The Limits of Inviolability: The Parameters for Protection of United Nations Facilities during Armed Conflict

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I. INTRODUCTION

United Nations peacekeepers, missions, headquarters and offices are increasingly the targets of direct attacks by terrorists and suicide bombers during armed conflict. For instance, a massive truck bomb exploded outside the headquarters of the UN Special Representative in Iraq in August 2003, killing twenty-two, including Sergio Vieira de Mello, the Special Representative. In August 2011, Boko Haram launched a suicide attack on the UN headquarters in Abidjan, Nigeria, killing eighteen people. Al-Shabab attacked the UN compound in Mogadishu, Somalia, in June 2013, detonating a suicide car bomb outside the entrance and then storming the compound on foot. UN peacekeepers have also been attacked and taken hostage during conflicts in, inter alia, Bosnia, Sierra Leone, Congo, Mali, Sudan, Central African Republic and other conflict areas.

1. From July 1, 2007 through June 30, 2008 alone, for example, 490 attacks were reported against UN offices, convoys and premises in conflicts and situations of violence around the world. Gu Zhenqiu, More Severe Security Challenges, Threats against UN Staff, XINHUA (Dec. 12, 2008), http://reliefweb.int/report/afghanistan/more-severe-security-challenges-threats-against-un-staff.


Beyond these examples of direct attacks, UN humanitarian assistance and other civilian facilities have been damaged or destroyed during combat operations. The nature of conflict fought unceasingly in civilian areas places a constant strain on organizations dedicated to civilian protection and humanitarian assistance during conflict. In ideal circumstances, their personnel and facilities remain immune from the violence, as mandated by the law, allowing them to carry out their essential tasks of feeding, sheltering, educating, and providing medical care. Unfortunately, the reality bears little resemblance to this ideal. Organized armed groups and some States have proven willing to use civilians, civilian infrastructure, protected objects, and facilities providing humanitarian assistance to shield military operations, store weapons, hide or transport fighters, and otherwise facilitate combat activity.

Recent conflicts in Gaza and in southern Lebanon showcase these challenges, which are exacerbated by the heavily integrated nature of UN refugee and humanitarian assistance infrastructure in both Gaza and southern Lebanon.\(^6\) For example, Hamas and other terrorist groups in Gaza have regularly and repeatedly launched rockets and mortars from within or immediately next to UN facilities, whether schools, medical clinics or other sites.\(^7\) Multiple times, rockets were found at such locations,\(^8\) and militants

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6. For example, “U.N. facilities in the Gaza Strip include not only official headquarters, but also hundreds of other buildings, including schools and medical clinics that bear U.N. insignia.” STATE OF ISRAEL, THE 2014 GAZA CONFLICT, 7 JULY–26 AUGUST 2014: FACTUAL AND LEGAL ASPECTS 146 n.411 (2015), http://mfa.gov.il/ProtectiveEdge/Pages/default.aspx.


used the area in or around them in the course of tactical maneuvers and attacks. On several occasions, Israeli airstrikes or artillery fire targeting militants and rocket launchers near or in UN facilities—to stop attacks and destroy Hamas’ capability to launch more attacks—tragically killed or wounded men, women and children seeking shelter from the hostilities raging around them.9

In condemning these Israeli attacks, top officials at the United Nations Relief and Works Agency (UNRWA) in Gaza and UN Secretary-General Ban Ki-Moon stated emphatically that UN facilities are inviolable and any shelling or other attacks are “absolutely unacceptable.”10 In the same manner, the UN Board of Inquiry established to review and investigate “incidents involving death and damage at UN premises in Gaza”11 during the Israel-Hamas conflict from December 2008 to January 2009 rested its findings on the rule that the inviolability of UN sites is absolute and “cannot be overridden by demands of military expediency.”12 These statements and

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findings raise important questions about the appropriate methodology for understanding the protection of UN facilities in areas of military operations and conflict—both for the planning and execution of military operations in areas near such facilities and for the post-conflict process of determining responsibility and enforcing accountability for any damage or legal violations. The responses to, and discourse surrounding, various incidents in which UN facilities in Gaza suffered incidental damage or direct harm in the course of hostilities evince two different legal and practical approaches to analyzing the nature and extent of their protection. UN officials—including Secretary-General Ban Ki-Moon, the UN Special Coordinator for the Middle East Peace Process and local UNRWA officials in Gaza—maintained a singular focus on the inviolability of UN premises, without any incorporation or interpretation of the law of armed conflict (LOAC). Israel, along with many military observers, analyzed such incidents within the LOAC framework, including the definition of military objective and the principles of distinction, proportionality and precautions.

This article examines the international legal protections for UN humanitarian assistance and other civilian facilities during armed conflict, including both general international law setting forth the immunities of the United Nations and LOAC, the relevant legal framework during wartime. Recent conflicts highlight three primary issues: (1) collateral damage to UN facilities as a consequence of strikes on military objectives nearby and military operations in the immediate vicinity; (2) the misuse of UN facilities for military purposes; and (3) direct attacks on fighters, weapons, or other equipment that cause damage to such facilities. Although peacekeeping and

[May 15, 2009], http://www.refworld.org/docid/4a292c8dd.html [hereinafter Secretary-General’s Summary (2009)] [Forwarding the Secretary-General’s Summary of the Report of the United Nations Headquarters Board of Inquiry into Certain Incidents in the Gaza Strip Between 27 December 2008 and 19 January 2009 to the Security Council]; see also Ido Rosenzweig & Yuval Shany, Report of the UN Board of Inquiry on “Operation Cast Lead,” Terrorism and Democracy, ISRAEL DEMOCRACY INSTITUTE (May 2009), http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-5/report-of-the-un-board-of-inquiry-on-operation-cast-lead (“[T]he report assumes that the inviolability of UN personnel and facilities is absolute and not subject to conditions of military necessity (and therefore, cannot suffer collateral damage.)”) (last visited Jan. 24, 2017). Although the UN Board of Inquiry established to review incidents during Operation Protective Edge in Gaza was tasked only with factual findings and did not make any legal findings—thus not addressing inviolability per se—its analysis rested on the same general approach, essentially ignoring the operational context and information demonstrating that Israeli attacks near UN facilities were in response to firing from UN premises or the immediate vicinity thereof.
peace enforcement missions faced many attacks, such attacks raise different questions under LOAC and are therefore outside the scope of this article.\textsuperscript{13}

UN facilities around the world enjoy protections enshrined in the 1946 Convention on the Privileges and Immunities of the United Nations (CPIUN).\textsuperscript{14} In particular, Article 3 affirms that “the premises of the United Nations shall be inviolable.” This protection helps to enable the UN—and its many components, agencies and other offshoots—to carry out the critical work of protecting, feeding and supporting individuals and communities around the world in tense and violent situations. At the same time, in situations of armed conflict, LOAC governs the conduct of hostilities, including the targeting of persons and objects and the protection of civilians, the civilian population, civilian objects, and specially-designated objects from attack. The interplay between these two legal frameworks provides the foundation for understanding the protection of UN premises during armed conflict—and the limits of that protection.

To identify the appropriate parameters for, and limits of, protection for such facilities, this article therefore focuses on what inviolability of UN premises—the term used in privileges and immunities law—means within the context of armed conflict and the law of armed conflict. Part II addresses the question of which law governs for the purposes of determining the scope of protection for UN facilities and analyzing actions during armed conflict to assess whether damage to UN facilities violated that law. For example, if an attack on Hamas militants causes damage to a nearby UN school,\textsuperscript{15} do we look to the inviolability provisions in the CPIUN or the LOAC principle of proportionality to assess the legality of such an attack and the resulting damage? In particular, Part II first explores the

\begin{itemize}
\item \textsuperscript{13} See Sesay, Kallon and Gbao, supra note 5, ¶ 215 (holding that peacekeepers are protected from attack “to the extent that they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict”); Abu Garda, supra note 5 (holding that peacekeepers lose their protection from attack when they directly participate in hostilities or combat-related activities); Convention on the Safety of United Nations and Associated Personnel art. 2(2), Dec. 9, 1994, 2051 U.N.T.S. 363 (excluding peace enforcement missions—i.e., “a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies”—from its scope).
\item \textsuperscript{15} U.N. Secretary-General, Letter dated Apr. 27, 2015, from the Secretary-General addressed to the President of the Security Council, annex, ¶¶ 43–44, U.N. Doc. S/2015/286 (Apr. 27, 2015) [hereinafter Secretary-General’s Summary (2015)].
\end{itemize}
meaning of “inviolability” in the CPIUN to understand if and how it applies in the context of military operations, and demonstrates that inviolability does not encompass harm from military operations during armed conflict. Second, this Part then applies the principle of *lex specialis* to demonstrate that even if one extends the principle of inviolability beyond its accepted understanding, LOAC is the appropriate legal framework for analyzing harm to UN facilities during armed conflict if there is a conflict between general international law on immunities of the UN and LOAC. Part III then examines how LOAC’s rules on military objectives, specially protected objects, proportionality and precautions apply in practice when UN facilities located in areas of combat operations face direct or collateral consequences from those operations.

II. THE APPLICABLE LAW: INVOLABILITY AND *LEX SPECIALIS*

A. Invviability of United Nations Premises

In reporting its findings on a January 5, 2009, strike that hit the UN Asma elementary school in Gaza, the UN Board of Inquiry established to review and investigate incidents of damage to UN facilities during Operation Cast Lead stated that the strike was “an egregious breach of the inviolability of United Nations premises.”16 Similarly, the UN Special Coordinator for the Middle East Peace Process announced in July 2014, during the most recent Israel-Hamas conflict, that “we have reminded relevant parties to the conflict of their responsibility to protect United Nations operations, personnel and premises which must remain inviolable in accordance with applicable international law, including the 1946 Convention on Privileges and Immunities of the United Nations.”17

The meaning of inviolability itself is the starting point for understanding the status and special protections for UN facilities in all situations, and

16. Secretary-General’s Summary (2009), supra note 12, ¶ 16.
therefore is a fundamental aspect of this discussion. The notion of inviolability is set forth in the CPIUN, which elaborated on the abstract principle set forth in Article 105 of the UN Charter: “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.” At the time the Charter was adopted, international organizations were still rare, providing few, if any, examples of how to establish the necessary legal personality and immunities to best facilitate effective UN operations. Building on the Covenant of the League of Nations, which provided for diplomatic privileges and immunities for its personnel and the inviolability of its property, the members of the United Nations negotiated and adopted the CPIUN as one of its first treaties. With regard to facilities and premises of the United Nations and any subsidiary organs, the CPIUN provides for two main protections: immunity and inviolability. For inviolability, Article II, section 3 of the CPIUN declares: “[t]he premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.”

Understanding the impact and application of this provision in the context of damage to UN facilities rests on the meaning of the word “inviolable.” With regard to the CPIUN itself, there is little in the way of commentary or travaux préparatoires to provide any guidance as to the intended breadth of the term “inviolable” at the time the Convention was adopted. Originally drafted as General Assembly Resolution 22A(I), the CPIUN builds on the mandates in Articles 104 and 105 of the UN Charter, noting in the preamble that the UN and its representatives and officials “shall enjoy in the territory of each of its Members such privileges and immunities


20. CPIUN, supra note 14. With regard to immunity, Article II, section 2 states, “The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity.” UNRWA was established by General Assembly Resolution 302(IV) in 1949 and its status as a subsidiary organ is confirmed in Article 22 of the UN Charter, which authorizes the General Assembly to establish “subsidiary organs as it deems necessary for the performance of its functions.”
as are necessary for the fulfillment of its purposes and . . . for the independent exercise of [its] functions.” Like the Convention generally, which sought to enable the necessary functional personality and functional immunity, the protection of inviolability is designed to prevent host States from interfering with the operations of the United Nations through judicial or other legal intrusion. Thus, the second sentence of Article II, section 3, explains and gives context to the concept of inviolability by explaining that UN property and assets will be immune from search, confiscation, and any form of judicial, legal or administrative interference.

Inviolability thus protects UN facilities from host State intrusion or unauthorized entry so as to ensure the UN’s— or relevant subsidiary organs’—ability to operate free from interference. General UN practice, including headquarters agreements and model status of forces agreements, affirms that inviolability is understood as “respect for the UN status and exclusive authority and control within its premises, and consequently, as a prohibition on non-consensual entry into UN premises, or search of UN vehicles for any reason or purpose and by any authority of the host country.”

