

NOTES & COMMENTS

THE LEGAL RAMIFICATIONS OF ISRAEL'S DESTRUCTION OF GAZA'S HEALTHCARE SYSTEM

by
Serene Mistkawi*

This Comment argues that Israel's attacks on the medical infrastructure of Gaza are a violation of international law because hospitals are protected zones and medical personnel are civilians. To Israel's response that Hamas is attacking from hospitals, thereby rendering them legitimate targets, this Comment presents a number of responses: (1) there is little to no evidence that Hamas is doing this; (2) even if Hamas is doing this, the military gains from attacking hospitals are outweighed by the civilian deaths; (3) even if Hamas is doing this and there is significant military gain from attacking hospitals, the international rules have been created by militarily powerful nations to enable themselves to conduct warfare to their advantage, at the expense of militarily-weaker nations, and international law should recognize and redress this power disparity, starting with Israel/Gaza. This Comment argues further that Israel's practices in detaining and torturing medical personnel providing care within such infrastructure amount to violations of international law. This Comment concludes by urging the international community to hold the leaders responsible for these violations accountable under the Rome Statute.

* J.D. 2025, Lewis & Clark Law School; B.S. 2022, Portland State University. Many thanks to Professor Tung Yin for his thoughtful guidance and for allowing this topic to be explored as the subject of independent research, as well as to the LCLR team for their exceptional work in preparing this Comment for publication. This Comment is dedicated to my family that has been killed and forced to flee Gaza as a result of Israel's attacks, and further, to all Palestinians currently suffering under Israel's attacks on and forced starvation of the Gaza Strip. May we see a free Palestine within our lifetimes.

Introduction 584

I. The Protection of Medical Personnel and Hospitals in International Law 595

 A. *Distinction*..... 596

 B. *Proportionality*..... 599

II. Detention of Medical Personnel..... 608

III. Israel’s Incarceration of Unlawful Combatants Law (UCL) 613

IV. Potential War Crimes Under the Rome Statute 618

 A. *Targeting Hospitals*..... 619

 B. *Unlawful Detention and Torture* 623

Conclusion..... 625

INTRODUCTION¹

Five-year-old Hind Rajab and her family tried to flee Gaza City by car on January 29, 2024, in the hopes of finding safer shelter in the southern part of the Gaza Strip.² An Israeli tank opened fire on the car, and Hind’s cousin, Layan Hamadeh, called the Palestinian Red Crescent Society (PRCS) for assistance; the news program Democracy Now! translated their call:

LAYAN HAMADEH: [translated] Hello?

RED CRESCENT DISPATCHER: [translated] Hello, dear?

LAYAN HAMADEH: [translated] They are shooting at us.

RED CRESCENT DISPATCHER: [translated] Hello?

LAYAN HAMADEH: [translated] They are shooting at us. The tank is next to me.

RED CRESCENT DISPATCHER: [translated] Are you hiding?

LAYAN HAMADEH: [translated] Yes, in the car. We’re next to the tank.

RED CRESCENT DISPATCHER: [translated] Are you inside the car?

LAYAN HAMADEH: [translated] [screaming]

RED CRESCENT DISPATCHER: [translated] Hello? Hello?

¹ Given the ongoing nature of Israel’s attacks, this Comment is current as of December 2024 and does not address the worsening conditions thereafter.

² Emine Sinmaz, *‘I’m So Scared, Please Come’: Hind Rajab, Five, Found Dead in Gaza 12 Days After Cry for Help*, THE GUARDIAN, <https://www.theguardian.com/world/2024/feb/10/i-m-so-scared-please-come-hind-rajab-six-found-dead-in-gaza-12-days-after-cry-for-help> (May 21, 2024); *“They Were So Close”: Israel Kills Medics Trying to Save Dying 6-Year-Old Hind Rajab*, DEMOCRACY NOW!: WAR AND PEACE REPORT (Feb. 16, 2024), https://www.democracynow.org/2024/2/16/gaza_hind_rajab_palestine_red_crescent.

AMY GOODMAN [Democracy Now! host]: That was 15-year-old Layan's last words, killed along with the rest of her family. The only one who remained alive was 6-year-old Hind. Wounded, she called the Red Crescent back, pleading with the dispatcher to be rescued.

HIND RAJAB: [translated] Come take me. You will come and take me?

RED CRESCENT DISPATCHER: [translated] Do you want me to come and take you?

HIND RAJAB: [translated] I'm so scared. Please come. Please call someone to come and take me.³

Hind Rajab spent three hours surrounded by her dead family, pleading with PCRS to rescue her.⁴ Although Israeli forces gave the PCRS ambulance permission to enter the area where Hind was stranded, they attacked the ambulance with gunfire directly following its arrival.⁵ The ambulance was clearly marked with the emblem of the Red Cross.⁶ Hind's surviving family members found her and her family's dead bodies in a car full of bullet holes two weeks later when "Israeli forces finally withdrew from the area."⁷ Near the car, the corpses of Yusuf Zeino and Ahmed al-Madhoun, the two medics working to save Hind, were also discovered, having been killed by Israeli gunfire.⁸ A forensic investigation of the murder of Hind and Layan found that a total of 335 bullets were fired into the family's car.⁹ The same investigation found that the exit hole left in the ambulance was "consistent with the impact" a 120mm M830A1 High Explosive Anti-Tank Multi-Purpose-Tracer (HEAT-MP-T) round shot from an Israeli tank would cause.¹⁰

"We will die standing and we will not kneel. . . . All that remains in the valley are its stones, and we are its stones," are the words written in the last X post of

³ "They Were So Close": Israel Kills Medics Trying to Save Dying 6-Year-Old Hind Rajab, *supra* note 2.

⁴ *Id.*; Sinmaz, *supra* note 2.

⁵ Sinmaz, *supra* note 2; "They Were So Close": Israel Kills Medics Trying to Save Dying 6-Year-Old Hind Rajab, *supra* note 2.

⁶ Sinmaz, *supra* note 2 ("[Palestinian Red Crescent Society spokesperson] Farsakh said the ambulance was found metres away from Hind's family's car. 'We have very clear red cross emblems on top of all of our ambulances,' she said.").

⁷ "They Were So Close": Israel Kills Medics Trying to Save Dying 6-Year-Old Hind Rajab, *supra* note 2.

⁸ *Id.*; see Sinmaz, *supra* note 2.

⁹ *The Killing of Hind Rajab*, FORENSIC ARCHITECTURE (June 21, 2024), <https://forensic-architecture.org/investigation/the-killing-of-hind-rajab> ("Working closely with journalists from Al Jazeera's Fault Lines, Forensic Architecture collaborated with Earshot to examine the circumstances surrounding the killing of Hind Rajab, her four cousins, her aunt and uncle, and the two paramedics who came to her rescue.").

¹⁰ *Id.*

assassinated Palestinian doctor Adnan Albursh.¹¹ Dr. Albursh was head of orthopedics at al-Shifa Hospital, the largest hospital in the Gaza enclave.¹² In December 2023, while Dr. Albursh was temporarily providing medical care to patients at al-Awda Hospital in the north of the Gaza Strip, Israeli forces abducted him and a group of other doctors, ostensibly “for national security reasons.”¹³ In April 2024, after more than four months of detention without charge or trial, Israeli forces tortured Dr. Albursh to death at Ofer prison.¹⁴ According to an Israeli human rights organization, Israeli guards dragged Dr. Albursh—bleeding, incapable of standing upright, and naked from the waist down—into the prison yard, and he was then carried into a room by other individuals being held at Ofer shortly before succumbing to his injuries.¹⁵ As of March 13, 2025, the corpse of Dr. Albursh remained in the custody of Israeli authorities.¹⁶ Nor is Dr. Albursh an outlier. Between October 7, 2023, and August 12, 2024, at least 36 Palestinian detainees died in Israeli detention, with indications many were killed by torture or medical neglect.¹⁷

¹¹ Kareem Khadder, Abeer Salman, Zeena Saifi & Kathleen Magramo, *Leading Gaza Surgeon Adnan Al-Bursh Dies in Israeli Prison*, CNN (May 3, 2024, 11:26 AM) (quoting عدنان البرش د. Adnan Albursh (@DrBursh), X (Nov. 20, 2023, 2:34 PM), <https://x.com/DrBursh/status/1726730875830767749>), <https://www.cnn.com/2024/05/03/middleeast/gaza-surgeon-adnan-al-bursh-israeli-prison-intl-hnk/index.html> (translated by CNN).

¹² *Doctor from Gaza's al-Shifa Hospital Dies in Israeli Prison*, AL JAZEERA (May 3, 2024) <https://www.aljazeera.com/news/2024/5/3/doctor-from-gazas-al-shifa-hospital-dies-in-israeli-prison>.

¹³ *See id.*

¹⁴ *Id.* (“Al-Bursh died on April 19, the prisoners’ groups said, citing Palestinian authorities. They alleged that his death was ‘part of a systematic targeting of doctors and the health system in Gaza,’ adding that he died ‘as a result of torture.’”); John Sparks, *He Was the Light of My Life and I Lost Him: How a Famous Surgeon Died in an Israeli Prison After Being Taken from Gaza Hospital*, SKY NEWS (Nov. 14, 2023, 11:13 AM), <https://news.sky.com/story/he-was-the-light-of-my-life-and-i-lost-him-how-a-famous-surgeon-died-in-an-israeli-prison-after-being-taken-from-gaza-hospital-13253157> (describing an account from a Palestinian doctor and former inmate at Sde Teiman—the prison where Dr. Albursh was first processed as a detainee).

¹⁵ Simon Speakman Cordall, *Dying in ‘Hell’: The Fate of Palestinian Medics Jailed by Israel*, AL JAZEERA (Nov. 24, 2024), <https://www.aljazeera.com/news/2024/11/24/dying-in-hell-palestinian-medics-jailed-by-israel> (“Four months later, Ofer Prison guards dragged Al-Bursh and dumped him in the prison yard, naked from the waist down, bleeding and unable to stand, according to a statement provided by Israeli human rights organisation HaMoked.”).

¹⁶ Indep. Int’l Comm’n of Inquiry on the Occupied Palestinian Territory, including E. Jerusalem, and Isr., “More than a Human Can Bear”: Israel’s Systematic Use of Sexual, Reproductive and Other Forms of Gender-Based Violence Since 7 October 2023, ¶ 121, U.N. Doc. A/HRC/58/CRP.6 (Mar. 13, 2025) [hereinafter *More than a Human Can Bear*].

¹⁷ Jack Jeffery & Jalal Bwaitel, *Released Palestinians Describe Worsening Abuses in Israeli Prisons*, ASSOCIATED PRESS, <https://apnews.com/article/israel-palestinians-gaza-war-hamas-prisons-ba6b5b7ba9f8955ebe5fb23c77145326> (Aug. 12, 2024, 6:26 AM) (reporting regular beatings, lack of medical care, sexual abuse, and food restriction in Israeli prisons); Shaimaa Khalil

Human rights groups suspect that the true number of Palestinians who have been killed in Israeli detention is actually much higher.¹⁸

On November 10, 2023, Israel besieged al-Nasr Children's Hospital and forced medical personnel and displaced families seeking refuge to leave the hospital.¹⁹ Doctors were forced to leave five babies on ventilators in the neonatal intensive care unit (NICU) in the hands of Israeli soldiers, who assured parents that the Red Cross would evacuate their babies.²⁰ Seventeen days later, when the doctors were permitted to access the NICU for the first time since the beginning of the siege of al-Nasr, the babies were found dead and in a state of decomposition.²¹

Gaza's largest hospital, al-Shifa, or "house of healing" in Arabic, has been raided twice by the Israeli military since October 7, 2023.²² After the second raid in March 2024, Al Jazeera reporter Ismail al-Ghoul stated that "[b]uildings in all departments have been burned, and the structure of the complex has been damaged from the inside, . . . [f]rom what we can see, it appears the occupation forces deliberately targeted the health sector and destroyed the largest medical complex in Gaza City."²³

& Mohamed Madi, *Bruises and Broken Ribs—Palestinian Deaths in Israeli Prisons*, BBC (Apr. 22, 2024), <https://www.bbc.com/news/world-middle-east-68780112> (same).

¹⁸ See Miriam Barghouti, *The Deadliest Period in History for Palestinian Prisoners in Israeli Detention*, DROP SITE NEWS (June 1, 2025), <https://www.dropsitenews.com/p/palestinian-prisoners-israeli-detention-abuse-starvation-death> (noting prisoner rights organizations' claims of additional unidentified deaths among Gaza detainees beyond official counts).

¹⁹ *Israel Left Premature Palestinian Babies to 'Die Alone' After Evacuating Gaza Hospital*, MIDDLE E. MONITOR (Nov. 29, 2023, 11:18 AM), <https://www.middleeastmonitor.com/20231129-israel-left-premature-palestinian-babies-to-die-alone-after-evacuating-gaza-hospital>; Nora Barrows-Friedman, *Israeli Military Left Palestinian Infants to Die*, ELECTRONIC INTIFADA (Nov. 29, 2023) (citing Liz Sly, Claire Parker & Sarah Dadouch, *Israeli Forces Push Deep into Gaza City Amid 'Catastrophic' Struggles at Hospitals*, WASH. POST, <https://www.washingtonpost.com/world/2023/11/11/gaza-israel-hamas-war> (Nov. 11, 2023, 2:02 PM)), <https://electronicintifada.net/blogs/nora-barrows-friedman/israeli-military-left-palestinian-infants-die>.

²⁰ Barrows-Friedman, *supra* note 19.

²¹ See *id.*

²² *As Israel Withdraws from Raid on Shifa Hospital, Accounts from Military and Witnesses Differ Wildly*, ASSOCIATED PRESS, <https://apnews.com/article/shifa-hamas-israel-gaza-military-war-hospitals-1842f3cc81744526c72bf727882e956> (Apr. 1, 2024, 6:28 PM) ("On Monday, the Israeli military withdrew from its second devastating raid on Gaza's largest hospital, Shifa, leaving it in ruins, with the walls blown out and frame blackened."); Maziar Motamedi, *Why Is Gaza's al-Shifa Hospital So Important For The Israeli Army?*, AL JAZEERA (Nov. 15, 2023), <https://www.aljazeera.com/news/2023/11/15/why-is-gazas-al-shifa-hospital-so-important-for-the-israeli-army>.

²³ *'No Life Here': Israel's Army Withdraws from Gaza's al-Shifa Hospital*, AL JAZEERA (Apr. 1, 2024) [hereinafter *'No Life Here'*], <https://www.aljazeera.com/news/2024/4/1/no-life-here-israeli-army-withdraws-from-al-shifa-hospital-in-gaza>.

Eyewitness accounts of the raid described executions of civilians, nurses, doctors, and other medical staff by Israeli occupation forces.²⁴ Israel detained and tortured medical staff during the two-week long siege.²⁵ The occupation forces prevented individuals seeking refuge inside al-Shifa from accessing medical supplies or basic necessities like food or water.²⁶

Dr. Said Abdulrahman Maarouf, a pediatrician from Gaza, was treating patients in December 2023 at al-Ahli Arab Hospital in Gaza City when Israeli occupation forces besieged the hospital.²⁷ The soldiers forced all doctors and medical personnel to evacuate the hospital.²⁸ Dr. Maarouf was detained by Israel for 45 days in an unknown location.²⁹ He suspects he was one of over 100 individuals being detained in the same location, and said, “Each one of us was wishing for death[,] wishing to die from the severity of the suffering.”³⁰ Dr. Maarouf described being blindfolded and having both his hands and legs shackled for the entirety of his detention, as well as being told to sleep on pebbles over blaring music.³¹ Dr. Maarouf stated that he lost over 25 kilograms, or 55 pounds, in the 45 days he spent in Israeli confinement.³² In describing the moments leading up to his detention, Dr. Maarouf told Reuters:

“From that moment until today I have no information about my children or my wife,” he said, crying. . . . “I am a paediatrician working for 23 years in this field. I did not commit any humanitarian crime. My weapon is my pen, my notebook and my stethoscope. I didn’t leave the place. I was treating children inside hospitals,” he said. “When we were called to where the tanks were I thought we’d be there a few hours and leave. I thought if they took me and

²⁴ Lorenzo Tondo, *Israeli Forces Withdraw from Gaza’s al-Shifa Hospital After Two-Week Raid Leaving Facility in Ruins*, THE GUARDIAN (Apr. 1, 2024, 11:47 AM) (citing *Israeli Forces ‘Executed’ Multiple Civilians at al-Shifa Hospital, Says PRCS*, AL JAZEERA (Apr. 1, 2024, 11:05 AM), <https://www.aljazeera.com/news/liveblog/2024/4/1/israels-war-on-gaza-live-twenty-one-al-shifa-patients-have-died-amid-siege-who?update=2810934>), <https://www.theguardian.com/world/2024/apr/01/israeli-forces-withdraw-from-gaza-al-shifa-hospital-after-two-week-raid> (reporting comments from Palestinian Red Crescent Society spokesperson)).

