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ISRAEL AND INTERNATIONAL LAW

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Israel and International Law
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Course Description:

Almost every major issue in Israeli politics and the Israeli-Palestinian conflict is routinely discussed in the media using the terminology of international law— "occupation," "illegal settlements," and, most recently, "apartheid." But international law is a specialized field, and most individuals cannot independently evaluate such claims. In this course, we will look behind supposedly uncontested assertions about the legality of Israel's conduct to examine the underlying sources and rules of international law. Moreover, we will do what lawyers typically do (except in regard to Israel)—identify and define the relevant rules by looking at all the relevant precedents, rather than focusing myopically on the world's only Jewish state.

Faculty Biography:

Eugene Kontorovich is a professor at the George Mason University Scalia Law School, and the director of its Center for the Middle East and International Law, as well as the director of the international law department at the Kohelet Policy Forum, a Jerusalem think tank. He previously taught for a decade at Northwestern University and University of Chicago Law Schools. He is one of the world's leading experts in the legal aspects of the Arab-Israeli conflict, and has written dozens of academic articles. His writings also regularly appear in the *Wall Street Journal* and other leading publications.

Israel and International Law

Session III: Recent Legal Blood Libels

1. Apartheid
2. Spreading disease (vaccine claims)
3. Use of force in Gaza
4. Private land & illegal building

Readings:

- HRW Crosses the Threshold into Falsehoods and Anti-Semitic Propaganda (April 2021), Kohelet Policy Forum.
- Fourth Geneva Convention, Article 6 (1949), Article 56 (1949) & commentary (1958).
- Additional Protocol to Geneva Conventions, Articles 48, 50-51.
- Israel-Palestinian Interim Agreement ("Oslo II") (1995), Annex III, Appendix 1, Article 17.
- Avi Bell, International Law and Gaza: The Assault on Israel's Right to Self-Defense (2008), Jerusalem Center for Public Affairs.
- Avi Bell, Understanding the Current Sheik Jarrah Property Dispute (2021), The Kohelet Policy Forum.

III

KPF
National sovereignty
Individual liberty

HRW Crosses the Threshold into Falsehoods and Anti-Semitic Propaganda

April 26, 2021

Human Rights Watch's new report, "A Threshold Crossed" accusing Israel of the crime of apartheid is, despite its length, a propaganda document: full of falsehoods and distortions. The world it describes is an alternate reality.

Overview

- The report mocks the history of apartheid by using its hateful memory to describe a grab bag of policies that HRW happens to disagree with, and in many cases are not in effect, or were never in effect. Apartheid is not just a term for policies one dislikes – it is an international crime defined as "inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups, and committed with the intention of maintaining that regime." These "acts" include such things as "widespread" murder and enslavement. The legal standard for labeling a government an "apartheid regime" is set quite high—indeed, so high that no country since the end of South African apartheid has ever received the distinction. Many countries, like the United States, grapple with systemic racism and discrimination – but no one suggests that amounts to apartheid. Despite massive systematic oppression of racial and ethnic minorities in countries from China to Sri Lanka to Sudan, the apartheid label has never been applied to those countries by the international community.

- Invoking the heinous crime of apartheid to criticize Israeli policy is classic anti-Semitic rhetoric: it accuses Jews, uniquely among the peoples of the world, of one of the most heinous crimes, while also judging the Jewish state by a metric not applied to any other country. And the clear agenda is to entirely delegitimize Israel: the remedy for apartheid is not reform, it is the abolition of the regime itself and a total reshaping of the government.

- HRW's position is so extreme, it goes beyond even the positions of PA/PLO President Mahmoud Abbas and the International Criminal Court. In a speech just this month, Abbas made clear that Israel is not an apartheid state. The ICC has been investigating potential crimes by Israel for years, and has never mentioned apartheid part of its investigation.

- The HRW's own report uses racist language, referring to all Arabs in the area as "Palestinians," though many of them are Druze, Bedouin, or Circassians. The negation of these national identities in the name of Palestinian supremacy further reveals the bigoted and activist nature of the HRW report.

Part I of this paper explains what apartheid actually is – and how Israeli policies have no resemblance to it.

Part II shows that the HRW report is based on an alternate reality, where neither the Palestinian Authority or Palestinian terrorism exist.

Part III performs a brief fact check on some of the many egregious assertions made by the report.

Part I: What apartheid really was

- The very essence of apartheid was the physical separation – apartness – of people based on a legislated racial hierarchy. There are no racial or ethnic hierarchies in Israeli law. Under the South African Reservation of Separate Amenities Act of 1953, municipal grounds could be reserved for a particular race, creating, among other things, separate beaches, buses, hospitals, schools and universities. In Israel and all territories under its jurisdiction, there are no separations of this sort—Jews and Arabs, Israelis and Palestinians patronize the same shops and restaurants, work together and go to the same hospitals. In South-Africa, public beaches, swimming pools, some pedestrian bridges, drive-in cinema parking spaces, parks, and public toilets were segregated. Restaurants and hotels were required to bar blacks. **Jews are de facto excluded from Palestinian-controlled territory, but that is not the apartheid HRW has in mind, as it involves Palestinian crimes against Israeli Jews.**

- Under the Bantu Homelands Citizenship Act of 1970, the Government stripped black South Africans of their citizenship, which deprived them of their few remaining political and civil rights in South Africa. In parallel with the creation of the homelands, South Africa's black population was subjected to a massive program of forced relocation. Israel did not dislocate Arabs citizens to the PLO territories, nor has it revoked the citizenship of Israeli Arabs.