Past examples outside the context of Gaza highlight this purpose. For example, after the Taliban took control of Kabul, and therefore Afghanistan, in 1996, Taliban forces dragged Afghan President Mohammad Najibullah from a UN compound, where he sought protection for several years, and executed him. Secretary-General Boutros Boutros-Ghali “deplored

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21. Reinisch, supra note 19, uses the terms “functional personality” and “functional immunity” to highlight that the UN’s personality and immunities are based on the functional needs of the organization.

22. As the authoritative introductory note to the Convention explains, “[i]n addition to immunity from suit, the General Convention provides for the ‘inviolability’ of United Nations premises and property which basically means that they are exempted from any search, requisition, confiscation, or other forms of executive, administrative, judicial or legislative interference.” Id.


the abduction of a person who had sought sanctuary in UN premises,”25 which was “a breach of the inviolability of those premises.”26 More recently, claims of spying and electronic surveillance of UN premises and conferences have also sparked protests of breaches of inviolability. In 2009 and 2010, British secret service agents allegedly spied on foreign governments at two consecutive UN international climate summits, prompting immediate calls to respect the inviolability of both diplomatic and UN premises and activities.27 Finally, in 2014, a U.S. federal district court refused to authorize service of process against UN headquarters in a suit brought by victims of Haiti’s cholera epidemic, citing the CPIUN’s protection against be-


27. UN to Investigate GCHQ, MI5 Spying on Foreign Delegate at Climate Summit Talks, RT (Nov. 5, 2010), http://rt.com/uk/202147-uk-climate-summit-spying/. In response to allegations of British intelligence services tapping Secretary-General Kofi Annan’s phone during the run up to the 2003 Iraq War, the Secretary-General’s spokesman stated that such tapping practices are illegal under the Convention on Privileges and Immunities. William M. Reilly, U.N. to Britain: If Spying on Us, Stop It, UPI, Feb. 26, 2004, http://www.upi.com/Business_News/Security-Industry/2004/02/26/UN-to-Britain-If-spying-on-us-stop-it/31241077833950/. Similarly, allegations of U.S. espionage to gather information about the Secretary-General and other high-ranking UN officials surfaced in 2010, triggering similar reminders of the immunity and inviolability of UN premises and personnel. Press Briefing, Office of the Spokesman for the Secretary-General (Nov. 29, 2010), http://www.un.org/press/en/2010/db101129.doc.htm (“[B]earing in mind that we don't have any judgement at this stage on the authenticity of the [leaked directive], bearing in mind that, I do want to read to you a little passage from the 1946 Convention on the Privileges and Immunities of the United Nations, and this is a direct quote: 'The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial, or legislative action.”); Robert Booth & Julian Borger, US Diplomats Spied on UN Leadership, THE GUARDIAN (Nov. 29, 2010), http://www.theguardian.com/world/2010/nov/28/us-embassy-cables-spying-un (“The UN has previously asserted that bugging the secretary general is illegal, citing the 1946 UN convention on privileges and immunities . . . .”); see also Dana Priest & Colum Lynch, Spying Much Denied but Done A Lot at U.N., Experts Say, WASHINGTON POST (Feb. 27, 2004), https://www.washingtonpost.com/archive/politics/2004/02/27/spying-much-denied-but-done-a-lot-at-un-experts-say/76579576-9bf9-4938-81d0-6812b1ba699b/.
ing subject to legal process or other legal enforcement mechanisms by the host State.\textsuperscript{28}

In the absence of any comprehensive treatment or analysis of the concept of inviolability in Article II, section 3, of the CPIUN, reference to the concept of inviolability in the Vienna Convention on Diplomatic Relations (VCDR) is instructive. As one commentary to the VCDR explains, “inviolability in modern international law is a status accorded to premises, persons or property physically present in the territory of a sovereign State but not subject to its jurisdiction in the ordinary way.”\textsuperscript{29} Article 22 of the VCDR thus states:

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission. 2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity. 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.\textsuperscript{30}

This provision is one of the VCDR’s “special rules—privileges and immunities—which enable diplomatic missions to act without fear of coercion or harassment through enforcement of local laws and to communicate securely with their sending Governments.”\textsuperscript{31} Article 22 sets forth two obligations owed by the receiving State to the sending State: a duty of absten-
tion—prohibiting interference in any way with the diplomatic mission—and a duty of protection.

The first duty ensures that the diplomatic mission can fulfill its functions and purposes without fear of legal, administrative, executive or judicial action by the host State, or unauthorized entry, search or other intrusive action. In this way, inviolability in the VCDR “shelters the mission and its members from any constraint or coercion which the receiving State, by virtue of its sovereignty, may exercise over all persons and objects present anywhere in its territory.” Agents of the receiving State may only enter diplomatic or consular premises with the prior consent of the head of mission. Invocability of diplomatic premises in this fashion was an established international practice at least as far back as the eighteenth century and rests on the diplomatic premises as “an attribute of the Sending state [because] the premises are used as the headquarters of the mission.”

The second duty goes beyond this prohibition on interference or other governmental action and requires the receiving State to take steps to protect the diplomatic or consular premises from intrusion, physical invasion or other interference. Unlike the first duty of abstention, this second duty is a positive duty. “The first aspect of the special duty of protection . . . requires the authorities of the receiving States—normally the police—to prevent unauthorized intrusion on mission premises and on the request of the


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head of mission to expel invaders.”

Receiving States have assumed these obligations on numerous occasions, particularly in response to embassy sieges in the 1980s and 1990s, such as the 1996–1997 Tupac Amaru Revolutionary Movement’s seizure of the Japanese Embassy in Lima, Peru. The Peruvian authorities’ eventual raid ended the siege, freed the hostages and killed all the guerrillas.

In contrast, the most egregious example of a receiving State abdicating its responsibilities of protection is the 1979 Iran hostage crisis. The International Court of Justice held that “the Iranian Government failed altogether to take any ‘appropriate steps’ to protect the premises, staff and archives of the United States’ mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion.” Although the government of Iran itself did not directly violate the embassy’s inviolability through its official agents, “an attempt to clear the embassy premises, to rescue the persons held hostage, or at least ‘to persuade the militants to terminate their action against the Embassy’ would have to be expected from the Iranian authorities.”

The VCDR reinforces that the basic concept of inviolability, as presented in the CPIUN, focuses on protecting the UN or diplomatic facility from interference by the host State in the form of search and seizure, legal, judicial or administrative interference, governmental intrusion or other invasion of the property and premises of the facility. Interference or intrusion plainly does not equate to damage from combat operations during armed conflict. Neither the CPIUN nor the VCDR address either the notion of incidental harm to facilities during armed conflict or the legal and operational consequences of misuse and abuse of such facilities during

36. DENZA, supra note 29, at 161. See also Draft Articles on Diplomatic Intercourse and Immunities with Commentaries, supra note 35, at 95 (“[T]he receiving State is under a special duty to take all appropriate steps to protect the premises from any invasion or damage, and to prevent any disturbance of the peace of the mission or impairment of its dignity. . . . The receiving State must, in order to fulfil this obligation, take special measures—over and above those it takes to discharge its general duty of ensuring order.”).

37. DENZA, supra note 29, at 163.


40. See Shraga, supra note 23, at 92 (“[N]o analogy can be drawn between attacks on UN premises during armed conflict, and unauthorized or non-consensual entry to such premises by a state’s authority for the purpose of executing arrest or search.”).
conflict. Both treaties continue to apply during wartime, but remain focused on their central prohibitions against interference, forced entry and other intrusions. 41 Indeed, the principle of inviolability simply does not contemplate the infliction of damage to UN facilities in the course of military operations—whether that damage is due to a deliberate attack or is incidental to an attack on a distinct and different objective. As a result, the lawfulness of harm to UN facilities, whether direct or indirect, simply does not fall within the inviolability construct.

B. Lex Specialis—Which Law Governs?

Inviolability does not address—let alone regulate or prohibit—the use of military force against, or causing incidental harm to, UN facilities during armed conflict. Questions of harm to and protection of UN facilities during armed conflict are therefore determined by LOAC, irrespective of the application of inviolability. Even if some, including the UNRWA and the Boards of Inquiry, 42 seek to extend the CPIUN and its principle of inviolability to damage to UN facilities during military operations, LOAC remains the dominant and governing legal regime.

If two legal regimes are applicable, the issue becomes whether and how they conflict and, if so, which law takes precedence in determining the rights and obligations of the relevant parties. Here, the CPIUN mandates that UN facilities are inviolable, at least in peacetime; LOAC accepts incidental harm to civilians and civilian objects in the course of attacks on lawful military objectives and also provides for the loss of protection for civilian and certain specially protected objects when used for military purposes. The principle of lex specialis is a primary rule, or methodology, for resolving situations of conflict between two legal norms or two legal frameworks. 43

41. See, e.g., Partial Award: Diplomatic Claim, Ethiopia’s Claim 8 (Eri. v. Eth.), 26 R.I.A.A. 407, ¶ 24 (Eri.–Eth. Claims Comm’n 2005) (“[T]he Commission does not accept that the Parties could derogate from their fundamental obligations under the Vienna Convention on Diplomatic Relations, notably those relating to the inviolability of diplomatic agents and premises, because of the exigencies of war.”).

42. See e.g., Secretary-General’s Summary (2009), supra note 12; Bartholomeusz, supra note 10, at 83 (“it is not necessary to conduct an analysis under international humanitarian law to determine whether there has been a breach of inviolability.”).

43. A simple difference of perspective between two legal norms is not sufficient, but rather “a relationship of conflict exists between two norms if one norm constitutes, has led to, or may lead to, a breach of the other.” Marko Milanovic, Norm Conflicts, International Humanitarian Law and Human Rights Law, in INTERNATIONAL HUMANITARIAN LAW AND
Lex specialis has a long history and falls within the category of general principles of law as a source of international law in the Statute of the International Court of Justice.\(^{44}\)

Posing the question of “what rules ought to be observed in such cases” of conflict between two legal norms, Grotius explained that “[a]mong agreements that are equal . . . that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general.”\(^{45}\) Grotius identified several reasons for a preference for the more specific law over the general law: the more specific law is more to the point; it regulates the relevant matter more effectively; the more specific law is better able to take account of particular circumstances; the need to comply with the more specific law is felt more acutely; and the more specific law offers greater clarity and definition.\(^{46}\)

INTERNATIONAL HUMAN RIGHTS LAW 95, 102 (Orna Ben-Naftali ed., 2011). Similarly, if one reaches two opposing results in applying two legal norms, such that an act is lawful under one regime and unlawful under the other, a norm conflict requiring resolution exists. As Vattel explained,

> There is a collision or opposition between two laws, two promises, or two treaties, when a case occurs in which it is impossible to fulfill both at the same time, though otherwise the laws or treaties in question are not contradictory, and may be both fulfilled under different circumstances. They are considered as contrary in this particular case; and it is required to show which deserves the preference, or to which an exception ought to be made on the occasion . . . .


46. Id. Similarly, after setting forth the challenge of conflicting legal norms, Vattel highlighted the same reasons for applying lex specialis as an interpretive tool:

> Of the laws of two conventions, we ought . . . to prefer the one which is less general, and which approaches nearer to the point in question: because special matter admits of fewer
The International Law Commission and public international law scholars emphasize two understandings of how *lex specialis* works. First, “a particular rule may be considered an application of the general rule in a given circumstance.”\(^{47}\) The particular—or more specific—rule thus provides elaboration or instructions as to the interpretation and requirements of the general rule.\(^{48}\) A second conception of *lex specialis* arises when a more specific rule serves as an exception to the general rule. The interpretive maxim thus “cover[s] the case where two legal provisions that are both valid and applicable are in no express hierarchical relationship and provide incompatible direction on how to deal with the same set of facts.”\(^{49}\) This second conception best describes the interpretive conflict that arises with regard to the protections due UN facilities during armed conflict and the identification of legal violations: two co-existent legal regimes with no hierarchical relationship that provide—at least in specific situations—conflicting determinations of the relevant legal obligations and authorities.\(^{50}\) In such situations of norm conflict, “the principle that special law derogates from general law is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts.”\(^{51}\)

exceptions than that which is general; it is enjoined with greater precision, and appears to have been more pointedly intended.