²⁵ *Id.*

²⁶ *Id.*; Aya Batrawy & Omar El Qatta, *Here’s What We Found After Israel’s Raid on Al-Shifa, Gaza’s Biggest Hospital*, NPR (Apr. 6, 2024, 5:02 AM), <https://www.npr.org/2024/04/06/1243045199/al-shifa-hospital-gaza-israel-raid-before-aftermath>.

²⁷ Bassam Masoud & Ibraheem Abu Mustafa, *Gaza Doctor Describes Ordeal of Detention*, REUTERS (Feb. 4, 2024, 2:35 PM), <https://www.reuters.com/world/middle-east/gaza-doctor-describes-ordeal-detention-2024-02-04/>.

²⁸ *See id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*; Mary Turfah, *Israel Has Created a Medical Apocalypse in Gaza*, THE NATION (Feb. 20, 2024), <https://www.thenation.com/article/world/gaza-medical-crisis/>.

³² Masoud & Mustafa, *supra* note 27; Turfah, *supra* note 31.

my colleagues they would treat us well because we are doctors and did not commit any crime[.]”³³

Upon release from his captors, Dr. Maarouf was dropped off at the Kerem Shalom crossing with no means of transportation, on the southernmost edge of Gaza, after having been kidnapped from the Northern part of the enclave.³⁴

These attacks continued, reaching hospitals across the entirety of the Gaza Strip. An Israeli airstrike on a tent in front of the al-Aqsa Martyrs Hospital on March 31, 2024, killed four people and injured at least 17 others.³⁵ On April 22, 2024, an attack on al-Awda Hospital damaged the solar panels that provide the hospital's electricity as well as the fuel and water tanks.³⁶ Mass graves have been reported to be found outside of both the al-Shifa and Nasser hospitals in Gaza City and Khan Younis, respectively.³⁷ On December 12, 2024, Dr. Saeed Jouda—the only orthopedic surgeon remaining in the north of Gaza—was killed in a targeted attack by an Israeli drone while travelling in an ambulance.³⁸

Medical neutrality enshrines in international law the idea that institutions providing medical care should be protected from hostilities during armed conflict.³⁹ The current Israeli assault on Gaza's healthcare infrastructure has marked an historic breakdown in the principle of medical neutrality due to Israel's “relentless assault

³³ Masoud & Mustafa, *supra* note 27.

³⁴ See *id.* (noting that Dr. Maarouf “was not sure if he was held inside or outside Gaza” while detained, and that he was “picked up by the Red Cross” after being “dropped at the Kerem Shalom crossing”).

³⁵ *At Least Four Killed in Israeli Attack on Al-Aqsa Hospital in Gaza*, AL JAZEERA (Mar. 31, 2024) (citing Tedros Adhanom Ghebreyesus (@DrTedros), X (Mar. 31, 2024, 9:41 AM), <https://x.com/DrTedros/status/1774477221278765248>), <https://www.aljazeera.com/news/2024/3/31/israel-attacks-gazas-al-aqsa-hospital-striking-civilians-and-journalists> (“At least four people were killed and 17 others were wounded in the air strike, WHO chief Tedros Adhanom Ghebreyesus said in a post on X on Sunday.”).

³⁶ *OPT Emergency Situation Update Issue 29*, WORLD HEALTH ORGANIZATION [WHO] 3 (Apr. 30, 2024), <https://www.emro.who.int/images/stories/palestine/Sit-rep-29.pdf>.

³⁷ United Nations [U.N.], *Mass Graves in Gaza Show Victims' Hands Were Tied, Says UN Rights Office*, UN NEWS (Apr. 23, 2024), <https://news.un.org/en/story/2024/04/1148876>.

³⁸ Ali Harb & Edna Mohamed, *Israel-Gaza Updates: Israel Kills at Least 33 in Nuseirat Camp 'Massacre': Israeli Fores Kill Northern Gaza's Only Orthopaedic Surgeon*, AL JAZEERA (Dec. 12, 2024, 9:30 PM), <https://www.aljazeera.com/news/liveblog/2024/12/12/gaza-live-news-israel-kills-30-palestinians-amid-renewed-ceasefire-push>; Jon Donnison, *Last Bone Surgeon In Northern Gaza Killed, Palestinians Say*, BBC (Dec. 13, 2024), <https://www.bbc.com/news/articles/cyv3m71g1q0o>.

³⁹ Soumitra S. Bhuyan, Ikenna Ebuonyi & Jay Bhatt, Editorial, *Persisting Trend in the Breach of Medical Neutrality: A Wake-Up Call to the International Community*, BMJ GLOB. HEALTH, Nov. 22, 2016, at 1, 1.

on the Palestinian medical and healthcare system.”⁴⁰ Israel has brought about a complete collapse of the Gaza healthcare system, a network which serves over 2.2 million people.⁴¹ Twenty out of 22 hospitals in the northern half of Gaza were destroyed in the first two months of Israel’s attack on Gaza.⁴²

The onslaught of violence Israel has unleashed upon the medical system in Gaza indicates that it is a military objective of Israel to destroy the medical infrastructure providing vital healthcare to Palestinians in Gaza.⁴³ Prior to the impunity that has been afforded to Israel’s attack on Gaza’s healthcare system and hospitals, similar attacks alleged to have been committed against medical personnel, including Russia’s 2022 bombing of a Ukrainian maternity hospital in Mariupol, were generally condemned by the international community.⁴⁴

Israel’s main justification—for both the destruction of Gaza in its entirety,⁴⁵ as well as the destruction of its hospital infrastructure specifically—has been its intent

⁴⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Application Instituting Proceedings, ¶ 4 (Dec. 29, 2023) [hereinafter Application Instituting Proceedings], <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>; see Turfah, *supra* note 31 (“Israel has been brazen in its flouting of international law and steadfast in its commitment to cut off Gaza’s lifelines. And it has done this largely with impunity.”).

⁴¹ Turfah, *supra* note 31; Maggie Fick, Ahmed Aboulenein & Saleh Salem, *Gaza’s Doctors Were Building a Health System. Then Came War*, REUTERS (June 4, 2024, 11:00 AM), <https://www.reuters.com/investigates/special-report/israel-palestinians-gaza-health>; Wafaa Shurafa & Kareem Chehayeb, *Doctors Visiting a Gaza Hospital Are Stunned by the War’s Toll on Palestinian Children*, ASSOCIATED PRESS, <https://apnews.com/article/gaza-aqsa-martyrs-hospital-health-care-israel-7c7a6117efae29e22a61e82151144613> (Mar. 28, 2024, 3:24 AM).

⁴² Katie Polglase, Gianluca Mezzofiore, Eliza Mackintosh, Livvy Doherty, Henrik Pettersson, Byron Manley & Henrik Pettersson, *How Gaza’s Hospitals Became Battlegrounds*, CNN (Jan. 12, 2024), <https://www.cnn.com/interactive/2024/01/middleeast/gaza-hospitals-destruction-investigation-intl-cmd>.

⁴³ Turfah, *supra* note 31 (“Israel’s assault on medical infrastructure amounts to one of the few discernible military objectives of this war. This makes sense, as medicine’s commitment to life compromises the effective implementation of genocidal intent.”); Annie Sparrow & Kenneth Roth, *Destroying Gaza’s Health Care System Is a War Crime*, FOREIGN POL’Y (Feb. 9, 2024, 10:12 AM), <https://foreignpolicy.com/2024/02/09/israel-gaza-health-care-hospitals-genocide-icj>.

⁴⁴ Turfah, *supra* note 31; *Mariupol Maternity Hospital Destroyed by Russian Air Strike, Triggering Global Horror, Outrage*, RADIOFREEEUROPE/RADIOLIBERTY, <https://www.rferl.org/a/ukraine-mariupol-hospital-bombed-russia/31744934.html> (Mar. 9, 2022); see JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK WITH CONTRIBUTIONS BY CAROLIN ALVERMANN, KNUT DÖRMANN & BAPTISTE ROLLE, INT’L COMM. OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 81 (2009) [hereinafter CUSTOMARY INTERNATIONAL HUMANITARIAN LAW], <https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

⁴⁵ Although Israel’s aggression has continued since September 24, 2024, 60% of Gaza had been damaged or destroyed by that date. Alison Snyder & Erin Davis, *Mapped: Nearly 60% of*

to “[d]estroy Hamas.”⁴⁶ Although Israel has repeatedly accused Hamas of using hospitals to harbor militants and weapons, after over a year of repeated attacks on Gaza’s healthcare infrastructure it has yet to provide reliable evidence to corroborate that accusation.⁴⁷

At the time of writing, the most current account of the devastation Israel has wrought upon the medical infrastructure of Gaza is detailed—albeit incompletely, as Israel’s attack is still ongoing—in a report published by the World Health Organization (WHO) on December 4, 2024.⁴⁸ As of that date, only 17 of Gaza’s 36 hospitals were partially functioning, and only 37% of primary health care facilities were functioning. Five field hospitals were partially functioning, and six field hospitals were fully functioning.⁴⁹ Hospitals throughout different parts of Gaza are functioning at varying capacities, with hospitals in Rafah unable to provide surgeries or inpatient care, although two field hospitals were at least partially functioning; the Indonesian Hospital, located in northern Gaza, lacks the ability to provide sufficient food and water to its patients because of Israel’s blockade; placing already wounded individuals at risk of death.⁵⁰ According to the WHO, 591 attacks on healthcare affected 122 health facilities and 146 ambulances, including damage to 33 hospitals.⁵¹ These attacks on healthcare infrastructure killed 854 people and injured 1,262.⁵² As of August 2, 2024, more than 300 healthcare workers were detained,

Gaza Damaged or Destroyed in One Year of War, AXIOS (Oct. 5, 2024), <https://www.axios.com/2024/10/05/gaza-destruction-map-israel-hamas>.

⁴⁶ Elliott Gotkine, *Netanyahu’s Mission: Destroy Hamas, Bring Hostages Home—and Get Reelected*, CNN, <https://www.cnn.com/2023/12/19/middleeast/netanyahu-hamas-war-mission-reelected-intl/index.html> (Dec. 20, 2023, 1:19 AM) (noting an additional “war aim” of Israel is to “[b]ring back the remaining hostages held by Hamas”).

⁴⁷ See Isabel Debre, Julia Frankel & Lee Keath, *Takeaways from AP’s Report on Three Hospitals in Northern Gaza Raided by Israeli Troops*, ASSOCIATED PRESS, <https://apnews.com/article/gaza-hospitals-israel-civilians-d066117ec80bce83657447add762b2e7> (Nov. 3, 2024, 10:24 AM) (reporting that “Israel has presented little or even no evidence of a significant Hamas presence” in three hospitals raided by Israel in northern Gaza, including al-Awda).

⁴⁸ *OPT Emergency Situation Update Issue 52*, WORLD HEALTH ORGANIZATION [WHO] 1 (Dec. 4, 2024), https://www.emro.who.int/images/stories/Sitrep_52.pdf.

⁴⁹ *Id.*

⁵⁰ *Id.*; see Ephrat Livni, *A Northern Gaza Hospital Lacks Food and Water for Patients, Officials Say*, N.Y. TIMES (Dec. 10, 2024), <https://www.nytimes.com/2024/12/10/world/middleeast/gaza-hospital-food-water-shortage.html> (“The U.N. and humanitarian groups have said the dearth stems from Israel’s closing aid crossings and blocking the movement of aid on the ground while Israeli authorities have denied limiting aid entry, blaming aid groups for failing to distribute supplies.”).

⁵¹ *OPT Emergency Situation Update Issue 52*, *supra* note 48, at 1.

⁵² *Id.*

many without charge.⁵³ Frequent fuel shortages, due to Israel's blockade, also render Gaza's already overcrowded hospitals intermittently dysfunctional.⁵⁴

Further, because Gaza's civilian infrastructure has also been decimated, there is inadequate food available, and communicable diseases are spreading rapidly, increasing the already dire need for adequate medical care.⁵⁵ By April 2024, approximately six months after the conflict started, the WHO reported over 700,000 cases of respiratory infection, over 380,000 cases of diarrhea, nearly 90,000 cases of scabies and lice, nearly 50,000 cases of acute jaundice syndrome and more than 50,000 cases of skin rashes, including over 7,800 cases of chickenpox in Gaza.⁵⁶ By December 4, 2024, at least 394 patients had been admitted to a hospital due to "severe acute malnutrition with complications."⁵⁷ More than 33,000 children have been admitted into Community Management of Acute Malnutrition Programme for malnutrition treatment, including more than 7,000 children with severe acute malnutrition.⁵⁸

The reality of a partially functioning hospital in Gaza is ghastly: facilities meant to provide medical care crowded with displaced people in need of shelter;⁵⁹ child after child admitted with headshot wounds;⁶⁰ doctors forced to perform surgeries on

⁵³ See Anjana Sankar, *Many of Gaza's Medical Workers Have Been Detained or Killed*, N.Y. TIMES (Aug. 2, 2024), <https://www.nytimes.com/2024/08/02/world/middleeast/gaza-doctors-medical-workers-israel.html> (noting calls from international human rights groups to release detained workers held without charge).

⁵⁴ Rep. of the Indep. Int'l Comm'n of Inquiry on the Occupied Palestinian Territories, Including E. Jerusalem, and Isr., ¶ 13, U.N. Doc. A/79/232 (Sept. 11, 2024) [hereinafter Rep. of the Indep. Int'l Comm'n of Inquiry], <https://documents.un.org/doc/undoc/gen/n24/262/79/pdf/n2426279.pdf>.

⁵⁵ Turfah, *supra* note 31; Doctors Without Borders, *How a Year of War Has Devastated Gaza's Civilian Infrastructure* (Nov. 11, 2024), <https://www.doctorswithoutborders.org/latest/how-year-war-has-devastated-gazas-civilian-infrastructure>. See generally *OPT Emergency Situation Update Issue 52*, *supra* note 48 (reporting the status of Gaza's medical system).

⁵⁶ *OPT Emergency Situation Update Issue 29*, *supra* note 36, at 1.

⁵⁷ *OPT Emergency Situation Update Issue 52*, *supra* note 48, at 2.

⁵⁸ *Id.* at 4.

⁵⁹ Mark Perlmutter & Feroze Sidhwa, *We Volunteered at a Gaza Hospital. What We Saw Was Unspeakable*, POLITICO, <https://www.politico.com/news/magazine/2024/07/19/gaza-hospitals-surgeons-00167697> (Aug. 5, 2024, 12:24 PM) ("We first noticed the overcrowding: 1,500 people were admitted to a 220-bed hospital. . . . Next, we noticed the 15,000 people sheltering on the hospital grounds and inside the hospital—lining and even blocking the hallways, throughout the wards, in the bathrooms and closets, on the stairs, even in the sterile processing and food preparation facilities and the operating rooms themselves. The hospital itself was a displaced persons camp.").

