UN Premises as "Cities of Refuge": The Silence of the Laws of War

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Introduction

The shelling of UNRWA schools in Beit Hanoun, Gaza City, Deir al-Balah, Jabalia, and Rafah during Operation Protective Edge is only the latest in a series of attacks on UN premises in recent decades. They were preceded by the bombing of schools in Gaza City, Khan Yunis, Beit Lahia, and the Jabalia refugee camp; of the UNRWA Health Center in Bureij and UNRWA offices in Gaza City during Operation Cast Lead; the bombing of a UNIFIL observation post in Khiam in southern Lebanon during the Second Lebanon War, and the shelling of the UNIFIL compound in Qana in southern Lebanon during Operation Grapes of Wrath. In nearly all of these incidents and in almost identical circumstances, Israeli forces were fired upon from a launching position of Hizbollah or Hamas in the vicinity of UN premises (and in some cases, arguably from within[1]). UN premises were used during the attacks not only by the Organization, but also by thousands of civilians seeking refuge. In most cases, the evacuation of civilians to UN premises was done under instructions or with the knowledge of IDF authorities, and in some cases, Israel admitted its error, launched an investigation,[2] and without admitting liability paid compensation to the UN or the victims' families.

The vulnerability of UN premises in conflict areas, and the flight of civilian populations to these premises, is not unique to combat areas in Gaza and southern Lebanon. In Rwanda, Srebrenica, and East Timor in the 1990s, and since the 2000s in the Congo, Sudan (Darfur), South Sudan, and the Central African Republic, national, ethnic, and religious minorities

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have sought refuge in UN compounds, although in many of these cases, their concentration on these premises made them easy targets for attack.

The transformation of UN premises in areas of conflict into small scale "cities of refuge," and the growing number of attacks and victims on those premises require a reconsideration of the scope of legal protection afforded and necessary for UN premises and the civilians seeking shelter in them. This reconsideration is imperative for the UN, which must deal with the vulnerability of UN premises in many different parts of the world. It is no less a necessity for Israel, which for two decades has had to cope with the humanitarian, political, legal, and financial consequences of attacks on UN premises and those sheltered therein. A reconsideration of the status of UN premises – as the seat of the Organization or the center of its activities in the host country[3] – and their protective legal regime in times of war is in many respects a question of the applicable law, or the relationship between international humanitarian law applicable in times of war and the law of the United Nations applicable in times of peace and in times of war.

Protection of UN Premises under International Humanitarian Law

Under international humanitarian law, the protection of UN premises in armed conflict is no different than the protection of civilian objects. The Additional Protocol I to the Geneva Conventions of 1977 affords civilians (provided they do not take a direct part in hostilities) and civilian objects (provided they are not used for military purposes) protection against attack, reprisals, and "dangers arising from military operations." The general protection of civilian objects is not an absolute protection, and if the civilian object (or its immediate vicinity) is used for military purposes, it loses its protection. The loss of such protection, however, does not absolve the parties to the conflict of their obligations to the civilian population, and does not exempt them from the obligation to take the necessary precautionary measures with a view to avoiding or minimizing the incidental loss of civilian life or damage to civilian objects. These include the obligation to verify the civilian or military nature of the facility; the obligation to cancel or suspend the attack if it can be anticipated that the incidental loss of civilian life or damage to civilian objects will be excessive in relation to the concrete, direct, and anticipated military advantage, and the obligation to give effective advance warning to the civilian population (Articles 51, 52, and 57 of the Protocol). Over the years, international law has granted special protection to the UN flag and emblem, the Organization's military

uniforms,[4] and its peacekeeping forces, their premises, and vehicles.[5] The general protection of UN premises as civilian objects under international humanitarian law, however, continued to obtain.