1. LOAC and the CPIUN

In analyzing how to apply *lex specialis* to the question of the inviolability of UN facilities during armed conflict, consider the two primary scenarios that arose during the recent conflicts between Israel and Hamas and other Palestinian armed groups in Gaza and a third that could arise in similar situations of armed conflict. First, in a number of situations in both the 2008–2009 and 2014 conflicts, Hamas and other armed groups stored weapons in UN schools, used tunnels positioned underneath a UN medical clinic and fired rockets from the courtyard or close vicinity of UN facilities. Second, in both of those conflicts, UN schools or clinics suffered damage as the result of hostilities nearby or from Israeli attacks on military targets in the vicinity of the facility. Third, it is possible that one party to an armed conflict might target a UN facility directly as a lawful military objective in response to the other party using that facility for military purposes.52

Both the CPIUN and LOAC prohibit the first scenario—the use of UN facilities for military purposes,53 so no conflict of norms arises. Indeed, such misuse of UN facilities falls squarely within the notion of interference that inviolability prohibits. However, in the second case and the hypothetical third scenario, the two legal regimes lead to conflicting results with regard to authorities and prohibitions. Although the CPIUN states that UN facilities are inviolable, LOAC accepts incidental harm to civilians and civilian objects, including protected objects, in the course of attacks on lawful military objects, and provides exceptions to the immunity of specially pro-

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52. Although there were allegations of such direct attacks on UN facilities during the 2014 conflict in Gaza, the UN Board of Inquiry made no findings of deliberate targeting of those facilities. In addition, Israel explicitly stated that it never made a UNRWA school the object of attack. THE 2014 GAZA CONFLICT, 7 JULY–26 AUGUST 2014: FACTUAL AND LEGAL ASPECTS, *supra* note 6, at 163.

53. LOAC prohibits the use of UN medical facilities—which are specially protected objects—for military purposes. *See infra* Part III.A.2. Other UN facilities, such as schools or shelters, lose their protection from attack if used for military purposes, but the use itself would not be a violation of LOAC.
tected objects when they are used for military purposes—leading to conflicting conclusions about the lawfulness of such harm.

While the CPIUN provides the general rule prohibiting interference with, and intrusion into, a UN facility, without addressing armed conflict at all,54 LOAC sets forth the rules applicable during the specific situation of armed conflict and thus “the special nature of the facts justifies a deviation from what otherwise would be the ‘normal’ course of action.”55 By definition, therefore, LOAC is the specific law because it applies only in the specific circumstances of armed conflict—and thus is “the lex specialis in relation to rules laying out the peace-time norms relating to the same subjects.”56 LOAC effectively operates as an exception to legal normalcy and overrides peacetime norms in the case of direct conflict between the two regimes.57

The fact that LOAC is the more specialized law does not mean that the CPIUN or other relevant international law ceases to apply in situations of armed conflict. Indeed, the protections of the CPIUN, diplomatic law, human rights law and other legal regimes are essential during armed conflict, just as during peacetime. But ignoring the special circumstances of armed conflict or equating conflict and peacetime undermines the role of LOAC and the object and purposes of this law. Thus, even if it might be considered “desirable . . . to discard the difference between peace and armed conflict, the exception that war continues to be to the normality of peace could not be simply overlooked when determining what standards should be used to judge behavior in those (exceptional) circumstances.”58

Unlike the CPIUN and other legal frameworks within public international

54. Indeed, inviolability as codified in the Convention, and as understood more broadly in diplomatic and consular law, focuses on the activities of the host State in the judicial, administrative, legal and State security arenas and does not incorporate questions of targeting, incidental damage and other fundamental principles from LOAC and situations of armed conflict.

55. Fragmentation of International Law, supra note 51, at 57, ¶ 105.

56. Id. at 56, ¶ 103.

57. Id. at 6. See also C. Wilfred Jenks, The Conflict of Law-Making Treaties, 30 BRITISH YEARBOOK OF INTERNATIONAL LAW 446 (1953). See, e.g., Fragmentation of International Law, supra note 51, at 57, ¶ 104 (“The example of the laws of war focus on a case where the rule itself identifies the conditions in which it is to apply, namely the presence of an ‘armed conflict.’ Owing to that condition, the rule appears more ‘special’ than if no such condition had been identified. To regard this as a situation of lex specialis draws attention to an important aspect of the operation of the principle. Even as it works so as to justify recourse to an exception, what is being set aside does not vanish altogether.”).

58. Fragmentation of International Law, supra note 51, at 57, ¶ 104.
law, which were not developed with the particularities and exigencies of armed conflict in mind, LOAC “was especially conceived for the conduct of hostilities and . . . [t]hus, it is fair to say that for the conduct of hostilities, [LOAC] is the more refined body of law.”

In the absence of any judicial or administrative examination of how LOAC and the CPIUN should and would interact, other analogous scenarios prove useful. For example, one of the war crimes in the Rome Statute of the International Criminal Court demonstrates exactly this analysis. Article 8(2)(b)(iii) defines the following conduct as a war crime:

intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

As the wording indicates, the immunity and protections of such units or facilities—to which we can readily analogize other UN relief facilities for the purposes of the instant analysis—depends on the use or conduct of such entities as determined by the legal framework, definitions and rules of LOAC.

In essence, the particular presentation of the crime of attacks on UN humanitarian assistance or peacekeeping missions is an implementation of the principle of lex specialis, in the same way that lex specialis should determine the correct approach to harm to other UN facilities. As the provision states, in the event of a deliberate attack on such a UN entity, its personnel or its material, one must first ask whether the property and persons attacked were entitled to the protections due to civilian objects or civilians as categorized by LOAC, not by any other source of law. Thus, personnel of such missions lose their protection “when and as long as they take a direct part in hostilities” and objects lose protection when “used to make an effective contribution to the military action of a party to a conflict.” These understandings stem directly from the relevant LOAC provisions found in Additional Protocol I: Article 51(3) with regard to direct participation in

hostilities and Article 52(2) with regard to the definition of military objectives. Similarly, humanitarian assistance missions, including both personnel and installations, “lose their protection if they commit [or are used to commit], outside their humanitarian function, acts harmful to the enemy.”

Again, this framework rests on LOAC, drawing on the rules and obligations set forth in the First, Second and Fourth Geneva Conventions, and Additional Protocol I.

If absolute inviolability were indeed the correct framework for protection for UN facilities during armed conflict, the criminalization of attacks on UN missions and facilities would look entirely different and would have no qualification with regard to use for military purposes or acts harmful to the enemy. The text of the Rome Statute, as negotiated and acceded to by over one hundred countries, emphatically reinforces LOAC as the lex specialis with regard to the lawfulness of deliberate attacks on or incidental harm to UN facilities during armed conflict.

62. Article 51(3) of Additional Protocol I states that “civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

63. Article 52(2) of Additional Protocol I defines military objectives, including when civilian objects lose their protection and become lawful military objectives: “In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

64. DÖRMANN, supra note 61, at 159–60.

65. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 21, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I] (“The protection to which fixed establishments and mobile medical units of the Medical Service are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy.”); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 34, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II] (“The protection to which hospital ships and sick-bays are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy.”); Convention Relative to the Protection of Civilian Persons in Time of War art. 19, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] (“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.”); Additional Protocol I, supra note 62, art. 13 (“The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy.”).
A look at how diplomatic law treats questions of the use of force in self-defense in or against diplomatic premises offers similar guidance. At first glance, one might conclude that self-defense has no place in the arena of diplomatic immunity because the VCDR “allows for absolutely no exceptions to the principle of diplomatic inviolability.” This firm stance excluding all exceptions stemmed from the fear of abuse of any stated exceptions. However, the preamble to the VCDR affirms that “rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention.” Self-defense falls directly within this category of issues not expressly regulated. As the International Law Commission’s commentary states, the principle of inviolability “does not exclude either self-defense or, in exceptional circumstances, measures to prevent the diplomatic agent from committing crimes or offences.”

Indeed, States have historically accepted that diplomatic immunity and inviolability are not absolutes in the face of legitimate self-defense needs. Rather, self-defense provided a legitimate reason for an intrusion or use of force that would otherwise be in violation of the immunity or inviolability diplomatic law required. As early as 1830, a U.S. federal court held that “if a minister assault another, he may [even] be killed in self-defense though not by way of punishment.”


67. 1957 ILC Yearbook, supra note 32, at 138. See also Beaumont, supra note 66, at 397 (“[A] closer examination of both the Convention itself and of commentary submitted by the International Law Commission prior to the Vienna Conference reveals that the doctrine of self-defence was not within the scope of the Convention’s general ban on all exceptions to the principle of diplomatic inviolability.”).

68. Grotius explained, for example, that “all human laws have been so adjusted that in case of dire necessity they are not binding; and so the same rule will hold in regard to the law of the inviolability of ambassadors.” Grotius, supra note 45, at 444 (adding that “if an ambassador should attempt armed force he can indeed be killed, not by way of penalty, but in natural defence”).

69. United States v. Benner, 24 Fed. Cas. 1084, 1085 (C.C.E.D. Pa. 1830). Oppenheim took a similar approach, recognizing both the importance of diplomatic inviolability and the necessary exception to restrain and counter acts of violence by a diplomatic envoy. 1 Lassa Oppenheim, *International Law § 388* (1912) (“[T]here is one exception. For if a diplomatic envoy commits an act of violence which disturbs the internal order of the receiving State in such a manner as makes it necessary to put him under restraint for the purpose of preventing similar acts, he may be arrested for the time being . . . .”). See also Preparatory Committee, Conference for the Codification of International Law, *Damages Resulting from Insurrections, Riots or Other Disturbances*, League of Nations Doc. C.75.M.69.19
of the 1930 Hague Conference noted that a State cannot be held “responsible for damage caused . . . by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance.” When the international community began to codify the long history of diplomatic law in the form of the VCDR, self-defense remained a viable means for States to respond to threats or violence from diplomatic agents or premises.

The diplomatic law regime thus reaffirms the same lex specialis approach: diplomatic law remains the overarching framework for determining and governing the rights and duties of diplomatic agents and States, but the specific situation of armed conflict or other situation in which a diplomatic agent uses—or diplomatic premises are used for—violence against the State allows for and justifies acts taken in self-defense or to remove the threat from such person or premises.

2. The Comay-Michelmore Exchange of Letters

Beyond the broad framework of both the CPIUN and diplomatic law, which apply to all situations involving UN facilities or diplomatic and consular facilities, respectively, the specific context of Israel’s relationship with UNRWA—the agency with UN facilities throughout the Gaza Strip, where issues of damage to or even attacks on UN facilities have arisen most recently and predominantly—demonstrates exactly this operation of lex specialis. Like all other UN agencies, UNRWA enjoys the privileges and immunities enshrined in the CPIUN. However, the context of armed conflict then frames the operation of these protections within the relationship between Israel and UNRWA.

29.V (1929) (noting that a State’s responsibility for action against a diplomatic agent—that is, the extent of that person’s diplomatic protection—would be a function of the threat such person posed).

70. Preparatory Committee, supra note 69, at 107.

71. As the International Law Commission stated in its commentary to the draft convention on diplomatic and consular relations, diplomatic inviolability “does not exclude... measures of self-defence.” Draft Articles on Diplomatic Intercourse and Immunities, supra note 36, at 97.

72. See Beaumont, supra note 66, at 391 (“[T]he principle of self-defense is relevant in diplomatic law, and it may provide a legitimate pretext for acting in violation of diplomatic immunity”); Draft Articles on Diplomatic Intercourse and Immunities, supra note 36, at 75 (“Thus article 21 reflects the generally accepted position that self-defence precludes the wrongfulness of the conduct taken within the limits laid down by international law.”).
After the 1967 war, Israel and UNRWA penned an exchange of letters regarding relations between Israel and UNRWA, in light of the transition from operations under Jordanian and Egyptian control of the relevant territories. Affirming that the CPIUN governs relations between Israel and UNRWA, the exchange then confirms the role of military security as the determining factor in the extent to which and how the basic protections and privileges of UNRWA facilities would be carried out. The letter from the Israeli Ministry of Foreign Affairs to the Commissioner-General of UNRWA states, “the Israel Government will facilitate the task of UNRWA to the best of its ability, subject only to regulations or arrangements which may be necessitated by considerations of military security.”73 Accepting and agreeing to this construct, the Commissioner-General of UNRWA declared in response that he expects “that such restrictions as may for the time being be placed on the full use of those facilities will be removed as soon as considerations of military security permit.”74 As a result, “UNRWA continued its operations as it had during Jordanian and Egyptian control of the territories, and with the exception of matters pertaining to ‘military security,’ UNRWA’s installations and activities remained inviolable and governed by the UN’s standard Privileges and Immunities document.”75

More than twenty-five years later, upon the signing of the Declaration of Principles on the Interim Self-Government Arrangements, on September 13, 1993, and the Agreement on the Gaza Strip and the Jericho Area, on May 4, 1994, between Israel and the Palestine Liberation Organization (PLO), the latter organization entered into an exchange of letters with the Commissioner-General of UNRWA.76 In this exchange, the PLO “pledged to apply, in all relations with UNRWA, relevant articles of the Charter of

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74. Id.


the United Nations and the Convention on the Privileges and Immunities of the United Nations.” That same year, UNRWA began preparing to move its headquarters from Vienna to Gaza by the end of 1995, as well as relocating other operational branches from Vienna to Amman. Throughout this process, however, the framework established in the Comay-Michelmore exchange of letters for the relationship between Israel and UNRWA remained the same, with the application of the privileges and immunities in the CPIUN subject to “considerations of military security” as needed.