⁶⁰ *Id.* (reporting "seeing a series of children, preteens mostly, who'd been shot in the head").

the floor without anesthesia;⁶¹ wounds infected with maggots;⁶² the air thick with the stench of death.⁶³

Israeli attacks on Palestinian healthcare workers and infrastructure are not a new phenomenon. In 2021, nineteen health clinics were damaged in a ten-day-long attack on Gaza.⁶⁴ The 2021 attack was marked by Israel's deliberate bombing of the major streets around Gaza's largest hospital, al-Shifa Hospital.⁶⁵ In the aftermath of the attack, Khaled Hazareen, a doctor working at al-Shifa, told *The Intercept*: "'Victims lost their lives at the last minute before reaching the hospital because of the bombing of the roads,' he said. 'That is devastating for all of the health care workers.'" ⁶⁶ In 2014, seventeen hospitals, 45 ambulances, and 56 primary care facilities were damaged by Israeli strikes.⁶⁷ Al-Wafa Hospital, the sole public rehabilitation hospital in the Gaza Strip, was completely destroyed by Israeli forces after they struck the hospital with missiles and tank shelling between July 11 and July 23 of 2014.⁶⁸ Israel justified this attack, claiming Hamas used the hospital as a military facility, with fabricated images posted to X, formerly known as Twitter.⁶⁹ In 2017, Human Rights Watch (HRW) wrote to the Israeli military, requesting more

⁶¹ Nidal Al-Mughrabi, *In Gaza, Hospital Procedures Without Anaesthetics Prompted Screams, Prayers*, REUTERS, <https://www.reuters.com/world/middle-east/gaza-hospital-procedures-without-anaesthetics-prompted-screams-prayers-2023-11-10> (Nov. 10, 2023) ("The little girl was weeping in pain and screaming 'Mummy, Mummy' while the nurse stitched up her head wound without using any anaesthetic, because none was available at the time at Al Shifa Hospital in Gaza City.").

⁶² Perlmutter & Sidhwa, *supra* note 59 (remarking that "maggots fell in clumps onto the operating room table" as doctors began surgery on a child with "horrific injuries").

⁶³ *Id.* ("Then there were the odors: The intensive care units smelled like rot and death; the corridors stank like a kitchen filled with filth; the hospital grounds smelled of sewage and spent explosives.").

⁶⁴ Shrouq Aila & Anna Therese Day, *Israel Attacks on Gaza Left Strained Health Care System in Tatters*, THE INTERCEPT (May 21, 2021, 11:17 AM), <https://theintercept.com/2021/05/21/gaza-bombing-hospital-israel>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Neve Gordon & Nicola Perugini, *'Hospital Shields' and the Limits of International Law*, 30 EUR. J. INT'L L. 439, 441 (2019); *see also* Letter from Human Rights Watch to Israeli Military Advocate General (Feb. 21, 2017) [hereinafter Letter from Human Rights Watch], <https://www.hrw.org/news/2017/02/21/letter-israel-military-advocate-general-re-attacks-health-facilities> (requesting documents from the Israeli Military Advocate General related to an investigation "into airstrikes and shelling that damaged, and ultimately destroyed, the Wafa Rehabilitation Hospital" in 2014).

⁶⁸ Letter from Human Rights Watch, *supra* note 67; Nora Barrows-Friedman, *Israel Used Fabricated Images to Justify Bombing al-Wafa Hospital*, ELECTRONIC INTIFADA (July 24, 2014), <https://electronicintifada.net/blogs/nora-barrows-friedman/israel-used-fabricated-images-justify-bombing-al-wafa-hospital>.

⁶⁹ Barrows-Friedman, *supra* note 68.

specificity in the information provided regarding the airstrikes and shelling that destroyed al-Wafa and clarification regarding the reasons for each attack.⁷⁰ In response to this request, Israel denied the work visa application of HRW's Israel and Palestine Director and accused the NGO of "engag[ing] in politics in the service of Palestinian propaganda, while falsely raising the banner of 'human rights.'"⁷¹ The international community's failure to hold Israel accountable for its efforts to discredit a globally recognized human rights organization—over a mere request for specificity and clarification in information regarding airstrikes that destroyed Gaza's only public rehabilitation hospital—emboldened Israel in its attacks against healthcare institutions.⁷²

The West Bank has faced a similar Israeli attack on medical care, with 659 reported attacks on healthcare, including targeting ambulances and hospitals, as well as repeatedly preventing ambulances from reaching wounded individuals.⁷³ This includes an instance in January 2024 where Israeli soldiers disguised themselves as civilian doctors and nurses, raided Ibn Sina Hospital in Jenin, and killed three young Palestinian male patients while they were sleeping.⁷⁴ One of the men had been receiving medical care at the hospital for more than three months after being injured by an Israeli drone attack in October 2023.⁷⁵ While the situation in the West Bank warrants more discussion, given the scale of the assault on the healthcare system in Gaza specifically, the focus of this Comment will be on the Israeli destruction of

⁷⁰ Letter from Human Rights Watch, *supra* note 67.

⁷¹ Sheren Khalel, *Israel Bars Human Rights Watch Director from Entering Country, Calls Org 'Palestinian Propaganda'*, MONDOWEISS (Feb. 24, 2017), <https://mondoweiss.net/2017/02/direct-or-palestinian-propaganda>.

⁷² Weakening, or failing to use, accountability mechanisms generally emboldens states to evade responsibility for international law violations. See *Statement on ICC Sanctions*, AM. BRANCH OF THE INT'L L. ASS'N COMM. ON INT'L HUMANITARIAN L. (Dec. 16, 2024), https://www.ila-americanbranch.org/committee_reports/statement-on-icc-sanctions (urging U.S. lawmakers to reject sanctioning the International Criminal Court (ICC) when it pursues actions against the U.S. or its allies because these sanctions "may inhibit other nations from actively engaging with the ICC and embolden states to shield their citizens from accountability, further undermining global efforts to combat impunity for war crimes, crimes against humanity, genocide, and the crime of waging aggressive war").

⁷³ *OPT Emergency Situation Update Issue 52*, *supra* note 48, at 3 (reporting 659 attacks on medical infrastructure in the West Bank as of December 4, 2024, since October 7, 2023).

⁷⁴ *Israeli Forces Kill Three Palestinians in West Bank Hospital Raid*, AL JAZEERA, <https://www.aljazeera.com/news/2024/1/30/israel-troops-kill-three-palestinians-in-west-bank-hospital-ministry> (Jan. 31, 2024, 9:50 AM).

⁷⁵ *Id.*

Gaza's medical infrastructure⁷⁶ as well as its treatment toward the civilian medical personnel⁷⁷ working within this infrastructure.

The targeting of Palestine's medical infrastructure comes as no surprise. The goal of the Israeli project has been, since its inception, to acquire as much land from historic Palestine with as few Palestinians as possible left residing on that land as possible.⁷⁸ The UN stated that

[a]ttacks on health-care facilities are an intrinsic element of the Israeli security forces' broader assault on Palestinians in Gaza and the physical and demographic infrastructure of Gaza, as well as of efforts to expand the occupation. . . . The Commission finds that Israel has implemented a concerted policy to destroy the health-care system of Gaza.⁷⁹

The destruction of critical infrastructure such as hospitals, whose sole purpose is to preserve and nourish life, is a logical military policy only if the ultimate goal is to minimize the population that relies on those institutions.

I. THE PROTECTION OF MEDICAL PERSONNEL AND HOSPITALS IN INTERNATIONAL LAW

One of the fundamental obligations of humanitarian law is to allow medical care to be provided to those who are sick or wounded during armed conflict.⁸⁰ More than 105,000 individuals have been injured by the assault on Gaza as of December 2024.⁸¹ Medical care rendered throughout the conflict is governed by international humanitarian law (IHL).⁸²

Throughout its current attack on Gaza, Israel has sought to justify its strikes on medical facilities with the claim that Hamas uses these hospitals as military

⁷⁶ In this Comment, the term "medical infrastructure" refers to any physical structures utilized to provide medical care within Gaza, including, but not limited to hospitals, field hospitals, clinics, and ambulances.

⁷⁷ In this Comment, the term "medical personnel" refers to skilled personnel whose professional responsibility is to heal and sustain human life, including, but not limited to doctors, nurses, and first responders.

⁷⁸ See OMAR SHAKIR, HUM. RTS. WATCH, A THRESHOLD CROSSED: ISRAELI AUTHORITIES AND THE CRIMES OF APARTHEID AND PERSECUTION 2, 7–8, 10, 53–54 (2021), https://www.hrw.org/sites/default/files/media_2021/04/israel_palestine0421_web_0.pdf ("Israeli policy has sought to engineer and maximize the number of Jews, as well as the land available to them, in Israel and the portions of the [Occupied Palestinian Territory] coveted by the Israeli government for Jewish settlement. At the same time, by restricting the residency rights of Palestinians, Israeli policy seeks to minimize the number of Palestinians and the land available to them in those areas.").

⁷⁹ Rep. of the Indep. Int'l Comm'n of Inquiry, *supra* note 54, ¶¶ 88–89.

⁸⁰ Kenneth Watkin, *Medical Care in Urban Conflict*, 95 INT'L L. STUD. 49, 50 (2019).

⁸¹ OPT Emergency Situation Update Issue 52, *supra* note 48, at 1.

⁸² See Watkin, *supra* note 80, at 56.

command centers.⁸³ Israel has also attempted to justify attacks on Gaza hospitals by claiming Hamas has embedded itself within the displaced civilian population seeking refuge within Gaza's hospitals.⁸⁴ Military attacks on hospitals under the facade of targeting terrorist groups are not a new phenomenon, and have been normalized by U.S. attacks and diplomatic support.⁸⁵ Israel has wielded these accusations as justification to besiege hospitals, storming them and kidnapping working doctors and civilians seeking refuge.⁸⁶

The key principles of IHL require distinction as well as proportionality.⁸⁷ Distinction requires that parties to an armed conflict distinguish between civilians and combatants at all times.⁸⁸ Proportionality requires that parties to an armed conflict weigh the military necessity of an attack against the potential harm such an attack would cause to a civilian population.⁸⁹

A. *Distinction*

IHL, as well as the law of armed conflict (LOAC), differentiates between military and civilian objects, providing immunity from being targeted to civilian objects in most circumstances.⁹⁰ Civilians themselves enjoy immunity from direct attack

⁸³ Sparrow & Roth, *supra* note 43; Shuarafa & Chehayeb, *supra* note 41 ("Israel has alleged that hospitals serve as command centers, weapons storage facilities and hideouts for Hamas, but has presented little visual evidence.").

⁸⁴ Sparrow & Roth, *supra* note 43; Shuarafa & Chehayeb, *supra* note 41.

⁸⁵ See Gordon & Perugini, *supra* note 67, at 440 (noting attacks on medical infrastructure by the United States and its allies in conflicts in Yemen, Afghanistan, Palestine, and Syria).

⁸⁶ See Turfah, *supra* note 31.

⁸⁷ See Hilly Moodrick-Even Khen, *Reaffirming the Distinction Between Combatants and Civilians: The Case of the Israeli Army's "Hannibal Directive" and the United States' Drone Airstrikes Against ISIS*, 33 ARIZ. J. INT'L & COMPAR. L. 765, 766–67, 777–78 (2016); Tilman Rodenhäuser, Int'l Comm. of the Red Cross, Statement to the UN Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security, Second Substantive Session, Agenda Item "International Law" (Feb. 12, 2020), <https://www.icrc.org/en/document/principles-international-humanitarian-law-distinction-proportionality-have-direct-bearing> (discussing the application of distinction and proportionality to cyber operations).

⁸⁸ CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 44, at 3; Khen, *supra* note 87, at 766–67.

⁸⁹ *The Practical Guide to Humanitarian Law: Proportionality*, MÉDECINS SANS FRONTIÈRES, <https://guide-humanitarian-law.org/content/article/3/proportionality> (last visited Aug. 6, 2025).

⁹⁰ Emily Chertoff & Zachary Manfredi, *Deadly Ambiguity: IHL's Prohibition on Targeting Civilian Objects and the Risks of Decentered Interpretation*, 53 TEX. INT'L L.J. 239, 241–42 (2018); Khen, *supra* note 86, at 778.

during international armed conflicts (IAC).⁹¹ During armed conflict, medical personnel are protected by the same legal framework as civilians, albeit with additional protections in place to allow medical care to be provided.⁹²

During the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in 1974–1977, Britain pushed for an amendment stressing that the use of medical facilities to shield military activities from attack would be prohibited.⁹³ This is reflected in Article 12 of Additional Protocol I to the Geneva Conventions, which states:

1. Medical units shall be respected and protected at all times and shall not be the object of attack.
2. Paragraph 1 shall apply to civilian medical units, provided that they:
 - (a) Belong to one of the Parties to the conflict;
 - (b) Are recognized and authorized by the competent authority of one of the Parties to the conflict; or
 - (c) Are authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First Convention.
3. The Parties to the conflict are invited to notify each other of the location of their fixed medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1.
4. Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.⁹⁴

The requirement that hospitals be placed outside of the vicinity of military buildings being written alongside the requirement that medical units are not used to shield military objectives from attack serves to connect the idea that a medical unit being used as a shield is a legitimate target.⁹⁵ This logic protects military forces who bomb

⁹¹ CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 44, at 3 (“The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”).

⁹² *Id.* at 79; *The Practical Guide to Humanitarian Law: Medical Personnel*, MÉDECINS SANS FRONTIÈRES, <https://guide-humanitarian-law.org/content/article/3/medical-personnel> (last visited Aug. 7, 2025).

⁹³ Gordon & Perugini, *supra* note 67, at 448.

⁹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 12, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

⁹⁵ See Gordon & Perugini, *supra* note 67, at 448–49.

hospitals and sacrifice the patients, doctors, and nurses who rely on those hospitals.⁹⁶ This logic has also been utilized by Israel to justify bombings and invasions that have had devastating consequences on crucial civilian medical infrastructure.⁹⁷ Israel's justifications exemplify a common tactic of asymmetric warfare: the attempt to blur the difference between the civilians and combatants.⁹⁸ While there is undoubtedly logic behind prohibiting military objectives from using medical units as a shield, the justification it provides to those that seek to illegitimately attack a hospital that is not shielding military objectives is a problematic reality that must be grappled with.

The most common legal justifications for attacking hospitals during armed conflict are: (1) that the hospitals are being used for both civilian and military purposes (dual use); and (2) that a party to the conflict is deceitfully and intentionally failing to distinguish themselves from the civilian population (perfidy).⁹⁹ However, if the intention behind an attack on a dual-use medical facility is to cause harm to the civilian population relying on the facility, that attack is unlawful.¹⁰⁰ A specific claim that Israel has used in justifying their attacks is that the hospitals being attacked serve some sort of crucial connection between Hamas' underground tunnels in Gaza.¹⁰¹ While the Israeli military has claimed that Hamas uses some hospitals as command and control centers, it has also raided and besieged other hospitals without any claim of Hamas presence.¹⁰² The fact that the Israeli military has raided and besieged a hospital without any claim of its use for military purposes by a party to the conflict speaks to the impunity the international community has afforded Israel in its attacks on Gaza and its healthcare infrastructure. The UN has stated:

In relation to the attacks on Nasr, Shifa', Awdah and Turkish hospitals, the Commission finds that, in view of the excessive number of civilian deaths and injuries, as well as the damage caused to and the destruction of the hospitals' facilities, Israeli security forces failed to adhere to the principles of precaution, distinction and proportionality, constituting the war crimes of wilful killing and attacks against protected objects. The Commission finds that, in the

⁹⁶ *Id.* at 449.

⁹⁷ Sparrow & Roth, *supra* note 43.

⁹⁸ Chertoff & Manfredi, *supra* note 90, at 273–74.

⁹⁹ Gordon & Perugini, *supra* note 67, at 453–54.

¹⁰⁰ *Id.* at 454 (citing MARCO SASSÒLI, HARV. PROGRAM ON HUMANITARIAN POL'Y & CONFLICT RSCH., LEGITIMATE TARGETS OF ATTACKS UNDER INTERNATIONAL HUMANITARIAN LAW 7 (2003)).