Protection of UN Premises under UN Law: The Principle of Inviolability

The 1946 Convention on the Privileges and Immunities of the United Nations, which is applicable to UNRWA as a subsidiary organ of the UN,[6] establishes the principle of inviolability of UN premises as a protection from undue interference. The Secretary-General's Board of Inquiry into attacks on UNRWA premises in Operation Cast Lead noted that the principle of inviolability affords an absolute protection that is applicable in times of peace as in times of war. It concluded that the IDF attacks on UNRWA premises had breached their inviolability and failed to respect the immunity of the Organization, its property, and its assets from interference. The Board reiterated that the principle of inviolability could not be set aside on any grounds, nor could it be qualified or overridden by demands of military expediency.[7] In a side comment it noted that UN personnel, UN premises, and civilians sheltered therein are entitled to protection under the principles of international humanitarian law, but did not elaborate.

The report of the Secretary-General's Board of Inquiry into certain Incidents in Gaza during Operation Protective Edge[8] examined a series of events in seven UNRWA schools hit in an IDF attack and three (additional) premises that were not damaged and in which weapons and ammunition were found. The Board was asked to establish the facts, circumstances, and causes of the damage and injuries sustained in each of these cases, and their attributability to persons or entities. Unlike the 2009 Board of Inquiry, the 2014 Board was asked not to include in its report any legal findings or to determine legal responsibility. In reality, however, these were implied. Thus, for example, in investigating five of the seven incidents where UNRWA premises were hit, the Board found no evidence that the IDF attack was in response to fire from the UN premises or their immediate vicinity. Implicit in this determination, therefore, is the assumption that for lack of any proof that UN premises or their immediate vicinity were used for military purposes, like civilian objects, they continue to enjoy protection from attack; and if attacked, the attacking party (i.e., Israel) entails international responsibility. In the absence of any legal analysis, there is no explicit reference to the principle of inviolability, either. Nevertheless,

in his cover letter to the Security Council transmitting the report, the Secretary-General noted that, "United Nations premises are inviolable, and should be places of safety, particularly in a situation of armed conflict."

What, then, is this absolute protection of inviolability of UN premises that prevails, according to the Board, over any other international humanitarian law rule, including military necessity, and what is its scope of application and the consequences of its practical implementation in any given context of an armed conflict?

The principle of inviolability is established in Article II, Section 3 of the Privileges and Immunities Convention, which provides that "the premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action." The principle of inviolability was interpreted in the practice of the United Nations – reflected in a host of Headquarters and Office Agreements in countries where UN presences, including peacekeeping operations are deployed[9] – as respect for the UN status and its exclusive authority and control within its premises, and consequently, as a prohibition on non-consensual entry into UN premises, or search of UN vehicles for any reason or purpose and by any authority of the host country. The principle of inviolability is thus conceived of as an absolute prohibition that cannot be limited to times of peace, nor can it be qualified – like the Privileges and Immunities Convention as a whole – by security reasons or the demands of military expediency. And nevertheless, the Board of Inquiry erred in applying the principle of inviolability, within the meaning of the Convention, to the examination of the legality of attacks on UN premises in armed conflict, and this, for two reasons.

First, no analogy can be drawn between attacks on UN premises during armed conflict, and unauthorized or non-consensual entry to such premises by a state's authority for the purpose of executing arrest or search. An attack, if intentionally directed against UN premises and personnel, is prohibited under international humanitarian law, but is not necessarily prohibited if conducted in response to fire from within the premises, provided that it meets the conditions of proportionality and necessary precautionary measures. Unauthorized entry for search or arrest, on the other hand, is prohibited under the Convention at any time and for any reason. The view that the principle of inviolability of UN premises is an absolute principle

applicable in times of peace as in times of war is, of course, correct, but only within the meaning attributed to it in the Convention, namely, of unauthorized or non-consensual entry into UN premises for any reason – "military necessity" included. Within this meaning, and this meaning only, the protection is absolute.