In effect, the Comay-Michelmore agreement is a microcosm of the broader lex specialis paradigm for determining the applicable law in situations of incidental harm to or deliberate targeting of UN facilities during armed conflict. The recognition by both Israel and UNRWA of the needs of military security affirm that military operations and other security needs driven by the armed conflict between Israel and Palestinian armed groups are a specific context—one that must be governed by a specific law, LOAC, that is designed precisely for those circumstances. The agreement therefore reaffirms that LOAC determines the legality of damage to, misuse of, or attacks on UN facilities during armed conflict.

III. PROTECTION OF UN FACILITIES UNDER LOAC

LOAC provides the legal rules and analysis to determine the lawfulness of the types of harm to UN facilities at issue and therefore also to guide decision-makers and operators proactively in the appropriate lawful conduct of military operations in the vicinity of UN sites. LOAC—also known as the law of war or international humanitarian law—governs the conduct of both States and individuals during armed conflict and seeks to minimize suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare. LOAC applies during all sit-

77. Id. ¶ 9.
uations of armed conflict, whether between two or more States, between a State and a non-State group, or between two or more non-State groups.

The lawfulness of targeting individuals and objects, including UN facilities, during armed conflict is determined by the principles of distinction, proportionality and precautions. The principle of distinction mandates that all parties to an armed conflict distinguish between those who are fighting and those who are not and to only direct attacks at the former. The principle of proportionality requires that parties to a conflict refrain from launching any attack in which the expected civilian casualties are likely to be excessive in light of the anticipated military advantage to be gained. Finally, the principle of precautions obligates all parties to an armed conflict to take all feasible precautions to protect civilians from harm during military operations, including precautions when launching attacks and precautions when defending against attacks. In particular, for the purposes of this article, which focuses on targeting and the identification of military objectives and the application of proportionality and precautions to minimize harm to civilians and civilian objects, the legal obligations and princi-

the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

79. For international armed conflict, Common Article 2 of the Geneva Conventions of August 1949 states that the Conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Geneva Convention I, supra note 65, art. 2; Geneva Convention II, supra note 65, art. 2; Geneva Convention III, supra note 78, art. 2; Geneva Convention IV, supra note 65, art. 2. For non-international armed conflict, Common Article 3 of the Geneva Conventions sets forth minimum provisions applicable “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” Geneva Convention I, supra note 65, art. 3; Geneva Convention II, supra note 65, art. 3; Geneva Convention III, supra note 78, art. 3; Geneva Convention IV, supra note 65, art. 3 [hereinafter Common Article 3]. See also OSCAR M. UHLER ET AL., COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 26 (Ronald Griffin & C.W. Dumbleton trans., 1958) [hereinafter GC IV COMMENTARY] (“Born on the battlefield, the Red Cross called into being the First Geneva Convention to protect wounded and sick military personnel. Extending its solicitude little by little to other categories of war victims, in logical application of its fundamental principle, it pointed the way, first to the revision of the original Convention, and then to the extension of legal protection in turn to prisoners of war and civilians. The same logical process could not fail to lead to the idea of applying the principle to all cases of armed conflict, including internal ones.”).

81. Id. arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b).
82. Id. art. 57.
amples applicable in both international and non-international armed conflicts are nearly identical.\textsuperscript{83}

This Part analyzes the application of these fundamental tenets of LOAC to the three activities highlighted earlier: use of UN facilities for military operations, deliberate targeting of UN facilities and incidental harm to UN facilities. The first sub-part examines the definition of military objectives and the consequences when civilian objects—and specially protected objects in particular—are used for military purposes, analyzing the legal parameters governing the first two activities. The second sub-part addresses the third activity—incidental harm to UN facilities—and presents LOAC’s framework for protecting civilians and civilian objects through the obligations set forth in the principles of proportionality and precautions. Further, this Part highlights the critical role that LOAC plays in enhancing and maximizing protections for UN facilities and other civilian and protected objects during conflict and, more importantly, how disregarding LOAC’s framework in favor of a concept of absolute immunity or inviolability undermines those protections by incentivizing repeated abuse of that very inviolability.

\section*{A. Identifying Lawful Military Objectives and Misuse of UN Facilities}

One of the most fundamental issues during armed conflict is identifying who or what can be targeted. The principle of distinction, one of the “cardinal principles” of LOAC,\textsuperscript{84} requires that any party to a conflict distinguish between those who are fighting and those who are not and direct attacks solely against the former. Similarly, parties must distinguish between civil-

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\textsuperscript{83} Prosecutor v. Tadić, Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 96–127 (Int’l Crim. Trib. for the former Yugoslavia Oct 2, 1995) (highlighting the development and applicability of necessity, distinction, humanity, and proportionality to internal armed conflict); \textsc{Eve La Haye, War Crimes in Internal Conflicts} 380 (2010) (discussing the overlap between the LOAC applicable in internal and international armed conflict). \textit{See also} Laurie R. Blank, \textit{Extending Positive Identification from Persons to Places: Terrorism, Armed Conflict, and the Identification of Military Objectives}, \textit{2013 Utah Law Review} 1227.

\textsuperscript{84} Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8) [hereinafter \textit{Nuclear Weapons}] (declaring that distinction and the prohibition on unnecessary suffering are the two cardinal principles of international humanitarian law).
ian objects and military objects and target only the latter. Distinction thus lies at the core of LOAC’s seminal goal of protecting innocent civilians and persons who are hors de combat. With respect to objects, the core issue here, LOAC defines objects that can be attacked and mandates enhanced protections for certain special categories of objects. The prohibition on using civilian objects for military purposes—and the loss of protection for civilian objects used in such a manner—in incorporates LOAC’s balance between military necessity and humanitarian considerations. These prohibitions also enhance protection for civilians by seeking to ensure that civilian locations and objects remain safe for civilians and are not converted into military facilities at the risk of harm to the civilians living or working in or near such facilities.

1. UN Facilities and the Definition of Military Objectives

Article 52 of Additional Protocol I contains the definition of military objective, which is considered to be customary international law. First, Article 52(1) declares that “[c]ivilian objects shall not be the object of attack or of reprisals” and defines civilian objects as “all objects which are not military objectives.” Attacks on civilian objects, including UN facilities, are therefore flatly prohibited. Like the definition of civilian in Article 50 of Additional Protocol I, the definition of civilian object is a negative one,

85. Additional Protocol I, supra note 62, art. 48. Article 48 of Additional Protocol I thus sets forth the basic rule: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Article 48 is considered customary international law. See 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3–8 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL ¶ 2.5 (rev. ed. Dec. 2016) [hereinafter DoD LAW OF WAR MANUAL]; UNITED KINGDOM MINISTRY OF DEFENCE, JSP 383: THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT § 2.5 (2004) [hereinafter UK MANUAL].


88. Additional Protocol I, supra note 62, art. 51; Rome Statute, supra note 60, art. 8.

89. Additional Protocol I, supra note 62, art. 50(1) (“A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.”).
dependent on the definition of military objective, which appears in Article 52(2):

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

Although Additional Protocol I applies as a matter of treaty law only to States party in international armed conflicts, these rules for determining when objects constitute military objectives apply to all parties in both international and non-international armed conflict as a matter of customary law.90

The definition includes four criteria for determining whether a particular object qualifies as a military objective by making an effective contribution to military action—nature, location, purpose or use. Nature refers to “all objects directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres, etc.”91 Thus, military bases, units, equipment and forces, for example, can be attacked at any time. These are objects that are inherently military, that is, they have “intrinsic military significance”92 and by their nature make an effective contribution to military


91. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 636 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter PROTOCOL COMMENTARY]. For extensive lists of objects that are inherently military by nature, see id. at 632–33 n.3; A.P.V. ROGERS, LAW ON THE BATTLEFIELD 37 (1996); DINSTEIN, supra note 86, at 88.

action. In the specific contexts here, none of the UN facilities would be military objectives by nature—indeed, their intrinsic nature is civilian and humanitarian.

The categories of “use” and “purpose” refer respectively to an object’s present or intended function, and generally involve non-military objects, thus requiring further examination in given situations. An example of use that would cause an object to be classified as a military objective would be school buses or private taxis\(^\text{93}\) used to transport troops to the front during conflict. Purpose, in contrast, depends on the enemy’s intended future use of an object and must inherently be based on intelligence gathering and analysis regarding the enemy’s intentions. Thus, “[w]hen reliable intelligence or other information indicates that the enemy intends to use an object militarily in the future, the object qualifies as a military objective through ‘purpose.’”\(^\text{94}\) Any civilian object—even a UN facility—can thus become a lawful military objective if one party to a conflict is using or intends to use it for military purposes in accordance with the strictures of the definition of military objective.\(^\text{95}\)

When used for the educational, medical and humanitarian purposes for which they are designed and funded, UN facilities do not fall within the categories of military objective based on use or purpose. However, UN facilities that are used for military purposes will become military objectives

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\(^{93}\) During World War I, the “Taxis of the Marne” were commandeered to bring French reserve units to the front line. Once they were used in that manner, they became legitimate military objectives even though when they served their normal purpose—private taxis—they were civilian objects. See Dinstein, supra note 86, at 97–98 (citing 2 Georg Schwarzenberger, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 112 (1968)).

\(^{94}\) Schmitt, supra note 92, at 280. As the Eritrea-Ethiopia Claims Commission explained in holding that the not-yet-completed Hiriggo Power Station in Eritrea was a lawful military objective liable to attack by Ethiopian forces: “a State at war should not be obligated to wait until an object is, in fact, put into use when the purpose of that object is such that it will make an effective contribution to military action once it has been tested, commissioned and put to use.” Partial Award: Western Front, Aerial Bombardment and Related Claims (Eri. v. Eth.), 26 R.I.A.A. 291, 334–35 (Eri.-Eth. Claims Comm’n 2005).

and liable to attack, like any other civilian object. Indeed, the claim of absolute inviolability rests on the incorrect notion that there are some objects that can never be attacked, notwithstanding the fact that one side is using them to launch attacks or for other military purposes. LOAC simply does not include such a concept as “never target.”

Rather, the analysis under Article 52(2) of Additional Protocol I centers on whether the use of the object in question makes an effective contribution to military action—the first part of the definition of military objective—and whether its destruction, capture or neutralization offers a definite military advantage. Many of the examples reported during the 2014 Gaza conflict and earlier conflicts—storing weapons in residential buildings, schools, mosques, churches or hospitals; and launching rockets from in or near civilian buildings—fit directly within this construct. As the U.S. Department of Defense’s Law of War Manual states, “objects that contain military objectives are military objectives,” including storage and production sites for military equipment (which certainly includes mortars and rockets) and buildings or other facilities “in which combatants are sheltering or billeting.” For example, the 2014 UN Board of Inquiry examining incidents from the 2014 Gaza conflict noted that in one incident, where Israeli forces destroyed portions of an UNRWA school being used as an observation post and command and control structure, Israeli forces found “a Palestinian Islamic Jihad operational map and other military equipment” in the school.

Analyses by national courts, international tribunals and other fact-finding missions reached the same conclusions in other cases. For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) held

96. DOD LAW OF WAR MANUAL, supra note 85, § 5.6.4.2. See also ROGERS, supra note 91, at 36 (“A civilian object which contains military personnel or things of military significance is considered a military objective.”). Canada’s manual, The Law of Armed Conflict at the Operational and Tactical Levels, takes the same approach, as do the military manuals of numerous other countries. CHIEF OF THE GENERAL STAFF (CANADA), B-GJ-005-104/FP-021, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS ¶ 407(2) (2001) (“Civilian vessels, aircraft, vehicles and buildings are military objectives if they contain combatants, military equipment or supplies.”); Practice Relating to Rule 10: Civilian Objects’ Loss of Protection from Attack, ICRC, https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule10.