¹⁰¹ Isabel Debre, Julia Frankel & Lee Keath, *Still Wrecked from Past Israeli Raids, Hospitals in Northern Gaza Come Under Attack Again*, ASSOCIATED PRESS (Nov. 2, 2024, 9:28 PM), <https://apnews.com/world-news/still-wrecked-from-past-israeli-raids-hospitals-in-northern-gaza-come-under-attack-again-00000192eebfd414a79fffbf88cc0000>.

¹⁰² *Id.* ("The Israeli military has never made any claims of a Hamas presence at al-Awda. When asked what intelligence led troops to besiege and raid the hospital last year, the military spokesman's office did not reply.").

attacks on Shifa' and Nasr hospitals, Israeli security forces considered the hospitals' premises and all surrounding areas as targetable without distinction and thus violated the principle of distinction. With regard to Israeli security forces seizing the Turkish Hospital for military purposes and establishing a military post therein, the Commission finds that such actions were not required by the imperative of military necessity and thus amount to the war crime of seizing protected property.¹⁰³

In concluding that the medical infrastructure Israel attacked, including the Awdah, Shifa, Turkish and Nasr hospitals, had not lost their protected status, the UN stated:

The Commission did not find evidence of military activity by Palestinian armed groups at either Awdah or the Turkish Hospital at the time that they were attacked. The Commission documented Israeli security forces statements that Shifa' and Nasr hospitals were being used for military purposes, and the security forces' claims of finding weapon caches. However, it was unable to independently verify those claims. The Commission confirmed the presence of a tunnel and shaft on the grounds of Shifa' Hospital, but it could not verify that they were used for military purposes. The Commission verified information indicating that members of armed groups had entered Shifa' hospital with Israeli security forces vehicles that were stolen on 7 October. However, it did not find any evidence of a military presence in the specific hospital departments that Israeli security forces shelled in November, including the maternity ward and the intensive care unit. The Commission concludes that, at the time of Israeli security forces attacks, the hospitals and medical facilities enjoyed special protection under international humanitarian law and were immune from such attacks.¹⁰⁴

B. *Proportionality*

Article 57 of Additional Protocol I requires that parties to an armed conflict balance the potential harm that the attack will cause to protected people or places with the potential military advantage that may result from such an attack.¹⁰⁵ An example of a disproportionate attack would be destroying a hospital with an airstrike in response to one enemy combatant shooting a rifle from inside it.¹⁰⁶ Such an attack

¹⁰³ Rep. of the Indep. Int'l Comm'n of Inquiry, *supra* note 54, ¶ 91.

¹⁰⁴ *Id.* ¶ 92.

¹⁰⁵ Additional Protocol I, *supra* note 94, art. 57; Gordon & Perugini, *supra* note 67, at 455.

¹⁰⁶ *Protection of Medical Services Under International Humanitarian Law: A Primer*, MÉDECINS SANS FRONTIÈRES/DOCTORS WITHOUT BORDERS (Oct. 21, 2015), <https://www.doctorswithoutborders.org/latest/protection-medical-services-under-international-humanitarian-law-primer> ("A targeted attack on a medical facility is a violation of IHL and can constitute a war crime if it was A) intentional, B) due to negligence stemming from a failure to properly verify the military or civilian nature of the target, C) a disproportionate response to the identified military threat, or D) undertaken without advance warning of an imminent attack.").

would be disproportionate because the potential military gain to be had from eliminating one combatant is heavily outweighed by the number of people who would be killed, injured, or lose access to necessary medical care as a result of such an attack.¹⁰⁷ While Israel is not a party to Additional Protocol I, Article 57 reflects customary IHL,¹⁰⁸ and thus Israel is expected to abide by its mandates as a member of the international community.¹⁰⁹ Article 57 requires constant care to spare civilians, stating:

2. With respect to attacks, the following precautions shall be taken:
 - (a) Those who plan or decide upon an attack shall:
 - (i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
 - (ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
 - (iii) Refrain from deciding to launch 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;
 - (b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special

¹⁰⁷ See *id.*

¹⁰⁸ Ruth A. Fitzgerald, *International Humanitarian Law Applied to the Conflict Between Israel and Hamas*, L. LIBR. OF IRE. (Oct. 20, 2023), www.lawlibrary.ie/viewpoints/ihl (“Article 57(2) of Additional Protocol I obliges parties to take precautions in their attacks to avoid or minimise incidental civilian losses. These rules apply by way of customary international law to non-international conflicts.”). Customary international law is a body of international obligations that States are expected to abide by. Customary international law has two elements: 1) consistent international practice by states in accordance with the custom, and 2) an indication that such practice by States is based on their subjective belief that it is required by law. See *Customary International Humanitarian Law*, INT’L COMM. OF THE RED CROSS (Oct. 29, 2010), <https://www.icrc.org/en/document/customary-international-humanitarian-law-0>.

¹⁰⁹ See Michael N. Schmitt, *The Legal Protection of Hospitals During Armed Conflict*, LIEBER INST. FOR LAW & LAND WARFARE: ARTICLES OF WAR (Dec. 29, 2023), <https://lieber.westpoint.edu/legal-protection-hospitals-during-armed-conflict>; Lionel Beehner, *Israel and the Doctrine of Proportionality*, COUNCIL ON FOREIGN REL.: BACKGROUNDER (July 13, 2006, 5:26 PM), <https://www.cfr.org/backgrounder/israel-and-doctrine-proportionality>.

protection or that the attack 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;

- (c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
- 3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.
- 4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.
- 5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.¹¹⁰

Article 57 declares that it cannot be interpreted as condoning attacks on civilians.¹¹¹ However, when read in tandem with Article 12's removal of the protection afforded to medical facilities that are being used to "shield" military objectives, it provides armed forces who target civilians by attacking hospitals they accuse of being "dual use" with a robust defense.¹¹² Further, the precautions required by Article 57 are framed relatively.¹¹³ This relativity is a result of the fact that international law reflects a body of norms that strive to balance military objectives with humanitarian necessities.¹¹⁴ Whether this balance has been adequately struck by a party to an armed conflict is dependent upon the attack being proportionate, but IHL does not explicitly define when an attack goes beyond the bounds of proportionality and become disproportionate.¹¹⁵ As noted above, the UN has determined that Israel's attacks on medical infrastructure did not adhere to the requirement of

¹¹⁰ Additional Protocol I, *supra* note 94, art. 57.

¹¹¹ *Id.*

¹¹² Compare *id.*, with *id.* art. 12. See also *supra* text accompanying notes 94–99; Gordon & Perugini, *supra* note 67, at 449, 454.

¹¹³ Gordon & Perugini, *supra* note 67, at 455 (citing THÉO BOUTRUCHE, EXPERT OPINION ON THE MEANING AND SCOPE OF FEASIBLE PRECAUTIONS UNDER INTERNATIONAL HUMANITARIAN LAW AND RELATED ASSESSMENT OF THE CONDUCT OF THE PARTIES TO THE GAZA CONFLICT IN THE CONTEXT OF THE OPERATION "PROTECTIVE EDGE" 14 (Feb. 27, 2015), <https://apidiakoniase.cdn.triggerfish.cloud/uploads/sites/2/2021/07/expert-opinion-precautions-ihl-operation-protective-edge.pdf>); see Additional Protocol I, *supra* note 94, art. 57.

¹¹⁴ BOUTRUCHE, *supra* note 113, at 14.

¹¹⁵ See Gordon & Perugini, *supra* note 67, at 456.

proportionality.¹¹⁶ Given that determination, the discussion of proportionality herein seeks to critique the framework and inherent contradictions of IHL that have been used to justify repeated attacks on medical infrastructure.

Inherent in this framework and lack of definition is the reality that the international community will universally condemn the use of hospitals as a shield by armed groups, but offer only conditional protection to a hospital that is targeted during armed conflict.¹¹⁷ This privileges the attacker rather than the civilians seeking refuge in the hospital.¹¹⁸ Because the law makes legitimate the bombing of a medical facility that has lost its protection, it inevitably makes hospitals legitimate targets during an armed conflict, so long as the party attacking a hospital it claims is being used as a shield can reasonably argue that it believed the attack was proportional, that it warned medical personnel, and that the party took the required precautions.¹¹⁹ The subjectivity of this framework both normalizes the targeting of hospitals and affords relative legal immunity to whichever party that possesses more geopolitical power in an armed conflict.¹²⁰ That a carveout in IHL exists to effectively legitimize the targeting of hospitals demonstrates a failure in international law that has served to benefit dictators, as well as fascist regimes like Israel's.¹²¹

¹¹⁶ See *supra* note 103 and accompanying text.

¹¹⁷ Gordon & Perugini, *supra* note 67, at 457.

¹¹⁸ See *id.*

¹¹⁹ *Id.* ("All a warring party has to do is to provide a feasible argument that a medical unit was being used to shield a target, claim that before it bombed the unit it warned the medical personnel, claim that it anticipated the attack would be proportional and, finally, assert that during the assault it took all of the necessary precautions.").

¹²⁰ *Id.* at 457. This geopolitical power is often expressed through the five permanent members (namely the United States, in the case of Israel) to the UN Security Council exercising their veto power to block the only U.N. body that possesses the authority to adopt legally binding resolutions. See MARC. J. COHEN, AMY CROOME & ELISE NALBANDIAN WITH CONTRIBUTING AUTHORS PAULINE CHETCUTI & MATHEW TRUSCOTT, OXFAM INT'L, VETOING HUMANITY: HOW A FEW POWERFUL NATIONS HIJACKED GLOBAL PEACE AND WHY REFORM IS NEEDED AT THE UN SECURITY COUNCIL 19–20 (Sept. 2024), <https://oxfamlibrary.openrepository.com/bitstream/handle/10546/621621/bp-vetoing-humanity-190924-en.pdf>; Hope O'Dell, *How the US Has Used Its Power in the UN to Support Israel for Decades*, CHI. COUNCIL ON GLOB. AFFS.: GLOB. INSIGHT, <https://globalaffairs.org/commentary-and-analysis/blogs/how-us-has-used-its-power-un-support-israel-decades> (Feb. 21, 2025); see also Gordon & Perugini, *supra* note 67, at 462–63.

¹²¹ See Gordon & Perugini, *supra* note 67, at 441 ("[A]fter the bombardment of an underground medical facility in a rebel controlled area, a Syrian regime official declared that militants would be targeted wherever they were found, 'on the ground and underground', while his Russian patron explained that rebels were using 'so-called hospitals as human shields'. Saudi officials attempting to justify the high number of air strikes targeting medical facilities in Yemen have also adopted the same catchphrases. They, too, have accused their adversaries, the Houthi militias, of using hospitals to hide their military forces." (punctuation in original) (footnotes omitted) (quoting Ellen Francis, *Even in a Bunker Under a Mountain, Syrian Hospital Knocked Out by Strikes*, REUTERS (Oct. 3, 2016, 3:59 PM), <https://www.reuters.com/article/world/even->

This dynamic is unsurprising, given that international law has a tendency to serve former colonial powers.¹²² Because international law serves these powers, norms regarding what is proportional in an attack on a hospital depends on the political power wielded internationally by the respective parties to the conflict, specifically the willingness of the rest of the international political community to condemn such an attack.¹²³ Former colonial powers have largely come to the political and rhetorical defense of the settler colony that is Israel, or otherwise condoned Israel's conduct through military funding and the supply of arms.¹²⁴

Following the 2014 attacks on al-Wafa Hospital, the Israeli military investigated itself and found that, with one exception, it did not violate international humanitarian law.¹²⁵ HRW stated that even in the case that Hamas had been using the

in-a-bunker-under-a-mountain-syrian-hospital-knocked-out-by-strikes-idUSKCN1231RQ)); Marwan Bishara, *Netanyahu, The Godfather of Modern Israeli Fascism*, AL JAZEERA (Dec. 21, 2022), <https://www.aljazeera.com/opinions/2022/12/21/netanyahu-is-the-godfather-of-modern-israeli-fascism> ("Fascism has been on the minds of Israel's friends and foes alike since 'the Jewish State' held its latest elections and its former Prime Minister Benjamin Netanyahu began negotiations to form a new coalition."); Orly Noy, *Only an Anti-Fascist Front Can Save Us from the Abyss*, 972 MAG. (July 4, 2024), <https://www.972mag.com/anti-fascist-front-israel> (reporting that what is occurring in "all of Israeli society [is] a profound and accelerating slide toward fascism").

¹²² David Small, *The Continued Influence of Colonialism in International Law*, QUEEN'S UNIV. BELFAST: QUEEN'S STUDENT L.J. (Mar. 29, 2019), <https://blogs.qub.ac.uk/studentlawjournal/2019/03/29/the-continued-influence-of-colonialism-in-international-law/>; see NOURA ERAKAT, JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE 6 (2019) ("There are several reasons to be skeptical that international law has the capacity to overcome geopolitical realities and advance the Palestinian struggle for freedom. One is the sordid origin of international law as a derivative of a colonial order, and therefore as a body of law that reifies, rather than unsettles, an asymmetry of rights and duties among international actors.").

¹²³ See ERAKAT, *supra* note 122, at 6.

¹²⁴ Simon Speakman Cordall, *Western Allies Face Genocide Complicity If Support for Israel Continues*, AL JAZEERA (Apr. 3, 2024), <https://www.aljazeera.com/news/2024/4/3/western-allies-face-threat-of-complicity-if-support-for-israel-continues>. See, e.g., Josh Smith, *Britain's Deputy PM Defends Israel but Calls for Humanitarian Ceasefire in Gaza*, REUTERS (Mar. 19, 2024), www.reuters.com/world/middle-east/britains-deputy-pm-defends-israel-calls-immediate-ceasefire-gaza-2024-03-19/; Aurelien Breeden, *France Rejects Genocide Accusations Against Israel in Gaza*, N.Y. TIMES (Jan. 17, 2024), <https://www.nytimes.com/2024/01/17/world/middleeast/france-israel-genocide-gaza.html>. For further discussion of Israel as a settler colony, see generally SHAKIR, *supra* note 78.

¹²⁵ Letter from Human Rights Watch, *supra* note 67 ("On December 7, 2014, the IDF Military Advocate General (MAG) published a press release in which it summarized findings of an investigation by the General Staff Mechanism for Fact-Finding Assessments (FFAM) into the attack. The FFAM found that, with one exception, all attacks were carried out in accordance with Israeli domestic law and international humanitarian law, including the principle of proportionality. The FFAM found that one exception—the July 11 attack, which it found was carried out without warning—did not establish a serious violation of the law of armed conflict

hospital for military purposes, it would not necessarily serve as adequate justification for destroying an entire hospital that provides essential care for civilians.¹²⁶ HRW found multiple problems with Israel's investigation: the lack of specification in the justification for each attack; providing only five minutes for medical staff to evacuate the hospital, including many patients who suffered from physical disabilities, before striking the hospital multiple times; and failure to account for harm to two hospital staff and two patients that resulted from these strikes.¹²⁷ Despite pleas from Palestinian rights groups for the international community to hold Israel responsible for its attacks on medical personnel and facilities, the international community's inaction has empowered Israel to continue to conduct armed hostilities that target Gaza's healthcare with impunity.¹²⁸ This inaction has arguably also empowered Israel to carry out a similar policy of attacking healthcare infrastructure in Lebanon, and although this warrants further discussion, it is outside of the scope of this Comment.¹²⁹

Israel's first invasion of al-Shifa hospital, in November 2023, followed a days-long siege which resulted in dozens of deaths due to artillery fire and power outages.¹³⁰ Fuel ran out during the days-long siege of the hospital, and when the hospital

which requires criminal investigation.' The MAG closed the case without opening a criminal investigation, though it recommended that the Chief of General Staff examine the reasons why the attack on July 11 was carried out without warning.").