Second, the practical implication of the determination that shelling of UN premises under any circumstances is a violation of their inviolability, and for this reason unlawful, is that no misuse of UN premises, including fire from within them, could detract from the absolute protection granted to these premises, and would not justify return fire, not even that which meets the conditions of proportionality and the necessary precautionary measures under international humanitarian law. This assumption has no basis in the UN Convention on the Privileges and Immunities or the rules of international humanitarian law, for neither grants absolute protection, not only to civilian objects – a category that includes UN premises – but also to objects of special protection, such as places of worship, hospitals, or cultural property.[10]

On the assumption, therefore, that the protection granted to UN premises under international humanitarian law is inadequate, and that the inviolability protection granted under the Privileges and Immunities Convention is irrelevant, then there is a need to consider enhancing the protected status of UN premises in armed conflict and granting them special protection alongside hospitals; archeological, historic, cultural, and religious sites; security zones; and non-defended localities, and under the same conditions. The uniqueness of the special protection regime is not merely in the establishment of a prohibition of attack against the protected object – for such a prohibition exists already in respect of all civilian objects – but in creating a mechanism of special protection and precautionary measures that will reduce the risk of unintentional attack or collateral damage to the protected object and to those sheltering in it. Like the general protection, the special protection too is not an absolute protection, but when it is withdrawn, the conditions, restrictions, and limitations on the attack are more numerous and stringent.

Special Protection for Selected Civilian Objects

Without prejudice to the general protection of civilian objects, international humanitarian law has recognized the need to grant special protection to selected civilian objects for their humanitarian value or their historical,

artistic, scientific, or religious importance to the parties to the conflict or the greater international community. Special protection can also be granted under a "special agreement" between the parties to designated areas, safety zones or non-defended localities, and demilitarized zones designed for the protection of civilians and those placed "hors-de-combat."

For the first time, the Regulations annexed to the 1907 Hague Convention concerning the Laws and Customs of War on Land and a series of international conventions concluded throughout the twentieth century[11] singled out for special protection medical units and institutions, non-defended localities and demilitarized zones, and cultural property of archeological, historical, artistic, and religious importance to mankind as a whole, provided they are not used for military purposes. A condition for special protection is preparation in time of peace by the party in whose territory the object of the protection is located, including by clearly marking hospitals and cultural property with one of the recognized emblems; locating the protected objects at an adequate distance from military objectives, so that an attack on those objectives would not endanger the protected objects; and notifying the other party to the conflict of their location. A condition for the protection of safety zones and other non-defended localities is a special agreement between the parties defining the boundaries of the protected area and marking it with agreed markings.

An object of special protection, if used for military purposes, loses its neutral or humanitarian character, and thereby the protection and immunity from attack to which it is entitled. For a limited number of cultural objects of very great importance placed under special protection, withdrawal of immunity is possible under the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, but this only in cases of "unavoidable military necessity," for such time as that necessity continues and under an order of an officer in command of a division or its equivalent in size, or larger. These restrictions were made more stringent under the Second Protocol to the 1954 Convention, which upgraded the general protection granted to cultural property, and established a new category of specifically designated cultural property of the greatest importance to humanity and placed them under "enhanced protection." The immunity of cultural property under enhanced protection will be lost only if, and for as long as the property has, by its use become a military objective, where an attack is the only feasible means of terminating the said use, and after having taken all feasible precautions, including an effective advance warning

with a view to avoiding or minimizing damage to the cultural property, and under an order of an officer at the highest operational level of command.

The principle of special (or enhanced) protection established in international multilateral conventions should be implemented in a special agreement between the parties, and adapted to the circumstances of any given object and conflict. It is for this reason that the First and the Fourth Geneva Conventions, the First Additional Protocol to the Geneva Conventions, and the Convention for the Protection of Cultural Property have called on the parties to the conflict to conclude special agreements to ensure the special protection under the respective conventions for hospitals, cultural property, safety zones, and other non-defended localities situated in their territories.[12] For some civilian objects, the special agreement is a condition necessary for placing them under special protection; for others, the special agreement does nothing other than reiterate the principles of the framework convention by which the parties are already bound. Even then, however, the advantage of the special agreement is that it forces the parties to re-negotiate and explicitly reaffirm their obligations under international humanitarian law, and in so doing serves as an incentive to comply.

Special Protection for UNRWA Premises in an Agreement between Israel, the UN, and "the Silent Party"

Special protection to UN premises in areas of conflict should have long been recognized under international humanitarian law alongside other selected civilian objects of special protection. In the absence of any incentive to roll the wheels of international diplomacy, however, the chances of adopting an international convention at this time are slim. From the vantage point of Israel and the UN, therefore, a special agreement between the parties remains the only practical option for guaranteeing the protection of UNRWA premises.