- The black "Bantustans" were created by the apartheid government itself under a series of laws. Because they were generally regarded as puppets of Praetoria, their supposed independence was not recognized by other countries. The Palestinian government was created by the Palestinians themselves in negotiations conducted under international auspices, and is recognized internationally as legitimately representing the Palestinian population by almost every country in the world.

- Blacks in South Africa were deprived of their political rights, including the right to vote and the right to be elected. Palestinians with Israeli citizenship (Israeli Arabs) have full voting rights for the Knesset, while non-citizen Palestinians in the territories have voting rights for the Palestinian Legislative Council. Israeli citizens do not have voting rights in the Palestinian government, because it is a different and independent government – even though it passes laws that greatly affect Israelis, like the "pay for slay" rewards program for terrorists. By the same token, Palestinians do not vote in the Knesset – not because it is apartheid, but because since the 1993 Oslo Accords, they have had their own government. Millions of Palestinians with Israeli citizenship have voted in Israeli elections and dozens have been elected to Knesset. Voting rights for the Palestinian Legislative Council are more restricted, since they are under the exclusive jurisdiction of the Palestinian Authority. Jews are barred from receiving Palestinian citizenship and cannot vote for the Council.

- Human Rights Watch says what has sent Israel over the brink to apartheid is the Nation State Law and political discussions about applying Israeli law to the West Bank (which Human Rights Watch calls "annexation"). This is perhaps their most ludicrous statement. While the wisdom of the Nation State law can be criticized, it does nothing like what any of the apartheid laws did, and instead closely resembles numerous European democratic

constitutional provisions. Indeed, it is almost entirely declarative; its one substantive provision guarantees rather than denies Palestinian Arab rights (it guarantees Arabic language rights). As for talk of "annexation," it cannot be the basis for any claims of apartheid because it has not happened and is unlikely to happen in the near future. Apartheid was not evil because of things that were discussed and did not happen – apartheid was something that did happen. Moreover, the application of Israeli law would guarantee equality of rights for all residents of affected areas, just as in Israel proper today.

Part II. HRW's alternative universe: ignoring the Palestinian Authority, Palestinian terror, and actual apartheid policies

- The entire report is written as if Israel governs all of the Palestinians, and the Palestinian Authority does not exist. Yet since 1993 the Palestinians have had their own government, which regulates almost every aspect of their lives. (In fact, since 2007, the Palestinians have had two distinct independent governments, thanks to the military takeover of the Gaza Strip by the Hamas terrorist organization.) Unlike South African Bantustans, the PA government is recognized by most countries of the world, and functions outside of Israeli control. Israel does not tax the Palestinians, draft them, or impose other legislation upon them.

- Under the Oslo Agreements, the PA government and Israel agreed on a framework for dividing authority and jurisdiction in areas where the governments and populations are intertwined. The HRW cites those very features—agreed upon between Israel and the Palestine Liberation Organization—as evidence of anti-Palestinian apartheid, in effect saying that the internationally-backed Oslo Accords, for which several Nobel Peace Prizes were awarded, is equivalent to apartheid, for which Nobel Peace Prizes were awarded to those who ended it.
- By pretending that the Palestinian government does not exist, the report remarkably ignores actual apartheid-like policies. The Palestinian Authority pays generous salaries to people simply for murdering Jews. It criminally prohibits Palestinians selling land to Jews – upon penalty of torture, extended sentences in labor camps, or even death. It denies citizenship

or even residency rights to Jews. These policies resemble apartheid, and are not found anywhere in the HRW's long report. Indeed, the report speaks of "Israeli Palestinians," but it never speaks of Jewish Palestinians – because the PA has created a regime where it is impossible for Jews to live in its jurisdiction, and actively campaigns for the expulsion of all Jews from the West Bank.

Ignoring and whitewashing Palestinian terrorism

- Despite the length of the report, it entirely ignores Palestinian terrorism. Moreover, almost all of the restrictions on movement (including checkpoints and permanent barriers) were established only in response to the murderous wave of terror unleashed by the establishment of the PA in 1994, which accelerated following Israeli peace offers in 2000 and ultimately killed over 1000 Israelis. HRW tries to paint non-violent Israeli counter-terror measures as policies of subjugation – by entirely ignoring the context of Palestinian terror.
- On page 25, the report refers to the Palestinian terrorist organization Hamas, together with Fatah as "Palestinian political parties." The report refers to Hamas 13 times, but never once acknowledges that Hamas is listed as a terrorist organization by Israel, the United States, the European Union and others.

- On pages 193-194, the report refers to the Israeli ban on membership in terrorist organizations such as al Qaeda and ISIS as part of a depravation of "Palestinians in the OPT of their basic civil rights. It describes a ban on membership in groups like al Qaeda – common to many Western democracies – "targeting Palestinians for their anti-occupation … activism, and affiliations, jailing thousands, outlawing hundreds of political and non-government organizations …"

Part III. Brief Fact Check of the Report

- *On page 2, the report states "About 6.8 million Jewish Israelis and 6.8 million Palestinians live today between the Mediterranean Sea and Jordan River, an area encompassing Israel and the Occupied Palestinian Territory (OPT), the latter made up of the West Bank, including East Jerusalem, and the Gaza Strip. … From 1967 until the present, it has*

militarily ruled over Palestinians in the OPT, excluding East Jerusalem. By contrast, it has since its founding governed all Jewish Israelis, including settlers in the OPT since the beginning of the occupation in 1967, under its more rights-respecting civil law."