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See generally MED. AID FOR PALESTINIANS, AL MEZAN CTR. FOR HUM. RTS. & LAWS. FOR PALESTINIAN HUM. RTS., NO MORE IMPUNITY: GAZA'S HEALTH SECTOR UNDER ATTACK (2015), <https://www.map.org.uk/downloads/no-more-impunity—gazas-health-sector-under-attack.pdf> (calling for international action to hold Israel accountable: "[W]ithout a thorough and impartial investigation of the issues raised in this report and proper mechanisms for accountability, the international legal protection of medical facilities and personnel will continue to be eroded and this will directly impact the fulfilment of the right to health not only of Palestinians living in Gaza but of civilians caught up in armed conflict anywhere in the world.").

¹²⁹ See *Lebanon: A Conflict Particularly Destructive to Health Care*, WORLD HEALTH ORGANIZATION [WHO] (Nov. 22, 2024), <https://www.who.int/news/item/22-11-2024-lebanon—a-conflict-particularly-destructive-to-health-care>; see also Allegra Goodwin & Tamara Qiblawi, *Israeli Military Dropped Bombs in 'Lethal Proximity' of at Least 19 Lebanese Hospitals, CNN Analysis Finds*, CNN (Nov. 2, 2024), <https://www.cnn.com/2024/11/02/middleeast/israel-airstrikes-lebanon-hospitals-intl-invs> (suggesting that the silence of the international community in response to Israel's bombing of health infrastructure in Gaza emboldened Israel to attack health infrastructure in Lebanon).

¹³⁰ Malachy Browne & Neil Collier, *Evidence Points to Israeli Shells in Strikes on Gaza's Largest Hospital*, N.Y. TIMES (Nov. 14, 2023), <https://www.nytimes.com/2023/11/14/world/middleeast/israel-gaza-al-shifa-hospital.html>; Jeremy Scahill, *Al-Shifa Hospital, Hamas's Tunnels, and Israeli Propaganda*, THE INTERCEPT (Nov. 21, 2023, 7:22 AM), <https://theintercept.com/2023/11/21/al-shifa-hospital-hamas-israel/>; *More Than 20 Patients Die at Gaza's al-Shifa Hospital Amid Israeli Raid*, AL JAZEERA (Nov. 17, 2023), <https://www.aljazeera.com/news/2023/11/17/more->

ran out of electricity, at least two premature babies were killed due to the lack of power to their incubators.¹³¹ Israel justified its brutality with the claim that the al-Shifa complex was being used by Hamas as a military command center, but following its first withdrawal from the hospital, the lackluster evidence provided left questions about this justification's authenticity.¹³² Far from proof of a command center, the only evidence provided to corroborate Israel's claims were a small number of rifles and a tunnel.¹³³ Israel did not provide evidence that the tunnel could even be accessed from al-Shifa.¹³⁴

During Israel's second invasion of al-Shifa in March 2024, an estimated 3,000 people, including doctors, patients, and displaced civilians, were sheltering in the hospital.¹³⁵ Israel invaded the hospital under the justification that Hamas was using the hospital as a military base to command attacks.¹³⁶ Upon near-complete destruction of the hospital, Israel retreated, claiming to have killed 200 people and to have arrested hundreds of individuals suspected of being militants, including supposed senior Hamas officials.¹³⁷ Witnesses described an apocalyptic scene; bodies of

than-20-patients-die-at-gazas-al-shifa-hospital-amid-israeli-raid; Louisa Loveluck, Evan Hill, Jonathan Baran, Jarrett Ley & Ellen Nakashima, *The Case of al-Shifa: Investigating the Assault on Gaza's Largest Hospital*, WASH. POST (Dec. 21, 2023, 9:00 AM), <https://www.washingtonpost.com/world/2023/12/21/al-shifa-hospital-gaza-hamas-israel/>.

¹³¹ Loveluck et al., *supra* note 130.

¹³² *Id.*; Nikki McCann Ramirez, *Israeli Evidence of Hamas Command Center in al-Shifa Hospital Falls Short: Report*, ROLLING STONE (Dec. 21, 2023), <https://www.rollingstone.com/politics/politics-news/israeli-hamas-command-center-al-shifa-hospital-falls-report-1234934784>.

¹³³ See Loveluck et al., *supra* note 130 ("Photos released by the military later that day purported to show the full haul of weapons recovered at the hospital—about 12 AK-style rifles, in addition to magazines of ammunition and several grenades and bulletproof vests.").

¹³⁴ *Id.*

¹³⁵ Ibrahim Dahman & Celine Alkhaldi, *Israeli Military Orders Evacuation from Area Surrounding al-Shifa Hospital*, CNN (Mar. 19, 2024, 2:04 PM), <https://www.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-03-18-24>; *Israeli Forces Storm Gaza's al-Shifa Hospital*, AL JAZEERA, <https://www.aljazeera.com/news/2024/3/18/israeli-army-opens-fire-inside-gazas-al-shifa-hospital-officials-say> (Mar. 18, 2024, 3:17 PM).

¹³⁶ Dahman & Alkhaldi, *supra* note 135 ("The IDF said it was carrying out the operation based on intelligence that the hospital was being used by 'senior Hamas terrorists to conduct and promote terrorist activity.'").

¹³⁷ Yolande Knell & Sean Seddon, *Gaza's al-Shifa Hospital in Ruins After Two-Week Israeli Raid*, BBC (Apr. 1, 2024), <https://www.bbc.com/news/world-middle-east-68705765>; Emanuel Fabian, *IDF: 'Very Significant' Hamas Commanders Among 650 Nabbed at Gaza's Shifa Hospital*, TIMES OF ISR., <https://www.timesofisrael.com/idf-650-terrorists-including-hamas-officers-detained-in-shifa-hospital-raid-so-far/> (Mar. 21, 2024, 8:53 PM); Abeer Salman, Lucas Lilieholm, Jessie Yeung & Christian Edwards, *Israeli Troops End al-Shifa Hospital Raid, Leaving Behind Bodies and Trail of Destruction*, CNN, <https://www.cnn.com/2024/04/01/middleeast/israel-idf-withdraws-al-shifa-hospital-intl-hnk/index.html> (Apr. 1, 2024 1:36 PM).

hundreds of dead people littered the ruins of the hospital and surrounding streets.¹³⁸ Three mass graves were later found in the area surrounding al-Shifa Hospital.¹³⁹

Israel has claimed that al-Shifa Hospital and tunnels underneath are being used by Hamas for military advantage, but it is also required to warn medical personnel and take necessary precaution to protect civilians if it attacks the hospital.¹⁴⁰ Israel's focus on the tunnels underneath al-Shifa is also ironic, given the fact that they were built by Israel's Public Works Department in the 1980s.¹⁴¹ Israel claims that these tunnels have been expanded to house a Hamas military command center, but analysis of the evidence provided by Israel shows little more than a scant amount of small arms and a small room bearing no signs of recent use.¹⁴² If there is doubt as to whether a facility is being used for military purposes the assumption should be resolved in favor of those residing in the hospital, and the facility should be presumed not to be in use for military purposes.¹⁴³ Important to understanding whether these accusations would serve as adequate justification, even if true, in the context of what is permitted under international law is Article 19 of the Fourth Geneva Convention, which states that "[t]he fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet handed to the proper service, shall not be considered to be acts harmful to the enemy."¹⁴⁴

¹³⁸ See Salman et al., *supra* note 137 ("Medical crews are working to recover hundreds of bodies scattered across the grounds at Al-Shifa, with at least 300 bodies found so far, according to Gaza's Civil Defense. Determining the precise number of people killed is difficult, it added, because Israeli troops had buried bodies inside and around the complex and bulldozed nearby roads."); Knell & Seddon, *supra* note 137 (Images published following the Israeli withdrawal showed Palestinians walking near the charred main buildings with chunks of wall missing and carrying bodies wrapped in blankets. Graphic photos showed corpses partially exposed on the churned ground."); 'No Life Here,' *supra* note 23 ("Medical sources told Al Jazeera that hundreds of bodies were found inside the complex and in surrounding streets.").

¹³⁹ *Israel's War on Gaza: At Least 49 Bodies Found in New Mass Grave at al-Shifa Hospital*, MIDDLE E. EYE (May 8, 2024, 3:01 PM) <https://www.middleeasteye.net/news/bodies-found-new-mass-grave-shifa-hospital-gaza>.

¹⁴⁰ Scahill, *supra* note 130; Gordon & Perugini, *supra* note 67, at 457.

¹⁴¹ Scahill, *supra* note 130.

¹⁴² Julian Borger, *IDF Evidence So Far Falls Well Short of al-Shifa Hospital Being Hamas HQ*, THE GUARDIAN (Nov. 17, 2023, 1:33 PM), <https://www.theguardian.com/world/2023/nov/17/idf-evidence-so-far-falls-well-short-of-al-shifa-hospital-being-hamas-hq>; Ramirez, *supra* note 132.

¹⁴³ *The Protection of Hospitals During Armed Conflicts: What the Law Says*, INT'L COMM. OF THE RED CROSS (Nov. 6, 2023), www.icrc.org/en/document/protection-hospitals-during-armed-conflicts-what-law-says; see Scahill, *supra* note 130.

¹⁴⁴ Geneva 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 Relative to the Protection of Civilian Persons].

The U.S., as a financially invested party to Israel's genocide in Gaza,¹⁴⁵ backed Israel's allegations that Hamas was using al-Shifa as a military base.¹⁴⁶ As did the New York Times, albeit in a report based solely on Israeli intelligence documents that Israel provided in service of their media campaign to justify these attacks on hospitals.¹⁴⁷ By contrast, the United Nations acknowledged that Hamas and Israel engaged in intense armed conflict on the premises of al-Shifa in March 2024, yet it explicitly stated that the hospital remained a protected facility throughout that exchange of fire.¹⁴⁸ This determination indicates that Hamas had not utilized the hospital as a military base—or at least that Israel did not possess adequate evidence showing the hospital was being used for military purposes—thus enabling the hospital to retain its protected status.

The means which Israel uses to attack hospitals in Gaza exemplify a lack of proportionality, as well as a lack of distinction, as it repeatedly uses weapons causing a wide radius of harm in densely populated areas.¹⁴⁹ Although Israel has the means to conduct—and has in fact conducted—a ground invasion, its attacks have been

¹⁴⁵ *US Spends More Than \$20bn in Aid to Israel, Middle East Conflicts: Report*, AL JAZEERA (Oct. 7, 2024) (citing LINDA J. BILMES, WILLIAM D. HARTUNG & STEPHEN SEMLER, WATSON INST. FOR INT'L & PUB. AFFS., COSTS OF WAR PROJECT, UNITED STATES SPENDING ON ISRAEL'S MILITARY OPERATIONS AND RELATED U.S. OPERATIONS IN THE REGION, OCT. 7, 2023 – SEPT. 30, 2024, at 11 (2024), https://watson.brown.edu/costsofwar/files/cow/imce/papers/2023/2024/Costs%20of%20War_US%20Support%20Since%20Oct%20%20FINAL%20v2.pdf), <https://www.aljazeera.com/news/2024/10/7/us-spends-more-than-20bn-in-aid-to-israel-middle-east-conflicts-report> (estimating American military aid to Israel to be around \$250 billion adjusted for inflation since 1959). For further discussion of Israel's genocide in Gaza see generally, Amnesty Int'l, *'You Feel Like You Are Subhuman': Israel's Genocide Against Palestinians in Gaza*, MDE 15/8668/2024 (Dec. 5, 2024), <https://www.amnesty.org/en/documents/mde15/8668/2024/en/>.

¹⁴⁶ See, e.g., Michael D. Shear, *U.S. Says Hamas Operates out of Gaza Hospitals, Endorsing Israel's Allegations*, N.Y. TIMES (Nov. 14, 2023), <https://www.nytimes.com/2023/11/14/us/politics/hamas-hospitals-gaza-israel.html>.

¹⁴⁷ See, e.g., Matthew Rosenberg, Ronen Bergman, Aric Toler & Helmuth Rosales, *A Tunnel Offers Clues to How Hamas Uses Gaza's Hospitals*, N.Y. TIMES (Feb. 12, 2024), <https://www.nytimes.com/interactive/2024/02/12/world/middleeast/gaza-tunnel-israel-hamas.html> (stating that there is "substantial independent evidence that Hamas constructed a vast tunnel network across Gaza" and referencing "[c]lassified Israeli intelligence documents," "classified images," and "[s]enior Israeli defense officials, who spoke on the condition of anonymity to discuss intelligence matters"). Staff at the New York Times feel the paper's coverage has been biased. See Jeremy Scahill & Ryan Grim, *Leaked NYT Gaza Memo Tells Journalists to Avoid Words "Genocide," "Ethnic Cleansing," and "Occupied Territory,"* THE INTERCEPT (Apr. 15, 2024, 2:29 PM), <https://theintercept.com/2024/04/15/nyt-israel-gaza-genocide-palestine-coverage> (quoting anonymous New York Times journalists criticizing editorial directions to avoid terms that imply Israeli government actions are illegal even when internationally recognized as such).

¹⁴⁸ Rep. of the Indep. Int'l Comm'n of Inquiry, *supra* note 54, ¶ 93.

¹⁴⁹ Amnesty Int'l, *supra* note 145, at 14, 20, 31.

marked by aerial massacres.¹⁵⁰ Israel has used 2,000-pound bombs in the proximity of hospitals; a 120mm M830A1 HEAT-MP-T round shot from an Israeli tank was the weapon used to attack the ambulance the Israeli military itself gave permission to rescue Hind Rajab.¹⁵¹ A 2,000-pound bomb has the capacity to cause injury or death to a radius that amounts to an area of 58 soccer fields.¹⁵² The weapons used in these attacks are not proportionate to the perceived threat and indiscriminately kill civilians.

II. DETENTION OF MEDICAL PERSONNEL

Even in a case where Israel has correctly assumed that Hamas is conducting military operations inside a hospital, the doctors working inside the hospital who have exclusively performed healthcare duties do not lose the special protection afforded to them by IHL.¹⁵³ Customary international law requires that medical personnel be “protected in all circumstances.”¹⁵⁴ The customary protection of medical personnel protects those assigned to medical duties by a party to the conflict.¹⁵⁵ Civilian medical personnel, those assigned to medical duties by way of profession or volunteering, have similar protections extended to them under international law by Additional Protocol I, and in practice there is generally no distinction between different types of medical personnel.¹⁵⁶

¹⁵⁰ Rep. of the Special Comm. to Investigate Israeli Practices Affecting the Hum. Rts. of the Palestinian People & Other Arabs of the Occupied Territories, U.N. Doc. A/79/363, ¶ 34 (Sept. 20, 2024) (“By 10 December, the Israel Defense Forces reported conducting over 300 strikes daily, and by February 2024 they had used over 25,000 tonnes of explosives across the Gaza Strip, equivalent to two nuclear bombs.”); Evan Dyer, *Israel’s Gaza Bombing Campaign Is the Most Destructive of This Century, Analysts Say*, CBC NEWS (Dec. 30, 2023), <https://www.cbc.ca/news/politics/israel-gaza-bombing-hamas-civilian-casualties-1.7068647>; *Israel Begins Gaza Ground Operation, Kills 133 in Relentless Bombardment*, AL JAZEERA (May 18, 2025), <https://www.aljazeera.com/news/2025/5/18/children-among-over-100-palestinians-killed-in-israeli-barrage-across-gaza>.

¹⁵¹ Tamara Qiblawi, Allegra Goodwin, Gianluca Mezzofiore & Nima Elbagir, *‘Not Seen Since Vietnam’: Israel Dropped Hundreds of 2,000-Pound Bombs on Gaza, Analysis Shows*, CNN, <https://www.cnn.com/gaza-israel-big-bombs/index.html> (Dec. 22, 2023, 3:50 AM); *The Killing of Hind Rajab*, *supra* note 9.

¹⁵² Qiblawi et al., *supra* note 151.