Without prejudice to the status of all other UNRWA premises scattered throughout the Gaza Strip, an agreement between Israel and the UN providing special protection to a defined and more limited number of premises sheltering civilians could be considered. Israel would undertake to respect the protected status of UNRWA premises, avoid attacks against them or their immediate vicinity, and take the necessary precautionary measures (some of which exist already in the practice of Israel-UNRWA relations) in order to avoid or minimize any damage to the premises and those inside it. In the event of a military use of the premises, and according

to the circumstances, Israel would undertake to issue an advance warning requiring the termination of the use, lest its continuation lead to the loss of their immunity from attack. In the event that immunity is lost, and much like the protective regime of cultural property of the greatest importance to humanity, the decision to open fire would be taken by the highest operational level of command. For its part, the UN would undertake to mark the buildings with the UN emblem and notify Israel of their location. The Organization would also undertake to refrain from, to allow, or otherwise to take all necessary measures to prevent misuse of UNRWA premises and their immediate vicinity, including the storage of war materials or sheltering combatants for the purpose of shielding them from attack.

A UN commitment not to allow misuse of UN premises would be a tacit admission not only that they had, in fact, been misused (for such had already been acknowledged publicly), but also that misuse of UN premises is not implausible. In the battle for the international public image (of both the UN and Israel), this admission is all the more important for the fact that Israel's allegations of firing from within the UN premises or their use for weapon storage were met with scorn by the 2009 Secretary-General's Board of Inquiry.[13] Mindful of the damage that such allegations might cause to the UN public image, the Board of Inquiry recommended that Israel retract its allegations and apologize to the UN.[14] In retrospect, and without pronouncing on whether or not UN premises were actually used for military purposes during Operation Cast Lead, it now seems that the possibility that they might have been is not as far-fetched as was previously assumed by the Board.

Unlike other special agreements between parties to a conflict, however, the main difficulty in an agreement between Israel and the UN, should one be concluded, is that the parties to the agreement are not the parties to the conflict, that the other party to the agreement (the UN) cannot (by itself) fulfill, or even guarantee the fulfillment of its obligations under the agreement, and that the party to the conflict (Hamas) which cannot, does not want to, or is otherwise not invited to directly participate in the agreement, holds the key to its successful implementation. The consent of the "silent party,"[15] therefore, will be decisive for the viability of the agreement and the special protection granted thereunder to UN premises. Israel had to face this same difficulty in the aftermath of Operation Grapes of Wrath, with the conclusion of the Israeli-Lebanese Understanding that left the Galilee and the villages of southern Lebanon outside the circle of

conflict between Israel and Hizbollah. The supervision of implementation of the Understanding was entrusted to a monitoring group composed of the parties to the Understanding, the United States, France, and Syria with the assistance of an advisory group composed of the United States, France, the European Union, Russia, and other interested parties. But while the other party to the conflict was not a party to the Understanding, it was its "silent consent" which made it possible, temporarily at least, to honor the Understanding.[16]

Aside from the near-perfect analogy between the "other party" to the conflict in the Lebanon theater and the one in Gaza, their characteristics as a non-state entity, and the nature of the conflict in densely populated areas, the Grapes of Wrath Understanding has precedential value in two respects. First, it is a proof that a special agreement between parties to any given conflict is often necessary to ensure that civilians and civilian areas remain outside the circle of conflict, although the principle of distinction between civilians and combatants is a fundamental principle of international humanitarian law (both conventional and customary) by which the parties are already bound. And second, it evidences that such an agreement is possible even between parties to a conflict that do not recognize each other's legitimacy, as long as they share an interest in protecting their respective civilian populations. But the uniqueness of the proposed special agreement between Israel and the United Nations lies in the UN twofold interest in preventing an Israeli attack on its premises and the civilians sheltered therein, and preventing the misuse of such premises by Hamas or other armed groups in the Gaza Strip, which not only is a violation of the laws of war, but also a breach of the UN neutrality and inviolability within the meaning of the Convention.

