attack under International Law: Theory and Practice’ in R. A. (Pete) Pedrozo and D. P. Wollschlaeger (eds), *International Law and the Changing Character of War* (Newport, Rhode Island: Naval War College, 2011) 362. Available at: <<https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1091&context=ils>> accessed on 16 September 2024.



welfare of the wounded and sick being cared for in the facility may not be disregarded. They must be spared and, as far as possible, active measures for their safety taken. This derives from the obligation to respect and protect the wounded and sick as well as the general rules on the conduct of hostilities that apply to attacks on any military objective. Notably, an attacking party remains bound by the principle of proportionality. The military advantage likely to be gained from attacking medical establishments or units that have lost their protected status should be carefully weighed against the humanitarian consequences likely to result from the damage or destruction caused to those facilities. Such an attack may have significant incidental second-order and third-order effects on the delivery of health care in the short, middle and long-term.<sup>84</sup>

An attacking party remains also bound by the obligation to take precautions in attack, in particular to do everything feasible to avoid or at least minimize harm to patients and medical personnel who may have nothing to do with those acts and for whom the humanitarian consequences will be especially dire.<sup>85</sup> Measures should be taken to minimize the direct and indirect impact of such an attack on the provision of health-care services, whenever feasible and operationally relevant. These measures include the following: formulate a contingency plan to address the anticipated disruption to health-care services and facilitating the prompt restoration of comprehensive service delivery; the safe evacuation of patients and healthcare professionals and ensuring that adequate provisions are made for their proper management and care; halt the attack if the facility no longer meets the criteria leading to the loss of protected status, for instance, if combatants have vacated the medical establishment; and, in the aftermath of the attack, implement measures for the swift reinstatement of healthcare services, which may involve offering military medical support to civilian medical establishments.<sup>86</sup>

In its bid to comply with the International Humanitarian rule/principle of advance warning to cease the use of medical facilities for military purposes, Israeli authority ordered the evacuation of all 22 hospitals in Gaza City and Northern Gaza. International humanitarian experts have argued that these evacuation orders are impossible to carry out, risking the lives of inpatients and Internally Displaced Persons (IDPs), and particularly the most vulnerable requiring life support.<sup>87</sup>

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<sup>84</sup> Ibid, 363 -364.

<sup>85</sup> Diakonia International Humanitarian Law Centre, 'Principle of Precaution in Attack', available at: < <https://www.diakonia.se/ihl/resources/international-humanitarian-law/ihl-principle-of-precautions-in-attack/> > accessed on 16 September 2024.

<sup>86</sup> J. F. Queguiner, 'Precautions under the law governing the conduct of hostilities' (December 2006) 88 (864), *International Review of the Red Cross*, 795-796, available at: < [https://international-review.icrc.org/sites/default/files/irrc\\_864\\_5\\_0.pdf](https://international-review.icrc.org/sites/default/files/irrc_864_5_0.pdf) > accessed on 16 September 2024.

<sup>87</sup> WHO, Evacuation orders by Israel to hospitals in northern Gaza are a death sentence for the sick and injured, (14 October 2023), available at: < <https://www.who.int/news/item/14-10-2023-evacuation-orders-by-israel-to-hospitals-in-northern-gaza-are-a-death-sentence-for-the-sick-and-injured> > accessed on 16 September 2024.

See also: Amnesty International, 'Urgent! Hospital Evacuations A "Death Sentence" For Wounded in Gaza', available at: < <https://action.amnesty.org.au/act-now/urgent-hospital-evacuations-death-sentence-for-wounded-in-gaza-j> > accessed on the 16 September 2024.



It is evident that adequate time were not given by the IDF for the evacuation of the hospital before the attacks.<sup>88</sup> More so, when the possibility of the total evacuation of the hospitals are not achievable considering several factors such as risking the lives of inpatients and Internally Displaced Persons (IDPs), and particularly the most vulnerable requiring life support; insufficient ambulance capacity for transfer and insufficient bed capacity to care for these patients in the safe Southern Gaza. WHO described the Israeli evacuation order as “a death sentence for the sick and injured.”<sup>89</sup>

Israel's evacuation order issued on 13 October 2023 to 22 hospitals in Northern Gaza was not an effective warning in the eye of law, because the order did not take into account the specific requirements for hospitals, including providing for the safety of patients and healthcare professionals. The extensive nature of the directive, coupled with the lack of a secure means of escape or a safe haven within Gaza, has led to apprehensions that the intent may not be to safeguard civilians, but rather to instill fear and compel them to leave their homes.<sup>90</sup>