¹⁵³ Scahill, *supra* note 130; *see* Additional Protocol I, *supra* note 94, art. 8, 12; CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 44, at 79.

¹⁵⁴ CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 44, at 79.

¹⁵⁵ *Id.*; Additional Protocol I, *supra* note 94, art. 8.

¹⁵⁶ CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 44, at 79 n.4 (citing numerous military manuals); *see* Additional Protocol I, *supra* note 94, art. 15.

Previous armed conflicts between Palestine and Israel in Gaza have been classified as IAC.¹⁵⁷ This classification rests on the ongoing occupation of territory rightfully belonging to Palestine by Israel and the 2012 UN designation of Palestine as non-member observer State.¹⁵⁸ There is some likelihood that instances of armed conflict with other groups in Gaza, such as the Palestinian Islamic Jihad, would not be considered IAC.¹⁵⁹ However, considering the current aggression on Gaza has largely been framed as a war between Hamas and Israel, it seems clear that the international community considers the current conflict to be primarily between Israel and Palestine since “the international community recognizes that Hamas is part of the Palestinian Government.”¹⁶⁰ Given this fact, the analysis of this Section will focus on the obligations of Israel in IAC to the medical personnel it detains from Gaza.

IHL envisions and approves of restricting the liberty of individuals during an armed conflict.¹⁶¹ The driving force for IHL's regulation of detention that occurs during IAC is the recognition that inherent in a state's sovereign right “to protect its territorial integrity” is the right to detain individuals that threaten that state's security.¹⁶² Part of the purpose in IHL's recognition of the power to detain by party to IAC is to ensure reciprocity in the humane treatment of the individuals who are detained by each respective party to hostilities.¹⁶³

The nature of national security relative to armed conflict is that essentially all measures taken by a party to hostilities can arguably be construed as necessary to

¹⁵⁷ THE WAR REPORT: ARMED CONFLICT IN 2014, at 70–71, 89–90 (Annyssa Bellal ed., 2015) (ebook) (“Israel and Palestine were engaged in an international armed conflict (IAC) in 2014 not only by virtue of Israel's continued military occupation of Palestinian territory but also because Palestine, which was accorded the status of non-member observer State in the UN by the UN General Assembly on 29 November 2012, can be considered as a State under international law.”).

¹⁵⁸ See *id.* at 88–90.

¹⁵⁹ *Id.* at 89–90; see Yahli Shereshevsky, *Armed Conflict Classification in the ICC Prosecutor's Request for Arrest Warrants—Between International Humanitarian Law and International Criminal Law*, JUST SECURITY (June 18, 2024), <https://www.justsecurity.org/96914/armed-conflict-classification-icc-palestine-situation-gaza/> (distinguishing Hamas as Gaza's “de facto government” with comprehensive territorial control from other armed groups that lack such governmental functions, noting different conflict classifications for other organized armed groups).

¹⁶⁰ THE WAR REPORT: ARMED CONFLICT IN 2014, *supra* note 157, at 88–90. See, e.g., S.C. Res. 2735, ¶¶ 1,6 (June 10, 2024) (characterizing the resolution as addressing ceasefire negotiations between the two primary parties to the conflict and reiterating the United Nation's “unwavering commitment to the vision of the two-State solution where two democratic States, Israel and Palestine, live side by side in peace”).

¹⁶¹ Zelalem Mogessie Teferra, *National Security and the Right to Liberty in Armed Conflict: The Legality and Limits of Security Detention in International Humanitarian Law*, 98 INT'L REV. RED CROSS 961, 965 (2016) (“The extant rules of IHL envision various forms of restriction to the liberty of persons existing in armed conflict situations, including security detention.”).

¹⁶² *Id.* at 969.

¹⁶³ *Id.*

protect that state's security.¹⁶⁴ The ability to exploit this becomes entirely realized in situations such as Israel's hostilities with Hamas. Countries such as the U.S., who exercise immense amounts of power in international bodies such as the U.N., consistently cosign Israel's purported need to defend itself, providing the shield necessary to continue actions the international community may deem unacceptable in other circumstances.¹⁶⁵

States are permitted to detain combatants during IAC, who are then considered prisoners of war once detained under the Third Geneva Convention.¹⁶⁶ The detaining state is not mandated to prove the detention of a prisoner of war is necessary for the security of the state; IHL assumes this necessity and does not require judicial review of such detentions.¹⁶⁷ Regardless of whether a detained individual is considered a prisoner of war or a civilian, humane treatment is mandated.¹⁶⁸

However, in regards to civilian detainees, states are required to show that the restriction of civilian liberty is necessary for the security of the state.¹⁶⁹ The Fourth Geneva Convention permits a state, when it is necessary to security, to detain protected individuals (such as medical personnel) as well as civilians.¹⁷⁰ States are permitted to carry out this detention in their own territory as well as territory they occupy so long as security considerations necessitate doing so.¹⁷¹ It is assumed that each party to an IAC is capable at an institutional level of treating detained individuals humanely, and that each party carry out some form of judicial process to ensure an individual is not being detained on an arbitrary basis.¹⁷² The extension of

¹⁶⁴ *Id.* at 962.

¹⁶⁵ See Creede Newton, *A History of the US Blocking UN Resolutions Against Israel*, AL JAZEERA (May 19, 2021), <https://www.aljazeera.com/news/2021/5/19/a-history-of-the-us-blocking-un-resolutions-against-israel> (documenting that since 1972, the United States has vetoed at least 53 U.N. Security Council resolutions critical of Israel, repeatedly citing Israel's right to self-defense); Ramona Wadi, *Israel's Criminal Responsibility is Shielded by Political Complicity*, MIDDLE E. MONITOR (Nov. 24, 2024, 10:02 AM), <https://www.middleeastmonitor.com/20241124-israels-criminal-responsibility-is-shielded-by-political-complicity> (arguing that Western states' political support enables Israel to evade accountability despite International Criminal Court arrest warrants for war crimes, with the U.S. categorically rejecting the court's decision and maintaining that the U.S. "will always stand with Israel against threats to its security").

¹⁶⁶ Teferra, *supra* note 161, at 965 (citing Geneva Convention Relative to the Treatment of Prisoners of War arts. 21, 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135).

¹⁶⁷ *Id.* at 966 (citing Geneva Convention Relative to the Protection of Civilian Persons, *supra* note 144, arts. 42, 78).

¹⁶⁸ See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 166, art. 13 ("Prisoners of war must at all times be humanely treated.").

¹⁶⁹ See Teferra, *supra* note 161, at 966.

¹⁷⁰ *Id.* (citing Geneva Convention Relative to the Protection of Civilian Persons, *supra* note 144, arts. 42, 78).

¹⁷¹ *Id.*

¹⁷² *Id.* at 969.

protection to civilian medical personnel is considered customary in international law, and although Israel has not signed Additional Protocol I, it is still obligated to protect civilian medical personnel.¹⁷³

Additional Protocol I defines the term medical personnel to mean:

[T]hose persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under sub-paragraph (e) or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or [temporary]. The term includes:

- (i) Medical personnel of a Party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;
- (ii) Medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;
- (iii) Medical personnel of medical units or medical transports described in Article 9, paragraph 2;¹⁷⁴

Sub-paragraph (e) states:

“Medical units” means establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment—including first-aid treatment—of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary[.]¹⁷⁵

The crux of this definition is the requirement that medical personnel must be undertaking duties related to medical care exclusively in order to qualify for the “specific protection” that this definition entitles them.¹⁷⁶ Medical personnel who engage in hostilities will no longer have the protection that engaging in medical duties exclusively affords them.¹⁷⁷ This provision specifically applies to medical personnel

¹⁷³ See Jill Goldenziel, *Israel's Actions Must Match Its Words on the Law of War*, FORBES, <https://www.forbes.com/sites/jillgoldenziel/2023/12/22/israels-actions-must-match-its-words-on-the-law-of-war> (Dec. 22, 2023, 5:23 PM) (discussing inconsistencies between Israel's stated positions on the applicability of IHL in a position paper and its conduct in Gaza).

¹⁷⁴ Additional Protocol I, *supra* note 94, art. 8.

¹⁷⁵ *Id.*

¹⁷⁶ CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 44, at 82.

¹⁷⁷ *Id.*

that have been assigned to their duties by a state that is a party to the conflict.¹⁷⁸ Article 15 enshrines the protection of civilian medical and religious personnel, stating:

1. Civilian medical personnel shall be respected and protected.
2. If needed, all available help shall be afforded to civilian medical personnel in an area where civilian medical services are disrupted by reason of combat activity.
3. The Occupying Power shall afford civilian medical personnel in occupied territories every assistance to enable them to perform, to the best of their ability, their humanitarian functions. The Occupying Power may not require that, in the performance of those functions, such personnel shall give priority to the treatment of any person except on medical grounds. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.
4. Civilian medical personnel shall have access to any place where their services are essential, subject to such supervisory and safety measures as the relevant Party to the conflict may deem necessary.¹⁷⁹

This definition enumerates the responsibility of parties to hostilities to ensure the protection of civilians who provide vital medical care during an armed conflict.¹⁸⁰ The text of Additional Protocol I indicates that whether hospital workers in Gaza are treating injured combatants or injured civilians, they enjoy a protected status so long as they are not actively taking part in hostilities or combat activity.

Further, Article 16 reinforces the protection of those performing medical duties by explicitly stating they may not be punished:

1. Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.
2. Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics or to other medical rules designed for the benefit of the wounded and sick or to the provisions of the Conventions or of this Protocol, or to refrain from performing acts or from carrying out work required by those rules and provisions.
3. No person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse Party, or to his own Party except as required by the law of the latter Party, any information concerning the wounded and sick who are, or who have been, under his care, if

¹⁷⁸ *Id.*

¹⁷⁹ Additional Protocol I, *supra* note 94, art. 15.

¹⁸⁰ CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 44, at 79.

such information would, in his opinion, prove harmful to the patients concerned or to their families. Regulations for the compulsory notification of communicable diseases shall, however, be respected.¹⁸¹

The protection of the right to perform medical duties also inherently protects the right of sick and injured civilians to receive medical treatment.¹⁸² Further, medical professionals do not lose the protection that IHL provides them even if they carry light individual weapons for self-protection.¹⁸³ Medical personnel may not use these weapons to engage in “acts harmful to the enemy” but are permitted to utilize them in defending themselves or their patients from unlawful attacks.¹⁸⁴

III. ISRAEL'S INCARCERATION OF UNLAWFUL COMBATANTS LAW (UCL)

Administrative detention conducted by Israel is governed by different laws depending on where the detainee resides:¹⁸⁵ detention of individuals living in the West Bank is governed by the Order Regarding Administrative Detention,¹⁸⁶ while detention of individuals from Gaza is governed by the Incarceration of Unlawful Combatants Law (UCL).¹⁸⁷ The UCL purportedly allows Israel, for national security purposes, to incarcerate foreign nationals whom it reasonably believes are either participating in hostilities aimed at Israel or are members of an entity carrying out such hostilities.¹⁸⁸ The Israeli Supreme Court has ruled that this law conforms with both Israeli Basic Laws (its version of constitutional law) and the LOAC as applied

¹⁸¹ Additional Protocol I, *supra* note 94, art. 16; *see also* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 44, at 86 (“Punishing a person for performing medical duties compatible with medical ethics or compelling a person engaged in medical activities to perform acts contrary to medical ethics is prohibited.”).

¹⁸² CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 44, at 87.

¹⁸³ *See id.* at 86 n.41 (citing numerous military manuals).

¹⁸⁴ *Id.* at 86; Marco Sassòli, *Joint Blog Series: Medical Care in Armed Conflict Part II*, INT’L COMM. OF THE RED CROSS: HUMANITARIAN L. & POL’Y (Jan. 24, 2019), <https://blogs.icrc.org/law-and-policy/2019/01/24/joint-blog-series-medical-care-armed-conflict-part-ii>.

¹⁸⁵ HAMOKED & B’TSELEM, WITHOUT TRIAL: ADMINISTRATIVE DETENTION OF PALESTINIANS BY ISRAEL AND THE INCARCERATION OF UNLAWFUL COMBATANTS LAW 5 (2009), https://www.btselem.org/sites/default/files/sites/default/files2/publication/200910_without_trial_eng.pdf.

¹⁸⁶ Military Order Regarding Administrative Detention (Judea and Samaria) (No. 1591), 5767-2007 (Isr.).

¹⁸⁷ Incarceration of Unlawful Combatants Law, 5762-2002, SH No. 1834 (Isr.) [hereinafter UCL].

¹⁸⁸ Dvir Saar & Ben Wahlhaus, *Preventive Detention for National Security Purposes in Israel*, 9 J. NAT’L SEC. L. & POL’Y 413, 433 (2018).

under the framework of IAC.¹⁸⁹ The Israeli Supreme Court considers the regulation of “unlawful combatants” to be concerning the detention of a section of population considered civilian.¹⁹⁰

While both doctors and international medical volunteers in Gaza have confirmed that they have not witnessed militant activity occurring in hospitals, Israel continuously accuses Hamas of operating out of them in order to justify targeting hospitals and kidnapping doctors.¹⁹¹ However, there has been no accusation that the medical workers in these hospitals are assigned their duties by Hamas; thus, they are civilian medical personnel.¹⁹² Those kidnapped from Gaza, including medical personnel, are largely held by Israel under authority ostensibly afforded by the UCL.¹⁹³ As of September 24, 2024, at least 128 healthcare workers were confined in arbitrary

¹⁸⁹ *Id.* at 433, 436 (citing CrimA 6659/06, *A v. Israel*, paras. 6–8, 11 (2008) (Isr. [hereinafter Iyyad]), available at <https://hamoked.org/files/2010/110551.pdf>).

¹⁹⁰ *Id.* at 439 (citing Iyyad, *supra* note 189, paras. 12–13).

¹⁹¹ Miriam Berger, *A Gaza Doctor's Fear: Displacement, Detention, or Death*, WASH. POST (Feb. 24, 2024), <https://www.washingtonpost.com/world/2024/02/24/gaza-doctors-fear-displacement-detention-or-death>.

¹⁹² See Marco Sassòli, *Joint Blog Series: Medical Care in Armed Conflict Part I*, INT'L COMM. OF THE RED CROSS: HUMANITARIAN L. & POL'Y (Jan. 24, 2019), <https://blogs.icrc.org/law-and-policy/2019/01/24/joint-blog-series-medical-care-armed-conflict-part-i/> (citing Additional Protocol I, *supra* note 94, arts. 8(c), 51(2)) (explaining that medical personnel who are “not assigned by a party to the conflict—such as ordinary doctors and nurses as well as the staff of medical NGOs—do not benefit from the special regime afforded to medical personnel under IHL” but “nevertheless remain civilians who may not be attacked”).