FACT CHECK: FALSE

Israel has not had any government in Gaza since the 2005 Disengagement. While apartheid South Africa deported blacks from white areas, Israel did the opposite, expelling Jews from a largely Palestinian area.) In accordance with Israel's power-sharing agreement with the Palestine Liberation Organization, Israel has no military government or territorial jurisdiction in areas A and B of the West Bank since 1995. There is no military government in east Jerusalem, and Palestinian Arabs, Israeli Jews and Israeli Arabs are all subject to Israeli civil law. The Israeli military government in area C, in the meantime, is not personal or ethnically based. Palestinian Arabs, Israeli Jews and Israeli Arabs are all subject to the military government; for instance, Israeli Jews, Israeli Arabs and Palestinian Arabs who purchase land in area C all must register their purchases with the military government, and all are subject to the military government's land use regulations.

- *On pg. 71, the report claims Israel has been "denying residency rights to Palestinians for being abroad when the occupation began in 1967."*

FACT CHECK: FALSE. What the report is doing is accusing Israel of apartheid for not allowing the immigration of millions of Palestinians from enemy states like Lebanon and Jordan. The population they are speaking about was not "abroad" in 1967 in the sense of being on a trip, but long-time residents or even natives of foreign countries. The report is actually accusing Israel of "apartheid" for rejecting the Palestinian negotiating demand of unlimited Palestinian immigration to Israel under a "right of return."

- *The report claims Israel allows for Jewish communities to "exclude" Palestinians (pg. 151).*

FACT CHECK: FALSE. There are no laws privileging Jewish communities over Arab ones. Indeed, the opposite is true: The Supreme Court has ruled that Jewish towns cannot exclude Arabs from moving in (*Kaadan* case, 2000), while Jews could be excluded from buying in Arab towns (*Avitan* case, 1988).

- *On pages 16-17, the report states: "When Israel annexed East Jerusalem in 1967, it applied its 1952 Law of Entry to Palestinians who lived there and designated them as "permanent residents," the same status afforded to a non-Jewish foreigner who moves to Israel. The Interior Ministry has revoked this status from at least 14,701 Palestinians since 1967, mostly for failing to prove a "center of life" in the city. A path to Israeli citizenship exists, but few apply and most who did in recent years were not granted citizenship. By contrast, Jewish Israelis in Jerusalem, including settlers in East Jerusalem, are citizens who do not have to prove connections to the city to maintain their status."*

FACT CHECK: FALSE

Israel never applied its 1952 Law of Entry specifically to Palestinians living in east Jerusalem while denying its application to others. In fact, Israel never made any particularized decision about the Law of Entry. In 1967, Israel applied its law and jurisdiction to "East Jerusalem," i.e., those parts of the current municipality of Jerusalem that were unlawfully occupied by Jordan from 1948-1967. The Law of Entry does not differentiate between Palestinians and non-Palestinians. The application of Israeli law and jurisdiction made East Jerusalem part of Israel for purposes of Israeli civil law, making all residents of all ethnicities in East Jerusalem residents of Israel whatever their ethnicity. The only reason no Jews became residents as a result of the application of Israeli law was that Jordan had already expelled all Jewish residents of the areas of the city it occupied in 1948. There is no special status for Jewish Israelis under Israeli law in Jerusalem; all Israeli citizens in Jerusalem, whether Israeli Jews or Israeli Arabs (called Palestinians by the HRW report) enjoy full rights as Israeli citizens.

- *On page 17, the report states: "Inside Israel … a two-track citizenship structure … effectively regards Jews and Palestinians separately and unequally. Israel's 1952*

Citizenship Law contains a separate track exclusively for Jews to obtain automatic citizenship. That law grows out of the 1950 Law of Return which guarantees Jewish citizens of other countries the right to settle in Israel. By contrast, the track for Palestinians conditions citizenship on proving residency before 1948 in the territory that became Israel, inclusion in the population registry as of 1952, and a continuous presence in Israel or legal entry in the period between 1948 and 1952."

FACT CHECK: FALSE

The 1952 Citizenship Law does not have a separate track for Palestinians. The Citizenship Law provides six different paths for citizenship—one is the track for "returned" Jews, and the others are open to persons of all ethnicities. The track providing citizenship for former citizens of the British Mandate of Palestine (on the basis of lawful residence in Israel at the time of the law's enactment in 1952) applies to persons of all ethnicities, not specifically to Palestinians. 1.9 million Palestinians (Israeli Arabs) are citizens of Israel on the basis of the rights they have lawfully exercised under the Citizenship Law.

- *The report continues on page 17, "Authorities have used this language to deny residency rights to the more than 700,000 Palestinians who fled or were e*xpelled in 1948 and their descendants, who today number more than 5.7 million."

FACT CHECK: FALSE

The The UN Relief and Works Agency indeed claims that there are 5,703,546 registered "Palestine refugees," but it lists 2,348,359 of them as residing in the West Bank and Gaza Strip (https://www.unrwa.org/what-we-do/relief-and-social-services/unrwa-registered-population-dashboard), i.e., in areas that the HRW report claims are under exclusive Israeli control. Obviously, Israel does not deny those persons the right to continue residing in the West Bank and Gaza Strip.