On the assumption that the circumstances that led to Operations Cast Lead and Protective Edge continue to obtain, that UNRWA premises in the Gaza Strip remain as vulnerable as ever, and that the establishment of a UN Board of Inquiry – with which Israel exceptionally (but consistently) is willing to cooperate – is set up as a matter of routine in every case of attack on UN premises, the conclusion of a special agreement on the protection of UN premises is in the joint interest of both parties. The UN will gain an Israeli commitment to avoid an attack on UN premises, anchored in a regime of protection and precautionary measures, and Israel, for the first time perhaps, will gain a commitment from the UN and the "silent party" not to misuse or prevent misuse of UN premises and their immediate vicinity.

A special agreement in which the UN is not only an object of protection, but an equal party with correlative international obligations may also pave the way for a more comprehensive dialogue between Israel and the UN on a range of Israel-UNRWA related issues. But more importantly, a regime of special protection for UN premises is an existential interest for thousands of displaced persons seeking refuge from attack, for whom the blue flag remains a promise – the only one, perhaps – of life.

Notes

1 The Secretary-General's Board of Inquiry established to investigate the shelling of UNRWA premises during Operation Cast Lead rejected as incorrect, if not implausible, Israel's claim that during the course of the operation IDF forces were fired upon from within UN premises. The Board of Inquiry established by the Secretary-General to investigate attacks on UNRWA premises during Operation Protective Edge, however, found that on two occasions (the schools in Jabalia and Nuseirat) it was highly likely that fire originated from within the school premises. See Summary by the Secretary General of the Report of the United Nations Headquarters Board of Inquiry into Certain Incidents in the Gaza Strip between 27 December 2008 and 19 January 2009, A/63/855-S/2009/250 of 15 May 2009, paras. 70, 82.

2 On the criminal investigations that were opened in connection with some of the incidents affecting UNRWA premises, see Decisions of the IDF Military Advocate General Regarding Exceptional Incidents into which, Following an Assessment by the FFAM, the MAG has ordered Criminal Investigation, update 2 (27/12/2014) (http://www.mag.idf.il/261-6958-en/patzar.aspx); and update 3 (22/3/2015) (http://www.mag.idf.il/163-7183-en/patzar.aspx).

3 UN premises were defined in the practice of the Organization in two ways: geographically – by indicating the precise location of the building or the premises; and functionally – according to the double test of control and authority in the premises, and of making use of them for purposes of the Organization and the performance of its functions. According to the functional test, UNRWA premises in the Gaza Strip which are under the Agency's control and used to carry out its mandated functions – including schools, training centers, and medical clinics – are considered UN premises. Israel shares this view. In the Israeli report on Operation Protective Edge the following clarification was included: "UN facilities in the Gaza Strip include not only official headquarters, but also hundreds of other buildings, including schools and medical clinics that bear UN insignia." See *The 2014 Gaza Conflict, 7 July – 26 August 2014, Factual and Legal Aspects*, May 2015, p. 146, fn. 411.

4 Article 37 of the First Additional Protocol to the 1949 Geneva Conventions (Protocol I) 1977, prohibits the feigning of UN signs, emblems, or uniforms.

Under the 1998 Rome Statute of the International Criminal Court, improper use of the United Nations flag, insignia or military uniform that causes death or severe bodily injury is a war crime (Section 8(2)(b)(vii)).

5 The 1994 Convention on the Safety of United Nations and Associated Personnel criminalized the attack on the personnel, premises, and vehicles of UN operations. Article 8(2)(b)(iii) of the 1998 Rome Statute provides that an attack on the personnel, installations, units, or vehicles involved in humanitarian assistance or peacekeeping mission is a war crime, and the 1980 Second Protocol to the Convention on the Use of Certain Conventional Weapons, granted protection to United Nations forces and missions from the effects of minefields, mines and booby-traps in their areas of operation (Article 8).