### 5.0.3 *Rule of Proportionality*

The principle of proportionality in attack is codified in Article 51(5)(b) of Additional Protocol I, and in Article 57; and applies to all armed conflict (whether NIAC or IAC) as part of Customary IHL.<sup>91</sup> There are also questions of proportionality, whether the Israeli military aim justifies the harm caused. The proportionality rule operates as a general restraint on the conduct of parties engaged in hostilities and applies to attacks against lawful military targets located in the vicinity of civilians and civilian structures.<sup>92</sup> Hamas's headquarters would, in this view, be considered a high-value target in this instance. The proportionality rule prohibits an attack that may be expected to cause incidental death or injury to civilians or the destruction of civilian objects that would be excessive – or disproportionate – in relation to the concrete and direct military advantage anticipated.<sup>93</sup>

A hospital can only lose its protected status if it is used outside of its medical purpose to commit acts harmful to an enemy – for instance, as an active combat position. If a hospital

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<sup>88</sup> MSF: Israeli order to evacuate northern Gaza ‘outrageous’. Doctors Without Border (October 13, 2023). Available at: <<https://www.doctorswithoutborders.org/latest/msf-israeli-order-evacuate-northern-gaza-outrageous>> accessed on the 15 August 2024 (“Israel’s 24-hour notice that people in Northern Gaza must leave their land, homes and hospitals is outrageous—this represents an attack on medical care and on humanity.”).

<sup>89</sup> “WHO pleads for immediate reversal of Gaza evacuation order to protect health and reduce suffering”. Available at: <<https://www.who.int/news/item/13-10-2023-who-pleads-for-immediate-reversal-of-gaza-evacuation-order-to-protect-health-and-reduce-suffering>> accessed on the 15 August, 2024.

<sup>90</sup> Human Rights Watch, Gaza: Unlawful Israeli Hospital Strikes Worsen Health Crisis’, (14 November 2023), available at: <<https://www.hrw.org/news/2023/11/14/gaza-unlawful-israeli-hospital-strikes-worsen-health-crisis>> accessed on the 15 August 2024.

<sup>91</sup> R. Goldman, ‘How the ‘laws of war’ apply to the conflict between Israel and Hamas’ (15 October 2023), The Conversation, available at <<https://theconversation.com/how-the-laws-of-war-apply-to-the-conflict-between-israel-and-hamas-215493>> accessed on the 13 September 2024.

<sup>92</sup> Ibid.

<sup>93</sup> E. C. Gillard, ‘Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment’, (December 2018), *Chatham House: The Royal Institute of International Affairs*, p 11, available at: <<https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incident-harm-gillard-final.pdf>> accessed on 13 August 2024.



loses its protected status, armed forces can only attack after issuing the warning, and only in proportion to the threat. For instance, if a gunman is firing from a hospital, the other warring party could respond, but only against the gunman, not by destroying the entire hospital.

The proportionality rule requires those who plan a military operation to undertake in good faith a pre-attack analysis to determine the effects of the attack on civilians and civilians objects. Such a determination requires a balancing of probabilities that take in foreseeable collateral civilian casualties and the relative importance of a particular military target.<sup>94</sup> This is a relational concept, in other words, it can't be quantified by stating any fixed number of civilians dead or injured for any one attack.<sup>95</sup> Given the uncertainties of warfare, the actual number of civilian casualties may be greater or less than what the pre-attack analysis predicted.<sup>96</sup> So too might the military advantage gained. As such, the lawfulness of such an attack must be based on an honest appreciation of the facts and circumstances known to military planners at the time, and not in hindsight.<sup>97</sup> In addition, planners of a particular attack must choose a weapon that ideally will avoid or minimize likely civilian collateral damage.<sup>98</sup> Importantly, planners of any attack must suspend or cancel the operation if it becomes apparent that the target selected is not a military objective, or if the attack will result in disproportionate collateral damage.<sup>99</sup> As such, the rule of proportionality requires the attacking party to place high priority on the timely collection and evaluation of target intelligence.<sup>100</sup>

The higher the value of the military target, the more people are likely to be killed.<sup>101</sup> The protection of hospitals is not absolute. It can be compromised if it is being used for military purposes. However, it is not sufficient for an enemy to warn an entire hospital treating the sick and wounded to evacuate. Warnings would have to be issued directly to combatants, allowing sufficient time to comply and proving they were still present before attacking. In

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<sup>94</sup> The Practical Guide to Humanitarian Law, available at: < <https://guide-humanitarian-law.org/content/article/3/proportionality/> > accessed on the 16 September 2024

<sup>95</sup> Ibid.