97. Secretary-General’s Summary (2015), supra note 15, ¶ 47. The Board of Inquiry found “the commander on the ground had decided, for imperative reasons of military necessity, to clear an additional area of structures that were part of the school compound in order to improve the [Israel Defense Forces] own force protection.” Id.
that a post office used as a communications center for the Serb forces in the Krajina (SVK) and the government of the Republic of Serbian Krajina was a lawful military objective.\textsuperscript{98} Similarly, in examining strikes by both Georgian and Russian forces on schools in Tskhinvali and Gori, the Independent International Fact-Finding Mission on the Conflict in Georgia determined that when military units used it “as defence positions or other posts” or where military forces were in the yard of the school, a school lost “its status as a protected civilian object” and became a legitimate military target.\textsuperscript{99} And, in a comprehensive application of the rule of military objectives, the German Federal Prosecutor General at Germany’s Federal Court of Justice ruled that the fuel tankers captured by the Taliban and destroyed by German forces outside Kunduz, Afghanistan, in a controversial incident in September 2009 were lawful military objectives, such that their destruction was not a violation of LOAC.

The fuel tankers and the fuel were originally civilian objects. They became military objectives with the abduction by the Taliban because they were suited to effectively contribute to military action from this moment on. The fuel could be used to refuel vehicles used for attacks and used in combination with explosives as improvised explosive devices. It thus constitutes a military objective in any case as its destruction would offer a considerable military advantage. The fuel tankers also constituted a military objective . . . . The reason is that they could be used for attacks with vehicle-based explosive devices as already happened in Afghanistan five times in 2009 until 4 September 2009. It is irrelevant that the fuel tankers were immobilized on a sandbank. Colonel (Oberst) Klein wanted to prevent any future movement of the tankers. There was the risk that the insurgents would successfully free the tankers and use them for military purposes. Therefore they did not constitute civilian objects at the time when Colonel (Oberst) Klein ordered the dropping of the bombs. The same holds true for both vehicles present in the immediate surroundings of the fuel tankers. Because of their concrete use they were meant to make an effective contribution to the Taliban’s military action.\textsuperscript{100}

\textsuperscript{99} 2 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT 328–29 (2009).
\textsuperscript{100} Federal Court of Justice, Federal Prosecutor General, Decision ¶ 3(bb) (Apr. 16, 2010), https://www.icrc.org/customary-ihl/eng/docs/v2_cou_de_rule8_sectionf [hereinafter Fuel Tankers Decision].
By use or purpose (i.e., intended use), therefore, the fuel tankers and the fuel in the tankers met the definition of a military objective.

In the same manner, UN offices, schools, or other facilities will become military objectives when used to store weapons, as shelters for fighters, as command or observation posts, as launching sites for attacks, or as sites for tunnels.\textsuperscript{101}

2. Specially Protected Objects: UN Medical Facilities

Some UN facilities, such as UN medical clinics, fall within special categories of protected objects, because of their nature or function. LOAC provides additional protection for these special categories—hospitals, religious and cultural property, objects indispensable for the civilian population, and works and installations containing dangerous forces, such as chemical factories, dams or nuclear power generating stations\textsuperscript{102}—in an effort to ensure either that civilians can continue to benefit from their services and role in society or that civilians will have protection against the added danger such objects could cause if damaged or compromised. This sub-part focuses on hospitals and other medical units as the primary example of UN facilities enjoying special protection. Most other UN facilities that have suffered damage during armed conflict do not fall within any of LOAC’s special protection categories. To the extent any do in the context of a specific situation, this same analysis will generally apply.

Under LOAC, hospitals and other medical units, which are essential to the protection of both civilians and combatants during armed conflict, receive special protection in both the Geneva Conventions and the Additional Protocols. Article 18 of the Fourth Geneva Convention provides

\begin{itemize}
\item \textsuperscript{102} Geneva Convention IV, supra note 65, art. 18; Additional Protocol I, supra note 62, arts. 12, 53, 54, 56. LOAC does not include a provision granting such special protection to UN premises, as affirmed even by those who argue for a customary “protected status” for UN peacekeepers or other personnel. See Note on the Protection of Peacekeeping Personnel under International Humanitarian Law, 2006 UNITED NATIONS JURIDICAL YEARBOOK 518, 521, U.N. Doc. ST/LEG/SER.C/44 (indicating a “customary international humanitarian law principle has emerged, whereby peacekeeping personnel . . . taking no part in the hostilities, are entitled to the status of a ’protected group’,” while recognizing that “none of the afore-mentioned IHL instruments explicitly grant peacekeeping operations the status of a ’protected group’ (similar to the one enjoyed by medical personnel and units)”).
\end{itemize}
that “[c]ivilian 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.”

The Geneva Conventions also mandate that all hospitals be marked with distinctive emblems visible to enemy land, air and naval forces and recommend that all hospitals be located as far as possible from military objectives. Additional Protocol I reinforces this protection of medical units in international armed conflict and Additional Protocol II mandates the same protections in the context of non-international armed conflict as well, stating that “[m]edical units and transports shall be respected and protected at all times and shall not be the object of attack.”

Furthermore, protection of hospitals in non-international armed conflict can also be traced to the obligation in Common Article 3 that “the wounded and sick shall be collected and cared for.” If hospitals did not enjoy protection from attack, the wounded and sick could not receive the necessary treatment and the protection they are ensured under LOAC, such that “the only logical conclusion is that hospitals are protected in [non-international armed conflicts] as in [international armed conflicts], despite the lack of express provision to this effect in Common Article 3.”

This notion of “respect and protect” lies at the heart of the Geneva Conventions framework for the protection of the wounded and the establishments necessary to ensure their treatment and safety during armed conflict. Respect means “to spare, not to attack” and protect means “to come to someone’s defence, to lend help and support.” Extended beyond the individual wounded soldier, the notion of respect and protect then ensures

103. Geneva Convention IV, supra note 65, art. 18. Article 19 of the First Geneva Convention similarly provides that “[f]ixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict.” Geneva Convention I, supra note 65, art. 19.
104. Geneva Convention IV, supra note 65, art. 18.
105. Additional Protocol I, supra note 62, art. 12(1).
106. Additional Protocol II, supra note 78, art. 11(1).
107. Common Article 3, supra note 79.
109. COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 134–35 (Jean Pictet ed., 1952) [hereinafter GC I COMMENTARY]. Thus, the “respect and protect” framework “made it unlawful for an enemy to attack, kill, ill-treat or in any way harm a fallen and unarmed soldier, while it at the same time imposed upon the enemy an obligation to come to his aid and give him such care as his condition required.” Id. at 135.
that medical facilities and units are equally safe to perform their essential
tasks of treating and protecting the wounded and sick, both combatants
and civilians. The special protections that hospitals enjoy are thus “a logical
consequence of the principle of inviolability of the wounded, sick, ship-
wrecked, and of medical personnel.” As the Commentary to the Fourth
Geneva Convention emphasizes, the obligation to respect and protect im-
poses on “belligerents . . . a general obligation to do everything possible to
spare hospitals” and goes beyond a prohibition on deliberate attacks.

First, respect means that parties to a conflict do not attack or harm
medical units in any way. This protection extends beyond fixed hospitals
to medical units in the field, hospital ships, and medical transport, such as
ambulances. Second, respect for hospitals and medical units requires that
parties to a conflict “not . . . interfere with their work [and] allow them to
continue to give treatment to the wounded in their care, as long as this is
necessary.” The obligation to protect then provides an additional af-
firmative obligation “to ensure that [medical facilities and units] are re-
spected, that is to say to oblige third parties to respect them [and to] com[e]
to their help in case of need.” These twin obligations of respect and pro-
tect mirror, in many ways, the two components of inviolability in the
CPIUN and the VCDR: the duty of abstention and the duty of protection.
Indeed, these parallels provide implicit support for concomitant parallels
regarding the limits of these protections as understood in LOAC.

International criminal law and the general practice and discourse of
States and international organizations reaffirm these protections. For ex-
ample, the Rome Statute criminalizes as a war crime intentional attacks
against hospitals, humanitarian assistance missions, and buildings,
transport and personnel marked with the distinctive emblems of the Gene-
va Conventions (i.e., the red cross, red crescent, red lion and sun, or red
crystal). All UN hospitals display the red cross or red crescent, like other
medical facilities. The UN Security Council has repeatedly condemned at-

111. GC IV COMMENTARY, supra note 79, at 147.
112. GC I COMMENTARY, supra note 109, at 196.
113. Id.
114. Id.
116. Id. arts. 8(2)(b)(ii), 8(2)(e)(ii).
117. Id. art. 8(2)(b)(xxiv).
Attacks on medical units, as have other UN agencies and international organizations. Similarly, in investigating allegations of LOAC violations during the 2008 conflict between Georgia and Russia, the International Fact-Finding Mission on the Conflict in Georgia declared that Russian helicopter attacks indicating a deliberate targeting of a hospital in Gori could amount to a war crime. This basic structure for the protection of hospitals sets forth the status of hospitals and other medical units as objects enjoying special protection beyond the protections enjoyed by all civilian objects.

However, even specially protected objects such as hospitals or religious buildings can lose their protection from attack if used to cause harm to the enemy. Article 19 of the Fourth Geneva Convention states that “the protection to which civilian hospitals are entitled shall not cease until they are used to commit, outside their humanitarian duties, acts harmful to the enemy.” This includes UN hospitals, which are civilian hospitals. The definition of “harmful to the enemy” is quite broad, referring “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.”

118. See, e.g., S.C. Res. 771 (Aug. 13, 1992); S.C. Res. 794, pmbl., para. 8 (Dec. 3, 1992) (“expressing grave alarm at continuing reports of widespread violations of international humanitarian law occurring in Somalia, including . . . deliberate attacks on . . . medical and relief facilities” (emphasis omitted)).

119. See, e.g., Joint Statement by WHO Director-General, Dr. Margaret Chan; UN Emergency Relief Coordinator, Valerie Amos; and Anthony Lake, Executive Director of the UN Children’s Agency, UN Humanitarian Chiefs Strongly Condemn Attacks on Medical Personnel and Facilities by all Parties to the Syria Conflict (Dec. 6, 2013), http://www.who.int/mediacentre/news/statements/2013/syria/en/.

120. INDEPENDENT INTERNATIONAL FACT-FINDING MISSION, supra note 99, at 330.

121. See also Additional Protocol I, supra note 62, art. 13. The First Geneva Convention includes the same rule with regard to the loss of protection for military medical units and establishments. Geneva Convention I, supra note 65, art. 21 (“The protection to which fixed establishments and mobile medical units of the Medical Service are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy.”).

122. PROTOCOL COMMENTARY, supra note 91, at 175. See also GC IV COMMENTARY, supra note 79, at 154 (“[H]armful acts would, for example, include the use of a hospital as a shelter for able-bodied combatants or fugitives, as an arms or ammunition store, as a military observation post, or as a centre for liaison with fighting troops.”). Article 22 of the First Geneva Convention and Article 13 of Additional Protocol I also lists four representative situations that do not constitute “acts harmful to the enemy” to avoid misunder-
tions in a hospital, or using a hospital building as a command post—indeed, many of the very types of activities that are prohibited as improper uses of protected objects and emblems regularly occurred in Gaza. Similarly, the Iraqi practice of using hospitals and mosques for military uses drew strong condemnation, with human rights organizations noting that, by using hospitals as military headquarters, Iraqi forces turned them into military objectives. Indeed, as the Commentary to the Additional Protocols states succinctly, “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.” In the case of hospitals or other medical units that lose their protection from attack due to use for military purposes, LOAC requires that the attacking party may only launch attacks after giving due warning to cease such military activities and providing a reasonable time, where appropriate, for ending the hostile activity or evacuating wounded and sick to a place of safety.

standings and clarify the appropriate role for medical establishments. Article 13(2) thus states:

The following shall not be considered as acts harmful to the enemy; (a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge; (b) that the unit is guarded by a picket or by sentries or by an escort; (c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units; (d) that members of the armed forces or other combatants are in the unit for medical reasons.


125. PROTOCOL COMMENTARY, supra note 91, at 176. See also Prosecutor v. Galić, Case No. IT-98-29-A, Appeals Chamber Judgment, ¶ 344 (Int’l Crim. Trib. for the former Yugoslavia Nov. 30, 2006) (“Therefore, where a hospital is used for one of the hostile purposes articulated [in the commentaries], or for an analogous purpose, or for a purpose even more obviously hostile, the hospital loses protection and becomes a legitimate military objective while used for that purpose.”).