6 The United Nation Relief and Works Agency for Palestine Refugees (UNRWA) was established by General Assembly Resolution 302(IV) on December 8, 1949. Its status as a subsidiary organ of the General Assembly is derived from Article 22 of the UN Charter, which authorizes the General Assembly to establish "subsidiary organs as it deems necessary for the performance of its functions." The Agency's status in the West Bank and the Gaza Strip was institutionalized at the end of the Six Day War in an exchange of letters between the Agency and Israel, known as the Michelmore-Comay Agreement of 14 June 1967. Accordingly, Israel had consented to the continued operation of the Agency in the territories, and to the applicability of the Convention on the Privileges and Immunities of the UN in the relations between Israel and the Agency.

7 Summary by the Secretary-General of the Report of the United Nations Headquarters Board of Inquiry into Certain Incidents in the Gaza Strip between December 27, 2008 and January 19, 2009, A/63/855-S/2009/250 of May 15, 2009, paragraphs 16, 26, and 91. See also GA Resolution 64/89 (preamble); GA Resolution 69/88 (preamble, paragraphs 17 and 18).

8 Summary by the Secretary-General of the Report of the United Nations Headquarters Board of Inquiry into Certain Incidents that Occurred in the Gaza Strip between July 8, 2014 and August 26, 2015, S/2015/286 of April 25, 2015 (Annex).

9 Convention on the Privileges and Immunities of the United Nations, 1946, (Article II Section 3); Agreement between the United Nations and the United States Regarding the Headquarters of the United Nations, 1947 (Article II, Section 9), and the Model UN Status of Forces Agreement (Article 16).

10 Unlike the Secretary General's Boards of Inquiry, the commissions of inquiry established by the UN Human Rights Council examined the legality of IDF attacks on UNRWA schools in Operations Cast Lead and Protective Edge under international humanitarian law. The Commission of Inquiry for Operation Protective Edge, however, noted that while an attack on UN facilities was likely to give rise to questions relating to their protection against interference under the UN Privileges and Immunities Convention,

an examination of that body of law was beyond its mandate. See Report of the United Nations Fact-finding Mission on the Gaza Conflict, A/HRC/12/48 of September 25, 2009, paragraphs 586-595; Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, HRC/29/CRP.4 of June 23, 2015, paragraph 449.

11 Article 27 of the 1907 Hague Regulations, the First Geneva Convention of 1949 (Articles 19-23), the Fourth Geneva Convention of 1949 (Articles 14, 18, and 19), Additional Protocol I to the Geneva Conventions of 1977 (Articles 12, 13, 53, 59, and 60), the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (Articles 4, 6, and 8-11), and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 1999 (Articles 5, 6, and 10-13).

12 ICRC Study in Customary IHL database, Rule 35, https://www.icrc.org/customary-ihl/eng/docs/home.

13 The 2009 report of the Secretary General's Board of Inquiry stated: "The Board expressed the view that public allegations by a Member State of misuse of United Nations premises for military activity should only be made on the basis of certainty, because of the gravity of such allegations, their effect upon public perceptions of the Organization, and their serious implications for the safety and security of its staff in the area of on-going military operations," (note 1, paragraph 106).

14 The first recommendation of the Board was that "the United Nations should seek formal acknowledgment by the Government of Israel that its public statements alleging that Palestinians had fired from within the UNRWA Jabalia school on January 6 and from within the UNRWA Field Office compound of January 15 were untrue and were regretted," (Recommendation 1).

15 Lior Avni, "Silent Bargaining between a State and a Sub-State Organization: Israel and Hezbollah from Operation 'Accountability' to 'Grapes of Wrath,' 1993-1996," *Politika*, Issue No. 21, 2012, General Issue, p. 4.

16 The 1996 Grapes of Wrath Understanding included, among others the following commitments: "(a) Armed groups in Lebanon will not carry out attacks by Katyusha rockets or any kind of weapon into Israel. (b) Israel and those cooperating with it will not fire any weapon at civilians or civilian targets in Lebanon. (c) Beyond this the two parties commit to ensuring that under no circumstances will civilians be the target of attack, and that civilian populated areas and industrial and electrical installations will not be used as launching grounds for attacks." See http://www.knesset.gov.il/process/docs/grapes.htm.