<sup>96</sup> n68, 357, 377& 381.

<sup>97</sup> n76.

<sup>98</sup> R. Lawless, 'The U.S. Legal Obligation to take Precautions to Minimize Civilian Harm' (8 February 2022), *Article of War*, available at: <<https://lieber.westpoint.edu/us-legal-obligation-precautions-minimize-civilian-harm/>> accessed on 16 September 2024.

See also: K. S. Coble *et al.*, 'Targeting in an Urban Environment: Why Weaponizing and Tactics Matter'

(6 September 2024), *Articles of War*, available at: < <https://lieber.westpoint.edu/targeting-urban-environment-why-weaponizing-tactics-matter/> > accessed on 16 September 2024.

<sup>99</sup> A. Maroonian, 'Proportionality In International Humanitarian Law: A Principle And A Rule' (24 October 2022), *Articles of War*, available at: <https://lieber.westpoint.edu/proportionality-international-humanitarian-law-principle-rule/> > accessed on 16 September 2024.

<sup>100</sup> G. S. Corn, 'The Essential Link between Proportionality and Necessity in the Exercise of Self-Defense', in Prof. C. Kreb and Capt. R Lawless (eds), *Necessity and Proportionality in International Peace and Security Law*, (Oxford University Press, 2020).

<sup>101</sup> I. Robinson and E. Nohle, 'Proportionality and precautions in attack: The reverberating effects of using explosive weapons in populated areas' (2016) 98(1), *International Review of the Red Cross*, 107.



the current situation, it looks like no such warning has been given, or adequate time was not allowed for the sick and the medical personnel to evacuate before the attacks.<sup>102</sup>

In concrete terms, the rule of proportionality and its associated precautionary measures require that the Israeli military undertake, in good faith, a pre-attack analysis of likely civilian casualties ensuing from each and every aerial attack in Gaza. That analysis should be based on timely, reliable and constantly updated target intelligence. Israeli military spokesmen have stated repeatedly that they are taking all feasible measures to avoid excessive collateral damage in their bombing campaign.<sup>103</sup> But given the alarming civilian death toll in Gaza, burden has now shifted to the Israeli military to be more forthcoming in explaining to the international community its target selection criteria. This is especially needed in those attacks that have caused extensive civilian deaths in Gaza.

For the same reason, it is believed that the onus is now on the Israeli military to explain what precautionary measures it has taken to avoid or minimize collateral damage, particularly given recent reports that it has used so-called “dumb bombs”<sup>104</sup> instead of precision-guided munitions in its campaign.<sup>105</sup>

## 6 CONCLUSION

The attacks on medical establishments in Gaza have resulted in significant humanitarian consequences, including the death and injury of medical personnel, damage to facilities, and disruption of healthcare services with some media outlets and public health publications condemning the attacks and tagging them as violation of IHL and some labelling the attacks as war crime. The perspective that hospitals may be deemed legitimate military targets is largely rejected by these critics, as these assertions are often viewed as misunderstandings, misinformation, or rhetoric linked to the issue of war.

What these condemnations overlook is that the protection of the medical establishments against attack during armed conflict is not absolute; the protection can be forfeited under some circumstances, and be targeted as a legitimate military targets. Under IHL, medical establishments lose their protection if they are used for acts that are considered “harmful to the enemy”. This provision essentially refers to the repurposing healthcare facilities for military purposes, in such a case, healthcare facilities can be targeted after a warning and after enough time has been given to allow for the evacuation of patients and medical personnel.

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<sup>102</sup> n76.

<sup>103</sup> UN Press Release, ‘Israeli Attack on Al Tabi’een School in Gaza Underscores Desperate Need for Ceasefire, Scaled Up Humanitarian Assistance’, (13 August 2024), available at: < <https://press.un.org/en/2024/sc15790.doc.htm> > accessed on 16 September 2024.

<sup>104</sup> John Hudson *et al.*, ‘Unguided ‘dumb bombs’ used in almost half of Israeli strikes on Gaza’ (14 December 2023), available at: < <https://www.washingtonpost.com/national-security/2023/12/14/israel-unguided-dumb-bombs-gaza/> > accessed on the 15 August 2024.