The loss of protection from attack for specially protected objects when used for military purposes thus applies to hospitals, religious and cultural property, UN facilities or installations, and other civilian objects not granted any special protections. In case of any doubt regarding the loss of protection for specially protected objects, the Rome Statute provides specific confirmation of this rule. In both international and non-international armed conflicts, intentionally directing attacks against UN installations or units is a war crime “as long as [such] facilities are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.”\textsuperscript{127} In the same manner, the Rome Statue also criminalizes attacks on hospitals or religious or cultural buildings, “provided they are not military objectives.”\textsuperscript{128} For both war crimes, the definition of military objective determines whether an attack on a protected building or object is a crime or whether that building or object has lost its protection from attack. As a result, “an object is entitled to protection, unless and for such time as it is used to make an effective contribution to the military action of a party to a conflict,”\textsuperscript{129} even if that object is a hospital, a church, a mosque or a UN facility. The Rome Statute thus confirms that when a UN facility—whether a peacekeeping unit or installation or a building forming part of a humanitarian assistance mission—is used for military purposes, attacks on that facility are not violations of LOAC.

The claim of absolute inviolability during armed conflict inherent in UNRWA’s statements and the 2009 and 2014 Boards of Inquiry’s findings is, in essence, an argument that a UN facility being used for military purposes—such as a health clinic housing a Hamas tunnel entry shaft\textsuperscript{130} or a hospital serving as an attack base and a command and control post\textsuperscript{131}—
does not become a military objective as a result of that military use. And yet, under the definition of military objective, such facility makes an effective contribution to military action by its use and its destruction or neutralization offers a definite military advantage in the circumstances ruling at the time. As such, this argument attempts to claim that unlike any other object, including specially protected objects under the Geneva Conventions and Additional Protocols, a UN facility can never be a military objective, even if one party’s forces use it as a headquarters or are firing at the other party’s troops from the facility.132 Nowhere in LOAC’s extensive treaties and customary law is there any provision exempting one type of object or building entirely from the definition of military objective. Indeed, the law states clearly that any specially protected object, whether a hospital, religious or cultural building, or even an object containing dangerous forces, can become a legitimate target of attack if used for military purposes such that it meets the definition of military objective under Article 52(2) of Additional Protocol I, customary LOAC applicable in international and non-international armed conflict, and any other specific rules for that category of specially protected objects.133

3. Prohibitions on the Use of Specially Protected Objects and Emblems for Military Purposes

The use of civilian objects for military purposes runs counter to the fundamental premise of LOAC to protect civilians from the horrors and suffering of war. Article 57 of Additional Protocol I thus requires that “in the conduct of military operations, constant care shall be taken to spare the

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132. Secretary-General’s Summary (2015), supra note 15, ¶ 70.
133. See, e.g., Geneva Convention I, supra note 65, art. 21; Geneva Convention IV, supra note 65, art. 19; Additional Protocol I, supra note 62, arts. 13, 56(2), 65; Additional Protocol II, supra note 78, art. 11(2); Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 4(2), May 14, 1954, 249 U.N.T.S. 215 [hereinafter Hague Cultural Property Convention]. Note that Article 56 of Additional Protocol I provides a rule of exceptionally special protection for works and installations containing dangerous forces, such that they “shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.” However, even this special protection can “cease[] under Article 56(2) only in extreme circumstances of ‘regular, significant and direct support of military operations.’” Dinstein, supra note 86, at 195.
Protection of UN Facilities during Armed Conflict

The use of civilian objects for military purposes will also often violate the prohibition on the use of human shields and the defending party’s obligation to avoid locating military objectives in densely populated areas. In most cases, the primary consequence for using civilian objects for military purposes is that those objects will become military objectives and therefore susceptible to attack, as discussed above.

Specially protected objects, such as hospitals and religious or cultural property, however, merit a further layer of protection: in addition to the loss of protection from attack, the use of such objects for military purposes, including to shield military objectives, can itself be a violation of LOAC. Additional Protocol I also specifically prohibits the improper use of the distinctive emblems of the Geneva Conventions (i.e., the red cross, red crescent, red lion and sun, or red crystal) and the UN emblem and the use of such emblems in perfidious attacks. These additional protections and prohibitions help to ensure that they remain available to the civilian population and to protect the humanitarian purposes at the core of LOAC. These prohibitions thus work as natural partners to the CPIUN’s mandate of inviolability and immunity for UN facilities, in essence serving as a wartime complement to international law’s ordinary protections against interference with the operations, infrastructure and facilities of UN entities.

First, Article 12(4) of Additional Protocol I declares that “under no circumstances shall medical units be used in an attempt to shield military objectives from attack.” The ICRC Commentary here focuses on the placement of medical units or facilities “on the periphery of military objectives” as an attempt to immunize those objectives from attack, noting that doing so is a violation of LOAC and “would completely distort the spirit of humanitarian law and devalue both the victims being cared for and the medical personnel who would be knowingly exposed to very grave danger.” Indeed, using medical units in this manner goes against the very purposes of the Geneva Conventions dating back to the first Geneva Convention of

134. Additional Protocol I, supra note 62, art. 57(1). The concept of military operations is quite broad and extends beyond combat to “any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat.” PROTOCOL COMMENTARY, supra note 91, at 680.

135. For more comprehensive discussion of these prohibitions and obligations, see Laurie R. Blank, Taking Distinction to the Next Level: Accountability for Fighters’ Failure to Distinguish Themselves from Civilians, 46 VALPARAISO LAW REVIEW 765 (2012).


137. PROTOCOL COMMENTARY, supra note 91, at 170.
However, the use of medical facilities to shield military objectives can extend well beyond this idea of peripheral shielding. Placing rocket launchers in a hospital courtyard or on the hospital roof, using medical facilities to shelter combatants or for command and control, storing weapons and other military equipment in or next to hospitals—all of these activities also involve using the medical establishment to shield military objectives from attack.

Second, LOAC prohibits the improper use of the emblems of the Geneva Conventions, the uniform or emblem of the United Nations, or other internationally recognized emblems, such as the protective emblem of cultural property, the international distinctive sign of civil defense and the international sign for installations containing dangerous forces. The red cross or red crescent are used to mark hospitals, including UN hospitals. In general, “improper use” is understood to mean any use that is not authorized by the Conventions or other relevant instrument. As the Commentary to Additional Protocol I explains, the distinctive emblem of the Geneva Conventions allows its bearers to venture on to the battlefield to carry out their humanitarian task. It bears witness to the totally inoffensive character of the persons and objects that it designates, as well as to the impartial, useful and orderly nature of their humanitarian task, and in return, it grants them immunity. Thus it should be displayed in good faith and in accord-

140. Booth, supra note 123.
142. Additional Protocol I, supra note 62, arts. 38(2), 66(8); Hague Cultural Property Convention, supra note 133, art. 17. The term “internationally recognized emblems” also includes the protective emblem for hospital zones, the letters “PG” or “PW” to mark prisoner of war camps and the letters “IC” to mark civilian internment camps. See Geneva Convention I, supra note 65, art. 23; Geneva Convention III, supra note 78, art. 23; Geneva Convention IV, supra note 65, arts. 14, 83.
143. Geneva Convention IV, supra note 65, art. 18.
This proscription serves a similar purpose to the basic inviolabilities and immunities of UN facilities: to ensure that specially protected facilities, objects and personnel can continue to serve their essential functions at all times, free from obstruction by government, armed entities or other agents. Indeed, although UN facilities do not enjoy any special protection under LOAC comparable to medical, religious or cultural property, the UN emblem is specifically noted in the provisions on improper use, an explicit demonstration of LOAC and general privileges and immunities law working in concert.

U.S. military manuals and those of other States offer several examples of improper use of the distinctive emblem of the red cross, many of which have been reported in Gaza as well, including

using a hospital or other building accorded such protection as an observation post or military office or depot; firing from a building or tent displaying the emblem of the Red Cross; using a hospital train or airplane to facilitate the escape of combatants; displaying the emblem on vehicles containing ammunition or other nonmedical stores; and in general using it for cloaking acts of hostility.

These acts coincide with the type of activity that causes civilian objects to become military objectives based on their use, as explained previously, thus losing their protection from attack. But the loss of immunity from attack is not the only consequence here—improper or unauthorized use of the distinctive emblems resulting in death or serious injury is a war crime under the Rome Statute of the International Criminal Court. Thus, LOAC does not rely solely on the loss of immunity from attack as a motivation for par-

144. PROTOCOL COMMENTARY, supra note 91, at 450.
146. U.S. Department of the Army, FM 27-10, The Law of Land Warfare ¶ 55 (1956); see also Department of the Air Force, AFP 110-31, International Law—The Conduct of Armed Conflict and Air Operations ¶ 8-6(b) (1976); UK MANUAL, supra note 85, § 5.10.1 (“It is forbidden to fire from a tent, building, or vehicle displaying the red cross emblem. A hospital protected by the red cross emblem must not be used as an observation post, military office, or store.”).
147. Rome Statute, supra note 60, art. 8(2)(b)(vii).
ties to a conflict to refrain from misuse of protected facilities, but instead makes that misuse itself a violation of the law to reinforce the prohibition against use of specially protected objects for military purposes.

Third, beyond the prohibition on improper use of distinctive emblems, the perfidious use of such emblems, signs or signals provided for in the Geneva Conventions or the Additional Protocols to kill, injure or capture an adversary is a grave breach of Additional Protocol I. Using a UN facility, the UN emblem, or other protected emblems to launch attacks is, in and of itself, a grave breach. Perfidy, as defined in Article 23(b) of the Regulations annexed to the 1907 Hague Convention on land warfare, “is [t]o kill or wound treacherously individuals belonging to the hostile nation or army.” A particularly insidious violation of LOAC, perfidy contravenes the very notions of honor and chivalry on which much of LOAC is based. Article 37(1) of Additional Protocol I offers a more comprehensive formulation, forbidding killing, capturing, or injuring the enemy “by resort to perfidy.” In particular, the Protocol states that “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.”

As a result, it is not the act of hiding from the enemy or making oneself less noticeable that is the essence of perfidy, but the use of what appears to be protected status.

The Commentary to the Additional Protocols explains that “[t]he central element of the definition of perfidy is the deliberate claim to legal protection for hostile purpose. The enemy attacks under cover of the protection accorded by humanitarian law of which he has usurped the signs.”

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149. See supra text accompanying notes 136–147.
151. Additional Protocol I, supra note 62, art. 37(1).
152. PROTOCOL COMMENTARY, supra note 91, at 435 (explaining that the “definition is based on three elements: inviting the confidence of an adversary, the intent to betray that confidence (subjective element) and to betray it on a specific point, the existence of the protection afforded by international law applicable in armed conflict (objective ele-
when fighters intentionally disguise themselves as civilians in order to lead soldiers on the opposing side to believe they need not take defensive action to guard against attack, they commit perfidy. As indicated previously, Additional Protocol I also prohibits as perfidy the use of distinctive emblems—whether the red cross, red crescent, red lion and sun, or red crystal, or the UN emblem—to invite the adversary’s confidence and then launch an attack. Such misuse of the emblems of protected status is also a war crime under the Rome Statute of the International Criminal Court.

A particularly egregious and catastrophic example of perfidy using the UN emblem took place in Srebrenica in the summer of 1995. As the Bosnian Serbs overran the UN’s safe haven of Srebrenica, thousands of Bosnian Muslims fled the city, seeking safety elsewhere. As a long column of Bosnian Muslim men—who had been forcibly separated from their families—tried to reach Bosnian government territory and safety, they faced repeated attacks by Bosnian Serb forces. Eventually, “Bosnian Serb soldiers wearing stolen UN uniforms and driving stolen UN vehicles announced over megaphones [that they were UN peacekeepers and that they were] prepared to oversee the Bosnian Muslims’ surrender and guarantee they would not be harmed.”

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154. Rome Statute, supra note 60, art. 8(2)(b)(vii) (“making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury”).
thereafter, the Bosnian Serb forces killed all of them and buried them in mass graves. The Bosnian Serbs’ conduct is a textbook example of perfidy: they used the stolen UN uniforms and vehicles to gain the Bosnian Muslims’ confidence, induce their surrender and then kill them. Indeed, the UN Commission of Experts examining violations of LOAC committed in the territory of the former Yugoslavia concluded that

\[\text{[i]f it can be established that [the Bosnian Serb army] used or authorized the use of vehicles which carried UN markings, this could be viewed as perfidious conduct and, if persons were killed or wounded as a result of this action, a grave breach of [Additional Protocol I] could be established.}\]

Although the prohibition on perfidious attacks focuses on the use of the UN emblem, flag or uniform, the foundational concept on which this proscription is based—preventing the use of emblems or objects that invite the adversaries’ confidence—provides a useful analytical framework for understanding why all UN facilities must be free from military use during conflict. At least one incident from the 2014 Gaza conflict is a telling example: in July 2014, three Israeli soldiers were killed when they entered a booby-trapped health clinic building bearing the UNRWA sign above its door. The soldiers were attempting to destroy or neutralize a terror tunnel shaft—a lawful military objective—housed under the health clinic. When they entered, the entire building, wired for this purpose, exploded.