- *On page 172, the report claims that "Since 2007, the year that Hamas seized effective political control over the Gaza Strip from the Fatah-led PA, Israel has imposed a generalized travel ban on movement in and out of the small territory with few exceptions.*

FACT CHECK: FALSE

Israel restricts travel *in and out of Israel* from Gaza. Israel has made no attempt to impose a generalized travel ban—Israel does not control Gaza's land border with Egypt, and it has never claimed to place any limitations on Egypt's entry and exit policies.

Treaties, States Parties and Commentaries

Advanced Search (/ihl-search/redirect.xsp?lang=EN&src=IHL)

Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. (/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=AE2D398352C5B028C12563CD002D6B5C)

BEGINNING AND END OF APPLICATION

ARTICLE 6 [Link]

The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2 [Link] .
In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.
In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 [Link] to 12, 27 [Link] , 29 [Link] to 34, 47 [Link] , 49 [Link] , 51 [Link] , 52 [Link] , 53 [Link] , 59 [Link] , 61 [Link] to 77, 143 [Link] .
Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.

Commentaries

Commentary of 1958 (/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=030537C0A8EE01DFC1

<< Previous (/applic/ihl/ihl.nsf/ART/380-600008?OpenDocument) Up (/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=AE2D398352C5B028C12563CD002D6B5C) Next >> (/applic/ihl/ihl.nsf/ART/380-600010?OpenDocument)

Treaties, States Parties and Commentaries

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Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. (/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=AE2D398352C5B028C12563CD002D6B5C)

HYGIENE AND PUBLIC HEALTH

ARTICLE 56 [Link]

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.

If new hospitals are set up in occupied territory and if the competent organs of the occupied State are not operating there, the occupying authorities shall, if necessary, grant them the recognition provided for in Article 18 [Link] . In similar circumstances, the occupying authorities shall also grant recognition to hospital personnel and transport vehicles under the provisions of Articles 20 [Link] and 21 [Link] .

In adopting measures of health and hygiene and in their implementation, the Occupying Power shall take into consideration the moral and ethical susceptibilities of the population of the occupied territory.

Commentaries

Commentary of 1958 (/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=7DCE280F4725F96EC1

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Treaties, States Parties and Commentaries

ARTICLE 56 -- HYGIENE AND PUBLIC HEALTH (1)

[p.313] GENERAL

The health conditions under which the inhabitants of occupied territory lived during the Second World War were often deplorable. Insufficient food, lack of medical supplies and the influx of refugees favoured the spread of epidemics, and the steps taken by certain belligerents to ease the plight of the inhabitants -- the opening of new hospitals, out-patients' clinics and medical diagnosis and disinfection centres, the adoption of modern methods of control of epidemics, the supervision of hygiene and the adoption of preventive measures -- were often only able to deal with the most urgent cases.

The International Committee of the Red Cross recommended, on the basis of the experience gained during the Second World War (2) that as soon as

hostilities ended, specific measures should be taken to prevent any repetition of this state of affairs.

PARAGRAPH 1. -- HYGIENE AND PUBLIC HEALTH

The reference in the Article to "the co-operation of national and local authorities" -- a formula we have already seen in Article 50 in connection with children's institutions -- shows clearly that there can be no question of making the Occupying Power alone responsible for the whole burden of organizing hospitals and health services and taking measures to control epidemics. The task is above all one for the competent services of the occupied country itself. It is possible that in certain cases the national authorities will be perfectly well able to look after the health of the population; in such cases the Occupying Power will not have to intervene; it will merely avoid hampering the work of the organizations responsible for the task. In most cases, however, the invading forces will be occupying a country suffering [p.314] severely from the effects of war; hospitals and medical services will be disorganized, without the necessary supplies and quite unable to meet the needs of the population. The Occupying Power must then, with the
co-operation of the authorities and to the fullest extent of the means available to it, ensure that hospital and medical services can work properly and continue to do so.

The Article refers in particular to the prophylactic measures necessary to combat the spread of contagious diseases and epidemics. Such measures include, for example, supervision of public health, education of the general public, the distribution of medicines, the organization of medical examinations and disinfection, the establishment of stocks of medical

supplies, the despatch of medical teams to areas where epidemics are raging, the isolation and accommodation in hospital of people suffering from communicable diseases, and the opening of new hospitals and medical centres.

It will be remembered that Article 55 requires the Occupying Power to import the necessary medical supplies, such as medicaments, vaccines and sera, when the resources of the occupied territory are inadequate. It will also be able to exercise its right to requisition, and demand the co-operation not only of the national and local authorities but also of the population in the fight against epidemics. It has been seen that under Article 51, paragraph 2 , the Occupying Power is entitled to order work which is necessary "for the public utility services" and "for the ... health of the population of the occupied country". Consequently, it may, if it appears desirable, requisition the co-operation of any protected person within the limits set by that Article, should such co-operation be necessary for the efficient working of the health services or hospitals and medical installations.

The last sentence of paragraph 1 specifies that "medical personnel of all categories shall be allowed to carry out their duties". The Occupying Power's duty of maintaining hospitals and medical services and establishments and also the public health and hygiene services necessarily involves measures to safeguard the activities of medical personnel, who must therefore be exempted from any measures (such as restrictions on movement, requisitioning of vehicles, supplies or equipment) liable to interfere with the performance of their duty.