¹⁹³ *Individual Habeas Corpus Petitions to Locate Incarcerated Gazans Held Incommunicado and in Unknown Locations by Israeli Forces*, HAMOKED (Apr. 14, 2024) [hereinafter *Individual Habeas Corpus Petitions*], <https://hamoked.org/document.php?dID=Updates2401>; Berger, *supra* note 191 (“Israel has detained hundreds, perhaps thousands, of civilians and combatants in Gaza and has held them without charge inside Israel in a secretive legal framework that rights groups say is ripe for abuse. Released civilian detainees have told The Post they were subjected to physical and psychological violence, blindfolded and forced to kneel all day, and denied access to lawyers. Israel reserves the authority to hold Gazans without charge under the 2002 Unlawful Combatants Law, a form of administrative detention that rights groups say violates international law. Israel was holding 606 undisclosed Gazans under the law as of Feb. 1, according to the Israeli rights group Hamoked.”); PUB. COMM. AGAINST TORTURE IN ISR., INCARCERATION OF UNLAWFUL COMBATANTS LAW (AMENDMENT 4 AND TEMPORARY PROVISION – IRON SWORDS), 2023, at 1 (2024), https://stop torture.org.il/wp-content/uploads/2024/02/Incarceration-of-Unlawful-Combatants-Law_February-2024.pdf (explaining that through discussion of an amendment to the UCL in 2023, “it became apparent that Israel is holding some 2,000 detainees from the Gaza Strip”).

administrative detention.¹⁹⁴ Israel has killed at least three physicians while holding them in administrative detention.¹⁹⁵

The UCL has been condemned by international human rights organizations such as Amnesty International and Human Rights Watch as a violation of human rights.¹⁹⁶ The UCL was also recently revised by the Israeli Knesset in its Amendment 4 and Temporary Provision – Iron Swords, which was adopted on December 18, 2023, and in effect until November 2024.¹⁹⁷ Prior to this amendment, the United Nations Committee Against Torture, in its fifth periodic report on Israel, urged the country to “[t]ake the measures necessary to repeal the Incarceration of Unlawful Combatants Law.”¹⁹⁸

The UCL purports to provide a procedural framework for detention that respects the rights required to detained individuals under international law; however, the UCL permits detention without charge, based on secret evidence, for an indefinite and unlimited amount of time.¹⁹⁹ The temporary amendment passed by the Israeli Knesset on December 18, 2023, Amendment No. 4 and Temporary Provision – Iron Swords (Amendment No. 4), significantly aggravated the likelihood for horrid treatment of detainees who are confined under the authority of the UCL.²⁰⁰

Amendment No. 4 extended the maximum amount of time an individual can be confined before the Israeli government is required to present the individual with

¹⁹⁴ Press Release, U.N. Off. of the High Comm’r for Hum. Rts., UN Expert Shocked by Death of Another Palestinian Doctor in Israeli Detention (Sept. 24, 2024), <https://www.ohchr.org/en/press-releases/2024/09/un-expert-shocked-death-another-palestinian-doctor-israeli-detention>.

¹⁹⁵ See *id.*

¹⁹⁶ *Gaza: ‘Unlawful Combatants Law’ Violates Rights*, HUM. RTS. WATCH (Mar. 1, 2017, 12:00 AM), <https://www.hrw.org/news/2017/03/01/gaza-unlawful-combatants-law-violates-rights>; *Israel Must End Mass Incommunicado Detention and Torture of Palestinians from Gaza*, AMNESTY INT’L (July 18, 2024) [hereinafter *Israel Must End Mass Incommunicado Detention and Torture*], <https://www.amnesty.org/en/latest/news/2024/07/israel-must-end-mass-incommunicado-detention-and-torture-of-palestinians-from-gaza>; Miriam Berger & Hajar Harb, *Gazan Prisoners Describe Abuse at Secretive Israeli Detention Sites*, WASH. POST (Jan. 11, 2024), <https://www.washingtonpost.com/world/2024/01/11/gaza-detainees-israel-prisons-hamas>.

¹⁹⁷ PUB. COMM. AGAINST TORTURE IN ISR., *supra* note 193, at 1.

¹⁹⁸ U.N. Comm. Against Torture, Concluding Observations on the Fifth Periodic Report of Israel, ¶ 23(b) U.N. Doc. CAT/C/ISR/CO/5 (June 3, 2016).

¹⁹⁹ ADDAMEER, *ESCALATING OPPRESSION: ISRAEL’S SYSTEMATIC VIOLATIONS INTENSIFY IN PALESTINE POST-OCTOBER 7, 2023*, at 30 (2024), <https://addameer.ps/sites/default/files/publications/Full%20Report%20on%20the%20situation%20after%20October%207th.pdf>.

²⁰⁰ See Ruth Levush, *Israel: Parliament Adopts Law Expanding Authority to Detain Unlawful Combatants During Wartime or Significant Military Action*, LIBR. OF CONG.: GLOB. LEGAL MONITOR (Jan. 25, 2024), <https://www.loc.gov/item/global-legal-monitor/2024-01-24/israel-parliament-adopts-law-expanding-authority-to-detain-unlawful-combatants-during-wartime-or-significant-military-action>; *Individual Habeas Corpus Petitions*, *supra* note 193.

a detention order from 96 hours to 45 days, so long as an officer with a rank of major or higher approves after 30 days.²⁰¹ The amendment lengthened the permitted maximum period before judicial review is mandated from two weeks to 75 days.²⁰² The amendment also prevents confined individuals from meeting with their attorneys for at least 90 days, with reports of detainees being held without legal assistance longer than 90 days.²⁰³ HaMoked, a Palestinian prisoner's rights NGO based in Israel, warned that this policy could be considered enforced disappearance.²⁰⁴ Enforced disappearance is defined as the deprivation of liberty, typically in the form of detention, arrest, or abduction, approved by government officials who refuse to acknowledge that the individual has been deprived of their liberty or conceal the conditions and location of the disappeared individual.²⁰⁵

Detainees are initially held in military detention facilities under the approval of military officers, who must have "reasonable cause" to believe that an individual being detained is an "unlawful combatant."²⁰⁶ Defending against alleged "reasonable cause" is made incredibly difficult for detainees due to the fact that the evidence the detention is based on is, in the overwhelming majority of cases, declared to be privileged by the judge and not made available to the detainee or their attorney.²⁰⁷ While an Israeli military Chief of Staff was previously the lowest rank permitted to issue arrest orders under the UCL, Amendment No. 4 lowered the rank necessary so an Israeli military official is now qualified to sign off on the detention of a particular individual in an effort to issue arrest orders more quickly and frequently.²⁰⁸

Prior to this amendment, which clearly has negative implications regarding the liberty of detainees, Israel was urged by the United Nations Committee against Torture in 2016 to repeal the UCL.²⁰⁹ The report stressed the potential for individuals

²⁰¹ *Individual Habeas Corpus Petitions*, *supra* note 193; Levush, *supra* note 200.

²⁰² *Individual Habeas Corpus Petitions*, *supra* note 193; Levush, *supra* note 200.

²⁰³ *Individual Habeas Corpus Petitions*, *supra* note 193.

²⁰⁴ *Id.*

²⁰⁵ U.N. Off. of the High Comm'r for Hum. Rts., Working Grp. on Enforced or Involuntary Disappearances, About Enforced Disappearance, <https://www.ohchr.org/en/special-procedures/wg-disappearances/about-enforced-disappearance> (last visited Aug. 7, 2025).

²⁰⁶ See Saar & Wahlhaus, *supra* note 188, at 339–440 (citing UCL, *supra* note 187, § 3(b)(1)).

²⁰⁷ *Israel Must End Mass Incommunicado Detention and Torture*, *supra* note 196; HAMOKED & B'TSELEM, *supra* note 185, at 19 ("The central problem with the implementation of the judicial review on administrative detention orders is that in the vast majority of cases, the judges adopt the prosecution's position regarding the need to declare evidence as privileged on grounds of state security. In doing so, the judges turn the exception specified in the Administrative Detention Order into a sweeping rule that enables the fundamental evidentiary material to be declared privileged, preventing the detainees from any possibility of defending themselves against the allegations.").

²⁰⁸ See ADDAMEER, *supra* note 199, at 30; Saar & Wahlhaus, *supra* note 188, at 439–41.

²⁰⁹ U.N. Comm. Against Torture, *supra* note 198, ¶ 23(b).

to be “deprived of basic legal safeguards” when detained under the UCL.²¹⁰ The report further urged Israel to end its practices of administrative detention.²¹¹

In February 2024, the Public Committee Against Torture in Israel published a report regarding the implications of Amendment No. 4.²¹² According to the Israeli military, many individuals kidnapped from Gaza are transported into Israel and incarcerated at Sde Teman Military base in the Negev desert.²¹³ Following preliminary questioning at Sde Teman, detained Palestinians from Gaza are either released back into the dire conditions of the Gaza Strip or transferred to the Israel Prison Service (IPS).²¹⁴ Testimony of incarcerated individuals shows that many of the individuals being detained are not involved in hostilities.²¹⁵ A stark example of an individual kidnapped from Gaza who was obviously not involved in hostilities is the 82-year-old woman who suffered from Alzheimer's disease and was held for two months at Damun Prison “as an ‘unlawful combatant’ without access to an attorney.”²¹⁶ The location of detained individuals is not disclosed to the detainee's family, and they may be held for 45 days without any formal accusation that they were involved in combat.²¹⁷ The testimony of these detained individuals describes conditions eerily similar to those described by individuals detained at Guantánamo Bay.²¹⁸

To describe the conditions of those taken from Gaza and detained by Israel as torturous would be an understatement. Palestinian detainees report being bound and forced to sit in demeaning positions; confinement in animal cages; sexual abuse, including strip searches, forced nudity and other threats of sexual torture; being attacked by dogs; being denied access to food and restrooms; and severe beatings.²¹⁹

²¹⁰ *Id.* ¶ 22.

²¹¹ *Id.* ¶ 23(a).

²¹² See generally PUB. COMM. AGAINST TORTURE IN ISR., *supra* note 193.

²¹³ *Id.* at 2; see Mansoor Adayfi, Opinion, *Israel's Sde Teiman Is So Similar to Guantanamo for a Reason*, AL JAZEERA (July 4, 2024), <https://www.aljazeera.com/opinions/2024/7/4/israels-sde-teiman-is-so-similar-to-guantanamo-for-a-reason>.

²¹⁴ PUB. COMM. AGAINST TORTURE IN ISR., *supra* note 193, at 2.

²¹⁵ *Id.*

²¹⁶ *Id.* at 2–3; Amira Hass, *Israel Held 82-Year-Old Gaza Woman with Alzheimer's for Two Months as an 'Unlawful Combatant'*, HAARETZ (Feb. 1, 2024), <https://www.haaretz.com/israel-news/2024-02-01/ty-article.premium/israel-held-gaza-woman-82-with-alzheimers-for-two-months-as-an-unlawful-combatant/0000018d-613a-de6e-a79f-73bbc94d0000>.

²¹⁷ PUB. COMM. AGAINST TORTURE IN ISR., *supra* note 193, at 2; Hass, *supra* note 216.

²¹⁸ See Adayfi, *supra* note 213 (comparing detention conditions at Sde Teiman and Guantanamo Bay based on detainee accounts from both facilities).

²¹⁹ *Satellite Images Show Massive Expansion of the Israeli Sde Teman Detention Camp*, PALESTINIAN INFO. CTR. (Mar. 18, 2024) [hereinafter *Satellite Images Show Massive Expansion*], <https://english.palinfo.com/reports/2024/03/18/316060>; *New Testimonies Detail Torture and Abuse of Gazan Detainees in Israeli Jails, Detention Centres*, EURO-MED HUM. RTS. MONITOR (Feb. 6, 2024) [hereinafter *New Testimonies Detail Torture and Abuse*], <https://euromedmonitor.o>

Women detainees describe being forced to remove their hijabs and sexual abuse in the form of Israeli soldiers touching their genitals or threatening to assault or rape them.²²⁰ As of March 2024, at least 27 Palestinians have been killed while incarcerated at Sde Teman since October 2023.²²¹

Dubbed “Israel’s Guantanamo,” the military camp and airbase Sde Teman has been rapidly expanded and transformed into a detention center and interrogation/torture facility.²²² A whistleblowing doctor who has treated detainees at Sde Teman told the Israeli newspaper Haaretz that it had become routine for detainees to be forced to have their legs or hands amputated because of injuries from the handcuffs they are forced to wear 24 hours a day on all four limbs.²²³ The doctor stated that over half of the injuries sustained by detainees that led to them being treated at the hospital in Sde Teman were due to the handcuffs.²²⁴ The doctor described the conditions of the detainees, stating that they “are fed through straws, defecate in diapers, and are held in constant restraints”²²⁵ The doctor alleged that these torturous conditions do not legally comply with the medical requirements laid out in the UCL.²²⁶

IV. POTENTIAL WAR CRIMES UNDER THE ROME STATUTE

Israel’s actions in attacking hospitals likely constitute war crimes, as does its practice of abducting and abusing medical personnel.

rg/article/6138/New-testimonies-detail-torture-and-abuse-of-Gazan-detainees-in-Israeli-jails,-detention-centres; More Than a Human Can Bear, *supra* note 16, ¶ 122.

²²⁰ *New Testimonies Detail Torture and Abuse*, *supra* note 219; More Than a Human Can Bear, *supra* note 16, ¶¶ 124–26 (“Female detainees were also subjected to sexual assault and harassment in military and Israel Prison Service facilities, as well as threats to their lives. The sexual assault and harassment included kicking the women’s genitals, touching their breasts, attempting to kiss them, and threats of rape.”).

²²¹ *Satellite Images Show Massive Expansion*, *supra* note 219 (citing Hagar Shezaf, 27 Gaza Detainees Died in Custody at Israeli Army Facilities Since the Start of the War, HAARETZ (Mar. 7, 2024), <https://www.haaretz.com/israel-news/2024-03-07/ty-article/.premium/27-gaza-detainees-died-in-custody-at-israeli-army-facilities-since-the-start-of-the-war/0000018e-1322-d950-a18e-f3bbaa370000>).

²²² *Id.*

²²³ Hagar Shezaf & Michael Hauser Tov, *Doctor at Israeli Field Hospital for Detained Gazans: ‘We Are All Complicit in Breaking the Law,’* HAARETZ (Apr. 4, 2024), <https://www.haaretz.com/israel-news/2024-04-04/ty-article.premium/doctor-at-idf-field-hospital-for-detained-gazans-we-are-all-complicit-in-breaking-law/0000018e-a59c-dfed-ad9f-afdfb5ce0000>.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

A. *Targeting Hospitals*

According to the Rome Statute of the International Criminal Court (ICC), Article 8, which defines war crimes, a party engaged in IAC commits a war crime if it “[i]ntentionally direct[s] attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;” or “[i]ntentionally direct[s] attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.”²²⁷ Article 5 of the Rome Statute confirms that prosecuting persons who commit war crimes is within the jurisdiction of the ICC.²²⁸

Kenneth Roth, the former executive director of Human Rights Watch, argues:

There is a particularly cruel circular logic at play here: Israeli forces, as they bomb and besiege Gaza, are creating an urgent need for medical care among civilians while simultaneously denying them access to it. . . . Israel’s destruction of Gaza’s health care system is not only an important part of the genocide charges—it is also a blatant war crime that should be prosecuted outright by the International Criminal Court (ICC)²²⁹

Hospitals have been targeted since the outset of hostilities in October.²³⁰ Whether Hamas previously used medical facilities is irrelevant to Israel’s duty to respect medical facilities.²³¹ Hospitals do not lose the protection afforded to them by international humanitarian law unless they are currently being used to engage in acts harmful to the opposing party to the armed conflict; past threat is not sufficient, the threat must be current.²³²

Because hospitals are protected institutions, for an attack on a hospital to be in conformance with international law, it cannot harm civilians unless the harm is proportional to some anticipated military advantage.²³³ In the case that a military advantage was anticipated to result from an attack on a hospital, if an attack causes civilian harm that clearly exceeds any possible military advantage, the ICC has jurisdiction to prosecute such an attack.²³⁴ Although Israel is not a member of the ICC, Palestine became a member in 2015, thus granting jurisdiction over IAC

²²⁷ Rome Statute of the International Criminal Court art. 8(2)(b)(ix), (xxiv), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

²²⁸ *Id.* art. 5.

²²⁹ Sparrow & Roth, *supra* note 43.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*; see also *supra* Section I.B.