159. Id.

160. Booby-traps, unfortunately, are notoriously indiscriminate; it takes little imagination to consider the harm that could have befallen civilians who might have innocently entered the health clinic seeking treatment. LOAC prohibits the use of booby traps on or
Furthermore, at least one news report suggests that the clinic was not a UN facility, but rather that the UNRWA sign was placed there either to shield the tunnel or to lure enemy soldiers into the building on the assumption it was a protected facility and therefore safe to enter. Either option, whether using medical units to shield military objectives or the commission of perfidy, is a serious violation of LOAC and a war crime.

4. The Limits of Inviolability

LOAC prohibits the use of specially protected objects and designated emblems for military purposes. LOAC also provides that even specially protected sites or objects can become lawful targets of attack if used to commit acts harmful to the enemy. These rules work in tandem to maximize protection for essential civilian facilities by seeking to keep such facilities removed entirely from combat. Understanding this relationship is essential to understanding why a framework of absolute inviolability would undermine the very goals its proponents seek to achieve.

The failure to consider certain objects or buildings as “never targets,” regardless of use or abuse, is not a failure of LOAC to provide appropriate protections. Rather, the loss of protection from attack due to military use is essential to fulfill LOAC’s core purpose of protecting civilians and to ensure that the law reflects the realities of military operations and armed conflict. Legal regulation of conflict has rested for centuries on the notion of separating conflict and combat operations from the civilian population and civilian areas. Removing combat from civilian areas helps to protect civil-

associated with medical facilities or other objects or persons enjoying special protection. See Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on May 3, 1996 art. 7(1)(a)(d), 2048 U.N.T.S. 93; 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, supra note 85, r. 80.

161. Ginsburg, supra note 158; Shalom Bear, Booby-Trapped (UNRWA) Clinic Update, JEWISHPRESS.COM (July 31, 2014), http://www.jewishpress.com/news/breaking-news/booby-trapped-unrwa-clinic-update/2014/07/31/. Israel later reported that the building in question was a Palestinian Ministry of Health clinic rather than a UNRWA clinic. See THE 2014 GAZA CONFLICT, 7 JULY–26 AUGUST 2014: FACTUAL AND LEGAL ASPECTS, supra note 6, at 102–3. If so, the same rules would nonetheless apply with regard to perfidy and booby-traps.

162. See PROTOCOL COMMENTARY, supra note 91, at 585 (“The notion that war is waged between soldiers and that the population should remain outside hostilities was introduced in the sixteenth century and became established by the eighteenth century.”); Lieber Code, supra note 150, art. 22 (“Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction
ians from incidental harm and suffering during conflict. For this reason, LOAC includes numerous provisions requiring parties to a conflict to refrain from locating military objectives in densely populated areas,\(^{163}\) to remove civilians from areas of active hostilities where feasible\(^{164}\) and to refrain from using civilians and civilian objects as shields for military operations.\(^{165}\) These obligations placed on the defending party to take precautions form a critical complement to the precautionary measures required of attacking parties. As the *Commentary* explains, “[b]elligerents may expect their adversaries to conduct themselves [lawfully] and to respect the civilian population, but they themselves must also cooperate by taking all possible precautions for the benefit of their own population as is in any case in their own interest.”\(^ {166}\) Parties therefore have an obligation to protect their own civilians from the consequences of their own offensive actions as well as those of the enemy.

Equally important, LOAC’s requirement that services and facilities essential for the civilian population and its protection, such as hospitals, religious and cultural property, and UN installations and units, should not be used for military purposes seeks to ensure that such facilities remain available to provide for the imperative needs of the civilian population. Housing troops

in purely civilian buildings, for example, in dwellings or schools, or [using] such buildings as a base for combat, exposes . . . the civilians present there to serious danger: even if attacks are directed only against members of the armed forces, it is probable that they will result in significant damage to the buildings.\(^ {167}\)

These dangers are significantly greater with regard to facilities providing essential services to the civilian community because of the likelihood that more civilians—and in particular civilians who are vulnerable or in need of

\(^{163}\) Additional Protocol I, *supra* note 62, art. 58(b).

\(^{164}\) *Id.* art. 58(a).

\(^{165}\) *Id.* arts. 12(4), 51(7); Geneva Convention III, *supra* note 78, art. 23; Geneva Convention IV, *supra* note 65, art. 28.

\(^{166}\) *PROTOCOL COMMENTARY*, *supra* note 91, at 692.

\(^{167}\) *Id.* at 681.
various types of assistance and protection—are using the facilities and thus placed in danger.

If civilian objects become military objectives by dint of their use or purpose, they can be targeted in accordance with the rules and principles governing all targeting during armed conflict: distinction, proportionality and precautions. For a host of reasons, parties to a conflict will seek to avoid using force against such objects even in the face of such military use or will use the minimum possible force in order to protect these critically important facilities. But those decisions reflect important policy and strategic choices and do not change the legal analysis of whether an attack in such circumstances is a violation of LOAC or is lawful. The question of lawfulness is the key issue in analyzing the scope and extent of protection for such objects, and for UN facilities in particular, the subject of the instant discussion. Thus, if an object can become a lawful target of attack, its protection or inviolability cannot be absolute. LOAC does not have different rules for objects that were once civilian objects or serve both military and civilian purposes at the same time; just as there are no intermediate targets, there are no intermediate rules. Allowing some objects to be permanently immune from attack simply invites parties to a conflict to use such facilities for military purposes, knowing that they will be “safe.” A rule

168. Note that specially protected objects, such as cultural property or medical facilities, only lose their protection from attack when being used for military purposes and not as a result of intended purpose. See DINSTEIN, supra note 86, at 181 (“[T]he key feature of complementary protection of cultural property and places of worship—as distinct from general protection of civilian objects—is that loss of immunity occurs solely in case of use of the protected object by the enemy. . . . [Therefore,] claims based on location, purpose or nature will not suffice to justify the launching of an attack against the [cultural property] as a military objective.”).

169. See, e.g., id. (explaining that the “loss of protection of certain places qualifying as protected cultural property or places of worship—brought about even by their brazen use by the enemy—may create an insoluble dilemma” (referencing Israel’s resort to siege tactics rather than force in the face of the takeover of the Church of the Nativity in Bethlehem by a group of Palestinian combatants)).

170. Christopher Greenwood, Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict, in THE GULF WAR 1990–1991 IN INTERNATIONAL AND ENGLISH LAW 63, 73 (Peter Rowe ed., 1993) (“If an object is a military objective, it may be attacked (subject to the requirements of the principle of proportionality . . .), while if it is a civilian object, it may not be attacked. There is no intermediate category of ‘dual use’ objects: either something is a military objective or it is not.”). Note, of course, the obligation to provide due warning before any attack on a hospital being used for military purposes, as described above.
that accepts and incentivizes one side to position itself in hospitals and re-
ligious buildings is unacceptable by any measure.

B. Incidental Harm to UN Facilities: Proportionality and Precautions

In January 2009, Israeli forces responded to mortar fire from Hamas mili-
tants inside a UN school in Jabaliya, Gaza. Three Israeli artillery shells
“landed close to the al-Fakhura school . . . , spraying shrapnel on people
both inside and outside the building.” 171 The previous day, debris and
shrapnel from an Israeli strike on an apartment building housing a Hamas
weapons storage site and workshop caused extensive damage to the
UNRWA Bureij Health Centre across the street, one death and several ex-
tensive injuries. 172 These incidents, and many others from the 2009 and
2014 conflicts in Gaza, highlight the dangers civilians and civilian objects
face from incidental harm suffered in the course of attacks on military ob-
jectives. LOAC seeks to minimize such harm as part of the fundamental
goal of protecting civilians from the ravages of war. Therefore, the legal
analysis of any particular attack does not end with the identification of a
legitimate target, as discussed above in the analysis of whether particular
objects constitute military objectives. 173 Rather, an attacking party must take
steps to help ensure that any attacks on lawful military objectives will min-
imize harm to civilians, in accordance with the principles of proportionality
and precautions. The application of these rules is thus essential to under-
standing the protection UN facilities enjoy—and the limits of that protec-
tion.

The principle of proportionality requires that parties refrain from at-
tacks in which the expected civilian casualties will be excessive in relation
to the anticipated military advantage gained and is well accepted as custom-
ary international law applicable in all armed conflicts. 174 Additional Proto-

middle_east/7814054.stm.
172. Id.; Secretary-General’s Summary (2009), supra note 12, ¶¶ 29–39; STATE OF IS-
LEGAL ASPECTS ¶¶ 348–52 (2009), http://www.mfa.gov.il/MFA_Graphics/MFA%20Ga-
lery/Documents/GazaOperation%20w%20Links.pdf.
173. See supra Part III.A.1.
174. Nuclear Weapons, supra note 84, at 587, ¶ 4 (dissenting opinion of Higgins, J.); 1
CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, supra note 85, at 46; Schmitt, supra
note 92, at 292; Yoram Dinstein, The Laws of Air, Missile and Nuclear Warfare, 27 ISRAEL
YEARBOOK ON HUMAN RIGHTS 1, 7 (1997) (citing Greenwood, supra note 170, at 77).
Protection of UN Facilities during Armed Conflict

Protocol I prohibits any “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.” This language demonstrates that LOAC contemplates incidental civilian casualties. Importantly, therefore, while it seeks to minimize civilian harm to the greatest extent possible, the law does not prohibit all civilian deaths or damage to civilian objects. As the German Federal Court emphasized in the Fuel Tankers case,

[even if the killing of several dozen civilians would have had to be anticipated . . . , from a tactical-military perspective this would not have been out of proportion to the anticipated military advantages. The literature consistently points out that general criteria are not available for the assessment of specific proportionality because unlike legal goods, values and interests are juxtaposed which cannot be “balanced” . . . . Therefore, considering the particular pressure at the moment when the decision had to be taken, an infringement is only to be assumed in cases of obvious excess where the commander ignored any considerations of proportionality and refrained from acting “honestly,” “reasonably” and “competently” . . . .]

The law therefore requires that military commanders and decision-makers assess both the advantage to be gained from an attack and the expected civilian casualties, and determine whether the attack is likely to result in excessive civilian harm.

Proportionality must be viewed prospectively, not in hindsight, as the very language of Additional Protocol I shows, referring to “anticipated” military advantage and “expected” civilian casualties. Furthermore, as is particularly relevant in the context of attacks like those in Gaza that cause incidental harm to UN hospitals, schools and other locations where civilians seek refuge from the dangers and consequences of military operations, a retrospective approach falls prey to the vastly different nature of military advantage and civilian casualties. The former is abstract, has little or no emotional impact, and is difficult to convey in pictures, while civilian casualties are dramatic and emotional and “lend themselves to powerful pic-

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175. Additional Protocol I, supra note 62, art. 51(5)(b); see also id. arts. 57(2)(a)(iii), 57(2)(b).

tures and strong reactions.”

Observers will often find it difficult to assess fairly whether collateral damage is excessive in practice because the military advantage from an attack may not be immediately apparent. Indeed, it may seem simpler to merely add up the resulting civilian casualties and injuries after an attack and assess the actual value gained from a military operation, because “the results of an attack are often tangible and measurable, whereas expectations are not.” However, doing so fails to do justice to the complexities inherent in combat; rather, the question is “whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”

LOAC also mandates that all parties take certain precautionary measures to protect civilians. At the broadest level, Article 57(1) of Additional Protocol I states: “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.” Next, parties must take all feasible precautions in launching attacks that may affect the civilian population. First, parties must do everything feasible to ensure that targets are military objectives. Second, they must choose the means and methods of attack with the aim of minimizing incidental civilian losses and damage. In addition, when choosing between two possible attacks offering similar military advantage, parties must choose the objective that offers the least likely harm to civilians and civilian objects. Proportionality considerations are also a major component of the precautions framework. Parties are required to refrain from any attacks

180. For example, during the 1991 Persian Gulf War, “pilots were advised to attack bridges in urban areas along a longitudinal axis. This measure was taken so that bombs that missed their targets—because they were dropped either too early or too late—would hopefully fall in the river and not on civilian housing.” Jean-François Quéguiner, *Precautions Under the Law Governing the Conduct of Hostilities*, 88 *International Review of the Red Cross* 793, 801 (2006) (citing Michael W. Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, 97 *American Journal of International Law* 481 (2003) (noting that this angle of attack “also means that damage would tend to be in the middle of the bridge and thus easier to repair”). Another common method of taking precautions is to launch attacks on particular targets at night when the civilian population is not on the streets or at work, thus minimizing potential casualties.
that would be disproportionate and to cancel any attacks where it becomes evident that the expected civilian losses would be excessive in light of the anticipated military advantage. Finally, Article 57(2)(c) of Additional Protocol I requires attacking parties to issue an effective advance warning “of attacks which may affect the civilian population, unless circumstances do not permit.”