"Medical personnel of all categories" should be taken to mean all people engaged in a branch of medical work: doctors, surgeons, dentists, pharmacists, midwives, medical orderlies and nurses, stretcher bearers, ambulance drivers, etc., whether such persons are or are not attached to a

hospital. On that point the provision differs from Article 20 of the Convention, which refers only to hospital staff, who are alone authorized to wear the armlet bearing the red cross emblem.

[p.315] PARAGRAPH 2. -- HOSPITALS

In order to understand this paragraph fully, reference must be made to Articles 18 , 20 and 21 of the Convention, according to which civilian hospitals and their staff, and transport carrying wounded or sick civilians, cripples or maternity cases, are entitled to display the red cross emblem. As was seen, that right is subject to a certain number of conditions, the most important being recognition by the State.

It is quite possible and even probable that it will become necessary to set up new hospitals in occupied territory. Like all hospitals, such establishments must be respected, protected and allowed to display the red cross on a white ground. What would happen if the competent body of the occupied State were no longer functioning and could not accord official recognition? In such a case the Occupying Power would take the place of the national authorities and would issue the document according recognition and granting the right to display the red cross to new hospitals. The same thing applies to the issue of identity cards to the staff of new hospitals and to the question of responsibility for transporting wounded and sick civilians.

The Occupying Power will confer official recognition and authority to display the emblem only on hospitals, staff and medical transport which fulfil the conditions laid down in Articles 18 , 20 and 21 of the Convention. The protection to which civilian hospitals are entitled may, in particular, be suspended if "they are used to commit, outside their humanitarian duties, acts harmful to the enemy" (Article 19).

PARAGRAPH 3. -- MORAL REQUIREMENTS

The last paragraph provides protected persons with a further safeguard, in that any measure of public health and hygiene the Occupying Power feels it should take in order to comply with the above stipulations must pay due regard to the habits and customs of the population (3).
The purpose of the provision is to ensure respect for sentiments and traditions, which must not be disregarded. The occupation must not involve the sudden introduction of new methods, if they are liable to cause deep disquiet among the population. The provision should be compared with Article 27 , which requires the Party to the conflict to respect, in all circumstances, the religious convictions and practices of protected persons, and also their manners and customs.

Notes: (1) [(1) p.312] For the origin of the Article, see ' Final Record, ' Vol. I, p. 122; Vol. II-A. pp. 666-668, 747-748, 830, 851-857; Vol. II-B, pp. 194, 418-419, 421; Vol. III, pp. 135-136;

(2) [(1) p.313] See ' Report of the International Committee of the Red Cross on its activities during the Second World War, ' Vol. I, pp. 710 et sqq.;

(3) [(1) p.315] There does not seem to be any real distinction between "moral" susceptibilities and "ethical" susceptibilities. The two terms appear to be synonymous. The most that could be said is that the word "moral" tends to emphasize the psychological aspect of the question;

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

COMMENTARY OF 1987: BASIC RULE

[p.597] Article 48

[p.598] 1863 The basic rule of protection and distinction is confirmed in this article. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 (1) and in Geneva from 1864 to 1977 (2) is founded on this rule of customary law. It was already implicitly recognized in the St. Petersburg Declaration of 1868 renouncing the use of certain projectiles, (3) which had stated that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy". Admittedly this was concerned with preventing superfluous injury or unnecessary suffering to combatants by prohibiting the use of all explosive projectiles under 400 grammes in weight, and was not aimed at specifically protecting the civilian population. However, in this instrument the immunity of the population was confirmed indirectly.

1864 In the Hague Conventions of 1899 and 1907, like the Geneva Conventions of 1929 and 1949, the rule of protection is deemed to be generally accepted as a rule of law, though at that time it was not considered necessary to formulate it word for word in the texts themselves. The rule is included in this Protocol to verify the distinction required and the limitation of attacks on military objectives.

1865 Up to the First World War there was little need for the practical implementation of this customary rule as the population barely suffered from the use of weapons, unless it was actually in the combat zone itself. The few measures adopted in The Hague in 1899 and 1907 seemed sufficient: a prohibition to attack places which are not defended, the protection of certain buildings, the fate of the population in occupied areas etc.

1866 The situation altered radically already during the First World War as a result of the increased range of artillery and the arrival of the first aerial bombardments from aircraft or airships. However, it was above all the development of weaponry after this conflict and its use during the Second World War which radically changed the situation. As a result the customary rule was affected to such an extent that one might have wondered whether it still existed. (4)

1867 By the repeated use of reprisals the point was reached where attacks were

systematically directed at towns and their inhabitants.

[p.599] 1868 From the beginning of its work the ICRC considered that it was necessary to explicitly confirm the concept of the distinction in a treaty. For this purpose it proposed the following:

"in the conduct of military operations, a distinction should be made at all times between, on the one hand, persons who directly participate in military operations and, on the other, persons who belong to the civilian population, to the effect that the latter be spared as much as possible." (5)

1869 Following the debates which took place during the two sessions of the Conference of Government Experts in 1971 (6) and 1972, (7) the ICRC introduced in the draft prepared for the Diplomatic Conference the following provision:

"' Article 43 -- Basic rule '

In order to ensure respect for the civilian population, the Parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary and shall make a distinction between the civilian population and combatants, and between civilian objects and military objectives."