²³⁴ *Id.*; see Rome Statute, *supra* note 227, art. 5.

between the two parties.²³⁵ Further, in the case that a hospital actually is being utilized for military purposes, any attack on that hospital should be preceded by a warning that affords adequate time for individuals inside to evacuate.²³⁶ An attack is only permitted after such a warning has been ignored.²³⁷

After the first siege and invasion of al-Shifa in November 2023, the only evidence Israel presented to prove that Hamas maintained a military command center under the hospital was a few rifles and one tunnel which may have been built to access the bunker Israel built underneath al-Shifa.²³⁸ Israel did not produce any evidence that showed tunnels could be reached from inside al-Shifa.²³⁹ Video evidence of the rooms underneath the hospital bore no indication of being used for command, control, or even habitation.²⁴⁰ Israel has also prevented international news agencies and journalists from independently verifying the evidence it presents.²⁴¹

The evidence that attacking hospitals is a routine policy of Israel's has become overwhelming given that at least the al-Ahli Hospital, the Turkish-Palestinian Friendship Hospital, the Indonesian Hospital, the al-Quds Hospital, and the International Eye Care Center have all faced fates similar to al-Shifa, according to Human Rights Watch.²⁴² Rather than warning hospitals specifically, Israeli forces call

²³⁵ ICC: *Palestine Is Newest Member*, HUM. RTS. WATCH (Apr. 1, 2015, 2:45 AM), <https://www.hrw.org/news/2015/04/01/icc-palestine-newest-member>; Eve Sampson & Marlise Simons, *Israel Is Not an I.C.C. Member: How Can the Court Prosecute Israeli Leaders?*, N.Y. TIMES (Nov. 22, 2024), <https://www.nytimes.com/2024/11/22/world/middleeast/israel-icc-jurisdiction-on-explained.html>; *How the Court Works*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works> (last visited Aug. 7, 2025).

²³⁶ Sparrow & Roth, *supra* note 43 (citing Int'l Comm. of the Red Cross, *Rule 28. Medical Units and Transports*, INT'L HUMANITARIAN L. DATABASES, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule28> (last visited Aug. 7, 2025)).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Loveluck et al., *supra* note 130.

²⁴⁰ *Id.*

²⁴¹ Hafiz Rashid, *Press Asks What Israel Doesn't "Want International Journalists to See,"* NEW REPUBLIC (Apr. 8, 2024, 1:24 PM), <https://newrepublic.com/post/180527/journalists-slam-israel-restricting-press-gaza>; see also *Israel: New Law Allows Government to Temporarily Shut Down Al Jazeera*, INT'L FED. OF JOURNALISTS (Apr. 2, 2024), <https://www.ifj.org/media-centre/news/detail/category/middle-east-arab-world/article/israel-new-law-allows-government-to-temporarily-shut-down-al-jazeera>.

²⁴² *Gaza: Unlawful Israeli Hospital Strikes Worsen Health Crisis*, HUM. RTS. WATCH (Nov. 14, 2023, 12:00 AM), <https://www.hrw.org/news/2023/11/14/gaza-unlawful-israeli-hospital-strikes-worsen-health-crisis> ("Human Rights Watch investigated attacks on or near the Indonesian Hospital, al-Ahli Hospital, the International Eye Care Center, the Turkish-Palestinian Friendship Hospital, and the al-Quds Hospital between October 7 and November 7. Human Rights Watch spoke by phone with two displaced people sheltering in hospitals and 16 healthcare workers and hospital officials in Gaza and analyzed and verified open-source data, including videos posted to social media and satellite imagery, as well as WHO databases. Israeli forces struck the

for the evacuation of whole regions of Gaza, without providing a safe passage or location for civilians or patients to travel to.²⁴³ Importantly, the U.N. Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, found that "Israel has implemented a concerted policy to destroy the health-care system of Gaza."²⁴⁴

On November 21, 2024, the ICC issued arrest warrants for Benjamin Netanyahu, the Prime Minister of Israel, and Yoav Gallant, Israel's Minister of Defense.²⁴⁵ These warrants were issued in accordance with the law of international armed conflict and international humanitarian law.²⁴⁶ The warrants allege the two Israeli leaders each "bear criminal responsibility" for multiple war crimes, including the crime of directing an attack against the civilian population.²⁴⁷ The ICC found that the conduct of Netanyahu and Gallant "had a severe impact on the availability of water in Gaza and the ability of hospitals to provide medical care."²⁴⁸

Indonesian Hospital multiple times between October 7 and October 28, killing at least two civilians. The International Eye Care Center was struck repeatedly and completely destroyed after a strike on October 10 or 11. Strikes hit the compound and vicinity of the Turkish-Palestinian Friendship Hospital on October 30 and 31. Damage to the hospital as well as a lack of fuel for hospital generators resulted in its closure on November 1. Repeated Israeli strikes damaged the al-Quds Hospital and injured a man and child out front. Israeli forces on several occasions struck well-marked ambulances, killing and wounding at least a dozen people in one incident on November 3, including children, outside al-Shifa hospital. These ongoing attacks are not isolated. Israeli forces have also carried out scores of strikes damaging several other hospitals across Gaza. WHO reported that as of November 10, 18 out of 36 hospitals and 46 out of 72 primary care clinics were forced to shut down. The forced closure of these facilities stems from damage caused by attacks as well as the lack of electricity and fuel."); Sparrow & Roth, *supra* note 43; see U.N. Off. of the High Comm'r for Hum. Rts., Thematic Report: Attacks on Hospitals During the Escalation of Hostilities in Gaza (7 October 2023 – 30 June 2024), ¶ 1 (Dec. 31, 2024), <https://www.ohchr.org/sites/default/files/documents/countries/opt/20241231-attacks-hospitals-gaza-en.pdf> (documenting that "[t]his pattern has led to the destruction of most hospitals in Gaza" and that "[a]ttacks on hospitals were reported in each of the areas in which the Israeli military conducted ground operations").

²⁴³ Sparrow & Roth, *supra* note 43; Amnesty Int'l, *supra* note 145, at 137 (discussing the evacuation orders issued during the initial ground invasion).

²⁴⁴ Rep. of the Indep. Int'l Comm'n of Inquiry, *supra* note 54, ¶ 89.

²⁴⁵ Press Release, Int'l Crim. Ct., Situation in the State of Palestine: ICC Pre-Trial Chamber I Rejects the State of Israel's Challenges to Jurisdiction and Issues Warrants of Arrest for Benjamin Netanyahu and Yoav Gallant (Nov. 21, 2024) [hereinafter Situation in the State of Palestine], <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

There is no discernable military advantage from attacking these hospitals, given the lack of evidence that hospitals were being used for military operations.²⁴⁹ That, coupled with the ample evidence that attacks on the hospitals caused devastating harm to civilians who had an increased need for medical care, indicates that Israel violated Article 8 of the Rome Statute by intentionally attacking hospitals and other medical units including ambulances and personnel.²⁵⁰ While intentionally attacking hospitals and other medical units, including ambulances and personnel, is not one of the specific grounds named in the ICC's arrest warrant, it is a step in the right direction for international accountability that warrants were issued on at least some necessary grounds.²⁵¹ The ICC has the jurisdiction to—and for the sake of the integrity of international law must—investigate and prosecute the Israeli officials responsible for the policy of routinely targeting hospitals and other healthcare infrastructure.²⁵² If Israel is not held accountable for its intentional destruction of Gaza's health infrastructure, it will become common practice during armed conflict to target medical institutions and deprive civilians of medical care.

Apart from the actions that the ICC must undertake, Israel's largest military financial backer, the United States, must also take action to prevent Israel's impunity in targeting hospitals.²⁵³ So long as the United States refuses to limit military aid and weapons sales to Israel, its attacks on medical infrastructure will continue.²⁵⁴ In fact, U.S. diplomatic cover for Israel in the face of ICC arrest warrants being issued for two of its most senior officials has empowered Israel to continue to attack

²⁴⁹ Sparrow & Roth, *supra* note 43 (“Israel has tried to defend its attacks on health care facilities by blaming Hamas for turning them into legitimate military targets, but given the paucity of evidence, the ICJ understandably found that excuse wanting.”).

²⁵⁰ See *id.*; Rome Statute, *supra* note 227, art. 8(2)(b)(ix), (xxiv).

²⁵¹ See Situation in the State of Palestine, *supra* note 245.

²⁵² Cf. S.C. Res. 2286, ¶ 7 (May 3, 2016) (“*Stressing* that the fight against impunity and to ensure accountability for war crimes and other serious violations of international humanitarian law has been strengthened through the work on and prosecution of these crimes in the international criminal justice system, and in this regard *reiterating* the importance of State cooperation with international courts and tribunals in accordance with States’ respective obligations[.]”).

²⁵³ *How Big Is Israel's Military and How Much Funding Does It Get from the US?*, AL JAZEERA (Oct. 11, 2023), <https://www.aljazeera.com/news/2023/10/11/how-big-is-israels-military-and-how-much-funding-does-it-get-from-the-us>; Victoria Kim, *Which Countries Are the Biggest Suppliers to Israel's Military?*, N.Y. TIMES (Apr. 10, 2024), <https://www.nytimes.com/2024/04/10/world/middleeast/israel-weapons-suppliers-us-germany-italy.html> (noting that from 2019 to 2023, 69 percent of Israel's arms imports were supplied by the United States).

²⁵⁴ See Urooba Jamal, *Why Does Israel Target Palestinian Hospitals? Psyops, Say Analysts*, AL JAZEERA (Nov. 20, 2023), <https://www.aljazeera.com/features/2023/11/20/why-does-israel-target-palestinian-hospitals-psyops-say-analysts>.

medical institutions, both in Gaza and now in Lebanon.²⁵⁵ The executive director of Amnesty International, Paul O'Brien, urged the U.S. government to stop giving Israel weapons in the face of overwhelming evidence that it has committed war crimes.²⁵⁶

Under any working definition of proportionality, the complete destruction of the largest hospital in Gaza is clearly an excessive response to any potential military advantage Hamas gained by supposedly using the hospital and tunnels underneath for military purposes and rendering the facility "dual use." If there is a scenario in which it is justified to destroy the largest hospital in Gaza, one that serves a trapped population, including over 100,000 people injured by the same armed conflict that destroyed said hospital, the international community must reckon with the failure of international law to protect the principle of medical neutrality.²⁵⁷ It seems unlikely that by any measure of the word, especially during a ground invasion by a supposedly advanced military, completely destroying al-Shifa was proportionate to any potential military gains.

B. *Unlawful Detention and Torture*

Article 8 of the Rome Statute of the International Criminal Court includes unlawful confinement, as well as inhumane treatment or torture in the definition of war crimes.²⁵⁸ Under Article 7, widespread torture is considered a crime against humanity, as well as widespread enforced disappearance of persons.²⁵⁹ Torture under Article 7 is defined as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in

²⁵⁵ See *Israel's Yoav Gallant Welcomed to White House Despite ICC Arrest Warrant for Crimes Against Humanity*, DEMOCRACY NOW! (Dec. 11, 2024), https://www.democracynow.org/2024/12/11/headlines/israels_yoav_gallant_welcomed_to_white_house_despite_icc_arrest_warrant_for_crimes_against_humanity; see also Goodwin & Qiblawi, *supra* note 129 (describing Israeli attacks on Lebanese medical infrastructure).

²⁵⁶ Press Release, Amnesty Int'l, *Amnesty International Demands U.S. Suspension of Weapons Transfer to Government of Israel* (Apr. 4, 2024), <https://www.amnestyusa.org/press-releases/amnesty-international-demands-u-s-suspension-of-weapons-transfer-to-government-of-israel>.

²⁵⁷ *OPT Emergency Situation Update Issue 52*, *supra* note 48, at 1; Aya Batrawy & Omar El Qattaa, *Here's What We Found After Israel's Raid on Al-Shifa, Gaza's Biggest Hospital*, NPR (Apr. 6, 2024, 5:02 AM), <https://www.npr.org/2024/04/06/1243045199/al-shifa-hospital-gaza-israel-raid-before-aftermath>.

²⁵⁸ Rome Statute, *supra* note 227, art. 8(2)(a)(ii), (vii).

²⁵⁹ *Id.* art. 7(1)(f), (i).

or incidental to, lawful sanctions.”²⁶⁰ Article 8 prohibits unlawful confinement and outlaws willfully depriving detainees of the right to a fair and regular trial.²⁶¹

While unlawful confinement and inhumane treatment are related and have similar elements, they are separate war crimes under the Rome Statute. The elements of the war crime of unlawful confinement pursuant to Article 8 are:

1. The perpetrator confined or continued to confine one or more persons to a certain location.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.²⁶²

The elements of the war crime of inhumane treatment pursuant to Article 8 are:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.²⁶³

The practices of Israel in detaining Palestinians from Gaza under the UCL implicate both war crimes. Medical services, including those who provide and need them, are protected under the Geneva Conventions of 1949.²⁶⁴ The protection afforded by the Geneva Conventions make clear that detention should only occur in

²⁶⁰ *Id.* art. 7(2)(e).

²⁶¹ *Id.* art. 8(2)(a)(vi), (vii).

²⁶² INT’L CRIM. CT., ELEMENTS OF CRIMES 11–12 (2013).

²⁶³ *Id.* at 10.

²⁶⁴ *Persons Protected Under IHL*, INT’L COMM. OF THE RED CROSS (Oct. 29, 2010), <https://www.icrc.org/en/document/persons-protected-ihl> (discussing the treaty-codified and customary IHL principles that protect medical personnel).

cases where it is an absolute security necessity.²⁶⁵ Israel claims that it does not intentionally detain doctors, and only detains “suspects of terrorist activities.”²⁶⁶ However, the U.N. Human Rights Office reported that Israeli military raids on hospitals frequently resulted in enforced disappearances and mass detention, casting doubt on the claim that Israel is carefully scrutinizing who it detains.²⁶⁷ This torturous confinement is taking place during an IAC. It is without dispute that individuals are being confined and that Israel is aware that it is a party to an armed conflict.

A detention becomes unlawful when the party detaining individuals does not afford detainees with fundamental procedural rights afforded to them by the Geneva Conventions.²⁶⁸ The routine detention of individuals, including doctors and other civilians, without access to the evidence that provides the basis for their detention cannot be reconciled with the right of detainees to be informed as to why they are being detained.²⁶⁹ Even before Amendment No. 4, which further restricts the liberty of detainees, the U.N. warned that the UCL was not a lawful mechanism by which to detain people.²⁷⁰ The reported conditions of detainees held at Sde Teman and other Israeli prisons clearly describe inhumane treatment of the individuals confined there, inflicting severe suffering by way of physical and mental torture.²⁷¹

CONCLUSION

Israel has repeatedly attacked medical infrastructure and personnel providing care within such infrastructure and has provided no reasonable justification for such attacks, in gross violation of international law. Israel has also abducted and confined medical personnel without adequate procedural safeguards which violates international law and has held these detainees in conditions which violate international law. The impunity afforded to Israel by the international community has enabled it to carry out these repeated attacks.

²⁶⁵ Knut Dörmann, *War Crimes Under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes*, 7 MAX PLANCK Y.B. U.N. L. 341, 375–76 (2003).

²⁶⁶ Sankar, *supra* note 53 (referencing Israeli military’s written response to inquiry from journalists).

²⁶⁷ *Id.* (citing U.N. Hum. Rts. Off. in Occupied Palestinian Territory, *Statement on the Killing and Arbitrary Detention of Health Workers in Gaza* (June 25, 2024), <https://www.un.org/unispal/document/statement-gaza-ohchr-25jun24>).

²⁶⁸ See Dörmann, *supra* note 265, at 375–76.

²⁶⁹ See Teferra, *supra* note 161, at 987.

²⁷⁰ U.N. Comm. Against Torture, *supra* note 198, ¶¶ 22–23.

²⁷¹ Press Release, U.N. Off. of the High Comm’r for Hum. Rts., *Israel’s Escalating Use of Torture Against Palestinians in Custody a Preventable Crime Against Humanity: UN Experts* (Aug. 5, 2024), <https://www.ohchr.org/en/press-releases/2024/08/israels-escalating-use-torture-against-palestinians-custody-preventable>. See, e.g., *Doctor from Gaza’s al-Shifa Hospital Dies in Israeli Prison*, *supra* note 12; Masoud & Mustafa, *supra* note 27; Shezaf & Tov, *supra* note 223.

For the sake of the integrity of international law, and the integrity of individual liberty, the global community must enforce the arrest warrants issued by the ICC, and the ICC must prosecute the Israeli officials responsible for their policies of targeting medical infrastructure, unlawful confinement, and inhumane treatment.