The obligations mandated by the principles of proportionality and precautions are essential to protecting the civilian population and civilian objects from harm during conflict. At the same time, LOAC is clear that the simple fact of civilian deaths, injuries or harm to civilian objects does not constitute a legal violation, in the absence of a deliberate, indiscriminate or disproportionate attack. This analysis holds true whether the objects harmed are ordinary civilian objects or specially protected objects—nothing in the law imposes a strict liability standard for harm to medical establishments or religious or cultural property, for example. The Commentary to Additional Protocol I thus notes 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.”

When one party to a conflict comingles fighters with civilians and civilian objects or locates military objectives in and around protected facilities, a tragic and unfortunate consequence may often be incidental harm to those civilians and protected facilities. During the 2014 conflict in Gaza, the director of UN operations in Gaza confirmed that “yes, the armed groups are firing the rockets into Israel from the vicinity of UN facilities . . . absolutely.” The fighters launching the rockets and the rocket launchers themselves are legitimate targets of attack and are thus placing the UN facilities and the civilians they assist directly in harm’s way. In such circumstances, incidental harm to UN facilities or other protected or civilian objects nearby from strikes on those fighters or launchers must be assessed through the lens of the principle of proportionality and not as deliberate attacks.

An examination of the UN Board of Inquiry report from the 2014 Gaza conflict suggests that the UN’s argument of absolute immunity or inviolability includes immunity from incidental harm, as well as from deliberate attacks (none of the incidents in the report involved deliberate attacks on

183. U.N. Director on Gaza School Shelling, supra note 7.
UN facilities as military objectives). However, the notion of absolute immunity from incidental harm runs counter to the principle of proportionality and the foundational underpinnings of LOAC itself. According to the summary of the report, the Board of Inquiry appears to conclude that harm to a UN school, medical clinic or other facility caused in the course of an attack on a lawful target—such as three Hamas militants on motorcycles or a weapons cache in an apartment building—is unlawful regardless of the extent of the harm, the intent of the commander, or the efforts taken to minimize that harm. And yet these considerations regarding the nature of the actual target, the precautions taken, and the expected harm to civilians are the very tools LOAC uses to determine lawfulness.

Eliminating LOAC’s acceptance of incidental harm with respect to UN facilities in this manner is akin to imposing a strict liability standard in which only the end result of the attack matters, regardless of the nature of the target, the information known to the commander, the tactics of the enemy or any other considerations.

LOAC firmly rejects this type of effects-based analysis. Although an attack on a lawful target will be unlawful if the expected civilian casualties, civilian injury or damage to civilian objects are excessive in light of the anticipated military advantage gained, this analysis must be made based on the circumstances and information available at the time of the attack, not the results and facts that come to light afterwards. Thus, since the time of the Nuremberg Tribunals, the law has required that “an individual should not be charged or convicted on the basis of hindsight but on the basis of information available to him or information he recklessly failed to obtain at the time in question.” The ICTY has consistently taken the same ap-

184. Secretary-General’s Summary (2015), supra note 15. See also Shraga, supra note 23, at 93 (“[T]he practical implication of the determination that shelling of UN premises under any circumstances is a violation of their inviolability, and for this reason unlawful, is that no misuse of UN premises, including fire from within them, could detract from the absolute protection granted to these premises, and would not justify return fire, not even that which meets the conditions of proportionality and the necessary precautionary measures under international humanitarian law.”).


186. Trial of Wilhelm List and Others, Case No. 47, 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 57 (1949). This basic principle is known as the Rendulic Rule, after the Nuremberg prosecution of General Lothar Rendulic, in which the tribunal acquitted General Rendulic of the charge of wanton destruction of property not justified by military necessity because his decision to use scorched earth tactics to slow the advance of Russian troops during his retreat in Norway was reasonable based on the circumstances and in-
proach, holding that in order “to establish the mens rea of a disproportionate attack, the Prosecution must prove . . . that the attack was launched willfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties.” In contrast, an effects-based approach lowers this legal standard for culpability from intentional or reckless, as set forth in the ICTY’s and other international jurisprudence, to wrong after the fact even if reasonable at the time.

The strict liability standard that absolute immunity imposes—i.e., asking only “was a UN facility damaged” but not “was the expected harm excessive in relation to the anticipated military advantage gained”—would thus require commanders to operate with a standard that allows for no errors. Doing so would run counter to the established legal standard in Additional Protocol I, the ICTY Statute, the Rome Statute and customary international law: that commanders are obligated to make reasonable decisions based on the information available at the time of the attack. The “law does not judge commanders based on the outcome alone, nor does it require commanders to be right in all circumstances.”

Using a strict liability standard for UN facilities based on effects after the fact is not just wrong as a matter of law. It also raises significant concerns about the misapplication and future development of LOAC, ultimately leading to greater danger for the civilians and civilian areas the law seeks to protect. First, the effects-based approach disregards the notion of targeting as methodology and ignores operational realities that inform both the targeting process and any careful analysis thereof. Proportionality and precautions are not simply rules or principles to be checked off on a list before launching an attack. Rather, they form the core of a methodology of targeting that guides the law-compliant military in implementing LOAC as part of effective and efficient military operations. Proportionality and precautions are thus components of a comprehensive prospective process to assess the lawfulness of an attack on a target or as part of a more complex mission. Once a lawful target is identified, implementing proportionality

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formation available to him at the time, even though after the fact it was evident that it was not necessary. Id.


requires an understanding of why a target is militarily valuable; that is, how destroying, capturing or neutralizing the target will contribute to the tactical and operational goals of the mission. For example, will the use of suppressing fire or other fire support for ground forces contribute to those forces’ ability to fulfill the mission? A commander must assess if and how any such actions will weaken the enemy’s forces, as well as whether and how they will strengthen the commander’s own forces. That analysis is key to understanding the “anticipated military advantage gained” component of proportionality for harm to UN facilities or people in or near such facilities, just like any other object.

Careful consideration of the risk to civilians and the likely numbers of civilian casualties is equally essential—a commander must gather information regarding civilians who live and work in the area, their patterns of movement, whether they would be susceptible to the methods and means of attack under consideration, how many might be present at the time of and within the blast radius of the attack, and any other information relevant to understanding the potential consequences for civilians in the area. He or she must also examine whether there is an alternative means or method of attack that could lessen harm to civilians and provide effective advance warning where feasible. Based on all of this prospective information, the commander then makes a determination as to whether the attack can go forward.

Although difficult in many circumstances, commanders engage in this methodology and process every time they apply combat power with consequences for civilians, sometimes in a longer, deliberative process and sometimes in the split second available for troops in contact and fleeting targets. Proportionality and precautions are more than just principles, therefore: they lie at the heart of a methodology for ensuring the application of combat power in a manner that minimizes civilian harm in accordance with LOAC’s central mandates. The principles highlight the goal of a balance between military needs and humanitarian concerns that minimizes civilian harm as much as possible, and the methodology provides guidance on how to achieve that goal—by gathering and analyzing information about both the military value of a target and the consequences to the civilian population and civilian objects in the area and making choices among various operational alternatives to achieve the mission while minimizing harm to civilians.

This methodology functions in tandem with the operational realities of combat operations. Many variables affect the execution of combat opera-
tions and the use of force against both planned and fleeting targets, including the quality and quantity of intelligence about both enemy and civilian locations, the quality of equipment and munitions, the training and capability of crews, timing, terrain, weather, fatigue, the location of fire support assets and many others. Although careful planning for military operations attempts to incorporate as many of these variables as possible, along with any attendant effects and variations, it is an axiom of military operations that “no plan survives first contact with the enemy.” Indeed, the enemy’s tactics, conduct and changes in situation throughout the course of the operation are significant variables as well—not only in terms of the operational choices the attacking party makes, but also in terms of the effects of the military operations on civilians and civilian objects. All of these variables are integral to any targeting process at the time of the planning and the attack; they are all also relevant for a tribunal or court in assessing the reasonableness of the commander’s decision-making process. In contrast to this sophisticated and reality-based methodology, a rule that says that damage to a UN facility is a legal violation even if unintentional and unexpected, and regardless of process or effort expended to protect civilians and civilian objects, undermines the essential value of this methodology by leaving commanders with only the after-the-fact effects to determine right from wrong.

This divorce from operational realities leads to the second problematic consequence of an absolute immunity, effects-based standard for harm to UN facilities: when commanders are faced with such a rule, the greatest danger is that they will disregard the law as irrelevant. Forcing a commander to a “no error” standard is simply ineffective and even dangerous for future operations. Commanders will either refrain from engaging in military operations altogether out of an overabundance of caution in the face of an impossible standard, or will simply disregard the law entirely as no longer relevant to their purposes and mission. Under either scenario, innocent civilians are the ultimate victims—a result directly at cross-purposes with a central goal of LOAC.

Finally, the most direct and evident consequence of the effects-based approach is that it opens the door to a grave danger: the exploitation of the law by the defending party for its own defensive and propaganda purposes. If one party knows that any damage to a UN facility means the opposing party has committed a LOAC violation, and one certain to trigger international condemnation, the defending party will simply locate its forces in and around such facilities, effectively guaranteeing greater civilian casualties
and increased civilian suffering, and marginalizing or eliminating the critical services the UN provides for civilians. Unfortunately, both States and armed groups will continue to fight and engage in military operations, including in densely populated areas and areas where the UN is providing essential services to the civilian population. At present, the prohibitions on improper use of protected facilities in both treaty and customary law are not enforced in any effective manner and even public condemnation of such abuse and exploitation of protected objects is all too rare, providing little, if any sanction for such violations.\footnote{Blank, supra note 135.} An absolute immunity rule thus merely ratifies the use of civilians and the civilian population—including the very operations present to serve that population—as a shield for military operations. Absolute immunity for UN facilities may seem like the most protective option on first impression, but the law, the nature of combat operations, and the willingness of some States and armed groups to exploit such alleged immunity actually make claims of absolute immunity dangerously counterproductive.

IV. \textbf{CONCLUSION}

LOAC provides the appropriate analytical legal tools to understand the protections UN facilities enjoy during armed conflict and the limits of those protections. Beyond the formal relationship between the privileges and immunities law of the UN and LOAC and aside from the inherent limits on the CPIUN’s application to military operations, LOAC’s framework demonstrates precisely why absolute inviolability, even in the face of military use, cannot be the rule for UN facilities or any other protected objects during armed conflict. Each of the protections, obligations and rules examined above contribute directly to and form the foundation for LOAC’s core goal of protecting civilians during conflict. They also represent the delicate balance between military necessity and humanity that lies at the heart of LOAC.\footnote{Michael N. Schmitt, \textit{Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance}, 50 \textit{VIRGINIA JOURNAL OF INTERNATIONAL LAW} 795 (2010).} Interpreting rights, obligations and protections during conflict in a manner contrary to LOAC’s core purposes will only serve to exacerbate suffering during conflict, thus undermining the law’s central objective of enabling “armed forces to achieve their strategic military objective while mitigating, to the extent feasible, the humanitarian suffering re-
sulting from armed conflict.” If UN facilities are absolutely inviolable with regard to both attacks and use for military purposes, there is no mechanism to protect against the use and exploitation of such facilities for military purposes. First, the prohibitions against such use are insufficiently enforced. Second, the armed groups and armed forces that engage in such improper use are clearly not concerned about LOAC compliance or any possible public condemnation. Third, such groups gain an unreasonable operational benefit as a result if they can shield their military forces and equipment from attack; and fourth, these groups reap a substantial propaganda windfall in the event of any attack on their forces, equipment or positions near or in such facilities because the attacking party automatically faces public condemnation and criminal responsibility.

Inviolability of UN facilities in all locations and situations is essential. However, the idea of absolute immunity, as framed by many responses to damage to UN facilities in Gaza, runs counter to the very framework of LOAC, which balances the protection for certain sites (such as hospitals or religious and cultural property) with the legitimate needs of military operations in the face of fighters abusing that protection. Although the urge to demand that such inviolability be absolute is understandable, granting protection to those misusing protected sites ultimately harms only the civilians in desperate need of the UN’s services.