1870 After several amendments had been proposed, (8) Committee III finally decided on the present text of the article. The term "military resources" was the main object of criticism; it was thought that this was not quite appropriate in a purely humanitarian convention, and that in view of the imprecise scope of the term, this could be used to justify attacks against certain non-military objectives. (9)

1871 As finally adopted, this article has the great advantage that it clearly establishes the rule that a distinction must always be made between the civilian population and combatants, on the one hand, and between civilian objects and military objectives, on the other, and that it proclaims the respect and protection to which the civilian population and civilian objects are entitled. It was not discussed in the plenary meetings and was adopted by consensus. However, it gave rise to two explanations of vote: one delegation simply stated: "if there had been a vote, it would have abstained therefrom", because it considered that that article "has direct implications as regards a State's organization and conduct of defence against an invader". (10) Another delegate considered that:

"this article will apply within the capability and practical possibility of each party to the conflict. As the capability of the parties to distinguish will depend upon the means and methods available to each party generally or at a particular moment, this article does not require a party to do something which is not within its means or its capability." (11)

[p.600] In this respect it should be noted that it is the duty of Parties to the conflict to

have the means available to respect the rules of the Protocol. In any case, it is reprehensible for a Party possessing such means not to use them, and thus consciously prevent itself from making the required distinction.

1872 The wording used in this article requires some explanation. First, respect and protection are terms which have long been used in the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. In the last version of that Convention (1949) these terms are used with regard to the wounded and sick (Article 12 [Link]), medical units and establishments (Article 19 [Link]), and medical personnel (Article 24 [Link]). In general the word "respect" implies the concept of sparing the persons and objects concerned, and not attacking them, while the word "protection" implies an act of positive aid and support. (12)

1873 The civilian population is defined in Article 50 [Link] ' (Definition of civilians and civilian population), ' paragraph 2; it comprises all persons who are civilians. According to Article 52 [Link] ' (General protection of civilian objects), ' paragraph 1, civilian objects are all objects which are not military objectives as defined in paragraph 2 of the same article. In the sense of Article 43 [Link] ' (Armed forces), ' paragraph 2, combatants are members of the armed forces with the exception of medical personnel and chaplains.

1874 As regards military objectives, these include the armed forces and their installations and transports. As far as objects are concerned, military objectives are limited, according to Article 52 [Link] ' (General protection of civilian objects), ' paragraph 2:

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

1875 Finally, the word "operations" should be understood in the context of the whole of the Section; it refers to military operations during which violence is used, and not to ideological, political or religious campaigns. For reasons which have nothing to do with the discussions in the Diplomatic Conference, the adjective "military" was not used with the term "operations", but this is certainly how the word should be understood. According to the dictionary, "military operations" refers to all movements and acts related to hostilities that are undertaken by armed forces. (13) This term is used in several articles in this Section, particularly in paragraph 1 of Article 51 [Link] ' (Protection of the civilian population) ' and it may be useful to refer to the commentary thereon.

' C.P./ J.P. '

NOTES

(1) [(1) p.598] The Conventions and Declarations adopted on 29 July 1899 and 18 October 1907 by the two International Peace Conferences in The Hague include the following:
-- Conventions concerning the laws and customs of war on land (II of 1899, IV of 1907);
-- Declarations prohibiting the discharge of protectiles and explosives from balloons (1899 and 1907);
-- Convention Respecting Bombardment by Naval Forces in Time of War (IX of 1907);

(2) [(2) p.598] Cf. General introduction;

(3) [(3) p.598] Declaration to the Effect of Prohibiting the Use of certain Projectiles in Wartime, signed in St. Petersburg, 29 November -- 11 December 1868;

(4) [(4) p.598] See H. Meyrowitz, "Le Protocole additionnel I et le droit général de la guerre", in "Forces armées et développement du droit de la guerre", ' Recueil de la Société internationale de droit pénal militaire et de droit de la guerre. ' Brussels, 1982, p. 119, in particular p. 124 (with notes);

(5) [(5) p.599] CE/3b, p. 24-25; see also pp. 11-16;

(6) [(6) p.599] ' CE 1971, Report ', pp. 75-77, paras. 424-439;

(7) [(7) p.599] ' CE 1972, Report ', Vol. I, pp. 141-144. paras. 3.97-3.124;

(8) [(8) p.599] Cf. O.R. III, pp. 193-195;

(9) [(9) p.599] See O.R. XIV, p. 15, CDDH/III/SR.2, para. 18; p. 20, CDDH/III/SR.3, para. 8; pp. 26-27, CDDH/III/SR.4, paras. 8-9; pp. 31-32, paras. 53 and 57;

(10) [(10) p.599] O.R. VI, p. 186, CDDH/SR.41, Annex (France);

(11) [(11) p.599] Ibid., p. 188 (India);

(12) [(12) p.600] For more details, cf. commentary on the articles mentioned and on Art. 10, supra, p. 145;

(13) [(13) p.600] ' The Shorter Oxford Dictionary ', 1973, p. 1452 defines "military operations" as a "series of warlike or strategic acts". Cf. also the ' Grand Dictionnaire encyclopédique Larousse ', 1984, Vol. 7, p. 7592: "ensemble des combats et des manoeuvres de toute sorte exécutés par des forces militaires dans une région déterminée en vue d'atteindre un objectif précis" (battles and manoeuvres of all kinds, taken as a whole, as carried out by armed forces in a defined area, with a view to gaining a specific objective) (translated by the ICRC);

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

COMMENTARY OF 1987: DEFINITION OF CIVILIANS AND CIVILIAN POPULATION

[p.609] Article 50 -- Definition of civilians and civilian population

[p.610] 1907 This article reproduces almost word for word the provision contained in the 1973 draft (Article 45). It became clear that this very important Section of the Protocol required a definition of the persons to whom it applies in one of its first articles.