<sup>105</sup> Fabian Hinz, ‘Fighting Precision with Precision’ (26<sup>th</sup> June 2024) *International Institute for Strategic Studies*, available at < <https://www.iiss.org/online-analysis/military-balance/2024/06/fighting-precision-with-precision/> > accessed 13 January, 2025.



Although the Geneva Conventions and the Additional Protocols foresee an obligation on the part of the attacking party to be proportionate in the attacks on medical facilities and to take all feasible precautionary measures, these terms are not adequately defined in the Geneva Conventions, which rather allow for a margin of interpretation and debate. Secondly, states or armed groups do not have to share any information as to how they carry out their assessment. Military targeting, governed by these vague standards, can thus occur without transparency, undermining accountability. All these apparent *lacunae* make Medical Establishments remain vulnerable under the current international legal framework. In other words, the current legal protections of medical establishment under the Geneva Convention are insufficient.

Furthermore, military and armed groups charged with attacking medical facilities often revert to denial, claim ignorance, or assert that the strike was a mistake. Increasingly, they also accuse the other party of violating international law, claiming that a bombed or attacked facility was used as a command centre, used for shielding fighters or storing weapons, or that its grounds were used as a launch pad for missiles as it is in this instance of the Israel-Hamas war. The broad exceptions in the current legal framework make this possible for both state actors and non-state actors to leverage on complexities of war and flexibilities in their targeting assessments to justify virtually all the unlawful attacks. There are strong evidences of continuous attacks on medical establishment in the ongoing war between Israel and Hamas, with reverberating effects on health-care systems in the near future.<sup>106</sup> Comprehensive assessment of attacks on medical establishment in the ongoing conflict in Gaza clearly shows that the affected medical facilities were attacked with explosive weapons. It also found that these explosive attacks have the largest impact on health-care facilities and people killed or injured. In the face of this situation, new methods of protecting medical establishment in armed conflicts need be employed.

## 7 RECOMMENDATIONS

From the foregoing, the challenge now is how to reset and strengthen existing mechanisms and reaffirm a collective commitment to uphold the protection of medical establishments and medical personnel in armed conflict. This study therefore recommends the followings to prevent and mitigate attacks on medical establishment in armed conflict.

1. Alliance among committed member states, United Nations agencies, and international, non-governmental, and civil society organisations on the prevention attacks on medical establishment. The alliance would leverage political, diplomatic, and legal mechanisms to promote greater respect for international humanitarian law and to advocate for greater accountability.
2. Establishment of a special rapporteur on the protection of medical establishment in armed conflict to monitor and report on attacks and to facilitate advocacy and cooperation on safeguarding health. Intensified diplomatic efforts are also urged, including valid accountability mechanisms and the exercise of universal jurisdiction.

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<sup>106</sup> 'The Effects on Health-Care of the Use of Explosive Weapons in 2023' (July 2024) *Insecurity Insight*, available at < <https://insecurityinsight.org/wp-content/uploads/2024/07/The-Effects-on-Health-Care-of-the-Use-of-Explosive-Weapons-July-2024.pdf> > accessed 13 January, 2025.



3. This study also encourages governments of member states to build capacities of medical professionals on health and humanitarian diplomacy. They should also redouble efforts to train military personnel on their obligations under international humanitarian law and to develop relevant policies and laws to enshrine respect for the right to health and humanitarian law. In conflict zones, special attention must be paid to responding to physical and psychological trauma among health workers.
4. Protection of medical establishment should become integral to health and humanitarian programming. This includes ensuring that emergency response plans contain options for service continuity in the context of attacks on medical establishment and potential health system disruption.
5. A total and unequivocal prohibition of attacks on medical facilities. At the very least, a strict prohibition could be adopted prohibiting explosive weapons in and around medical establishment.
6. Intense advocacy for a change in the way medical establishments are protected via international law that will be complementary to the Geneva Conventions; and
7. International agencies, such as the UN and WHO, should step forward to address the inherent *lacunae* in the Geneva Conventions and adopt additional international legislation for the protection of medical establishment in conflict.
8. Parties to an armed conflict should do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection (as is the case for medical personnel, units and transports) but are military objectives.
9. Not one single actor or organisation can ensure the protection of medical establishment in armed conflict alone. Political leaders, judicial bodies, the global health community, policy makers, civil society, and others must move beyond words and actively protect medical establishment in conflict zones. The stakes are too high to ignore; protecting medical establishment in conflict is a legal obligation and moral imperative.