1908 Article 4 [Link] of the fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War contains a definition of the persons protected by that Convention against arbitrary and wanton enemy action when they are in the power of the enemy; this is the main object of the Convention. However, Part II, entitled "General protection of populations against certain consequences of war" has a wider field of application; according to Article 13 [Link] , that Part covers "the whole of the populations of the countries in conflict". That definition is close to the definition of the civilian population given in Article 50 [Link] of the Protocol under consideration here.

1909 In protecting civilians against the dangers of war, the important aspect is not so much their nationality as the inoffensive character of the persons to be spared and the situation in which they find themselves. The definition covers civilians individually as well as collectively when they are referred to as the "civilian population", a concept which can be found in many articles in the Protocol.

1910 Some delegates wished the definition to be included in Article 2 [Link] ' (Definitions) ' (1) but the Conference preferred the present arrangement.

Paragraph 1

1911 As we have seen, the principle of the protection of the civilian population is inseparable from the principle of the distinction which should be made between military and civilian persons. In view of the latter principle, it is essential to have a clear definition of each of these categories.

1912 In the course of history many definitions of the civilian population have been formulated, and everyone has an understanding of the meaning of this concept. However, all these definitions are lacking in precision, and it was desirable to lay down some more rigorous definition, particularly as the categories of persons they cover has

varied.

1913 Thus the Protocol adopted the only satisfactory solution, which is that of a negative definition, namely, that the civilian population is made up of persons who are not members of the armed forces.

1914 This definition has the great advantage of being ' ne varietur. ' Its negative character is justified by the fact that the concepts of the civilian population and the armed forces are only conceived in opposition to each other, and that the latter constitutes a category of persons which is now clearly defined in international law and determined in an indisputable manner by the laws and regulations [p.611] of States. Therefore it was worth taking advantage of this possibility. It is clear that a negative definition of the civilian population implies that the meaning given to "armed forces" must be pointed out. This provision of the Protocol refers to the relevant article of the Third Convention [Link] and to Article 43 [Link] of the Protocol ' (Armed forces), ' which supplements it.

1915 The paragraph under consideration here therefore follows a process of elimination and removes from the definition those persons who could by and large be termed "combatants". Therefore, according to Article 4 A [Link] of the Third Convention, the following are excluded:

"1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

a) that of being commanded by a person responsible for his subordinates;
b) that of having a fixed distinctive sign recognizable at a distance;
c) that of carrying arms openly;
d) that of conducting their operations in accordance with the laws and customs of war.

3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
[...]
6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war."

1916 Paragraph 1 also refers to Article 43 [Link] of the Protocol ' (Armed forces), ' which contains a new definition of armed forces covering the different categories of the above-mentioned Article 4 [Link] of the Third Convention.

1917 In other words, apart from members of the armed forces, everybody physically present in a territory is a civilian.

1918 The last sentence of paragraph 1 gave rise to some discussion in the Diplomatic Conference. According to the ICRC draft there was "presumption" of civilian status, but this concept led to some problems and the Working Group decided to replace "presumed" by "considered". (2)

1919 Other delegates thought that the definition might be in conflict with Article 5 [Link] of the Third Geneva Convention. Paragraph 2 of that article reads as follows:

[p.612]
"Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

1920 The result of the discussions which took place on this subject was that there could be no contradiction between the two definitions, which are concerned with very different situations. (3) In the case of the Third Convention the persons concerned have committed a belligerent act and claim the status of combatants, and therefore ask to be treated as prisoners of war. Article 50 [Link] of the Protocol concerns persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances. They should be considered to be civilians until further information is available, and should therefore not be attacked.

1921 The methods combatants use will certainly have an influence on the application of this provision. Thus, for example, if combatants do not clearly distinguish themselves from the civilian population in accordance with the provisions of Article 44 [Link] ' (Combatants and prisoners of war), ' this could result in a weakening of the immunity granted civilians and the civilian population.

Paragraphs 2 and 3

1922 The second paragraph provides that "the civilian population comprises all persons who are civilians". However, in wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population. It is also clear that as laid down in Article 58 [Link] ' (precautions against the effects of attacks) ' belligerents should remove the civilian population, civilians and civilian objects under their authority from the vicinity of military objectives. A military unit is by definition a military objective and should not be placed in the middle of a civilian population.

' C. P./ J. P. '

NOTES

(1) [(1) p.610] See O.R. XIV, p. 80, CDDH/III/SR.10, para. 18 (with reference to doc. CDDH/III/66, not published in the Offical Records);

(2) [(2) p.611] O.R. XV, p. 239, CDDH/50/Rev.1, para. 39;

(3) [(3) p.612] Ibid;

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

COMMENTARY OF 1987: PROTECTION OF THE CIVILIAN POPULATION

[p.613] Article 51 -- Protection of the civilian population

[p.615] General remarks

1923 Article 51 [Link] is one of the most important articles in the Protocol. It explicitly confirms the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities. This general rule is accompanied by rules of application.

1924 Committee III of the Diplomatic Conference began examining this article in 1974 and referred it, with the ten amendments which had been submitted, to a Working Group. Committee III adopted the text of this article by consensus. Voting took place in a plenary meeting in 1977 and the article was adopted with 77 votes in favour, 1 against and 16 abstentions. (1)

1925 The delegation which voted against justified its vote by arguing that the article could seriously hinder the conduct of military operations against an invader and compromise the exercise of the right to self-defence recognized in Article 51 of the Charter of the United Nations. According to this delegation, the provisions relating to indiscriminate attacks should not be such as to prevent a State from defending its territory against an invader, even if this were to entail losses in its own population. Several delegations made similar statements. (2)

1926 Such fears do not seem justified. Article 51 of the Charter of the United Nations reads as follows:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security [...]"

1927 However, it seems clear that the right of self-defence does not include the use of measures which would be contrary to international humanitarian law, even in a case where aggression has been established and recognized as such by the Security Council. The Geneva Conventions of 1949 and this Protocol must be applied in accordance with their Article 1 [Link] "in all circumstances"; the Preamble of the Protocol reaffirms that their application must be "without any adverse [p.616] distinction

based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict".

1928 It is true that in the preparatory work and during the discussions in the Diplomatic Conference the possibility was referred to of making a distinction between the rules applicable by an aggressor, on the one hand, and by the victim of the aggression, on the other. (3) However, several delegations opposed this point of view. (4) In any case, the Conference did not adopt this suggestion; on the contrary, in the above-mentioned paragraph of the Preamble of the Protocol it confirmed the equality of the Parties to the conflict with regard to the obligations laid down by humanitarian law. This is wholly reasonable, as the distinction between ' jus ad bellum ' and ' jus in bello ' is fundamental and should always be respected.

1929 Several delegations made spoken or written statements, during the final debate, on the meaning to be given to some of the provisions contained in this article. They will be examined with regard to the paragraphs concerned.

1930 In the draft the ICRC had provided that Article 51 [Link] (46 of the draft) would be among the provisions to which no reservations could be made. Finally the Conference deleted all provisions relating to reservations, but in the discussions Article 51 [Link] had been included in the list of articles to which reservations were prohibited. (5) In the absence of a specific provision it is therefore general international law that applies, in particular the Vienna Convention on the Law of Treaties (Articles 19-23). It may be recalled that that Convention prohibits reservations which are incompatible with the object and purpose of the treaty. (6)

1931 During the course of the discussions and in the written statements some delegations indicated that in their view reservations to this article would be incompatible with the object and purpose of the treaty. (7) There is no doubt that, as stated above, Article 51 [Link] is a key article in the Protocol. It constitutes a reasonable balance which was achieved with difficulty between the divergent views that emerged in the Diplomatic Conference. That is why reservations, even partial ones, could jeopardize this balance and in this way go against the object and purpose of this indispensable provision.

1932 The importance attached by the Diplomatic Conference to this article is corroborated by the fact that violation of several of its provisions is qualified as a grave breach. In fact Article 85 [Link] ' (Repression of breaches of this Protocol), ' paragraph 3, qualifies as a grave breach the act of wilfully making the civilian population or individual civilians the object of attack if this causes death or serious injury to body or health.

1933 The same applies for wilful indiscriminate attacks affecting the civilian population or civilian objects (or against installations containing dangerous [p.617] forces in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57 [Link] ' (Precautions in attack), '

paragraph 2(a)(iii).

1934 Thus in relation to criminal law the Protocol requires intent and, moreover, with regard to indiscriminate attacks, the element of prior knowledge of the predictable result.

Paragraph 1

1935 This is an introductory paragraph which confirms the principle of the general protection of civilians against dangers arising from military operations. There is no doubt that armed conflicts entail dangers for the civilian population, but these should be reduced to a minimum. Such is the aim of the following paragraphs.

1936 According to dictionaries, the term "military operations", which is also used in several other articles in the Protocol, means all the movements and activities carried out by armed forces related to hostilities. (8) A mixed group of the Diplomatic Conference gave the following definition of the expression "zone of military operations": "in an armed conflict, the territory where the armed forces of the adverse Parties taking a direct or an indirect part in current military operations, are located". (9)

1937 The second sentence refers to the "other applicable rules of international law": (10) apart from some customary rules and, of course, the other relevant provisions of the Protocol, these are mainly the Hague Regulations annexed to Hague Convention IV of 1907 and the fourth Geneva Convention of 1949. In addition, mention could be made of the rules contained in the Geneva Protocol of 1925 for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, as well as the Hague Convention of 1954 for the Protection of Cultural Property. Although they are not aimed directly at the protection of the civilian population, these two treaties can have a positive influence on the fate of the civilian population in time of armed conflict. The Convention concluded in 1980 on the Prohibition or Restrictions on the Use of Certain Conventional Weapons contains corresponding provisions with respect to the civilian population. (11)

[p.618] Paragraph 2

1938 The first sentence gives substance to the principle of general immunity formulated in the preceding paragraph by explicitly prohibiting attacks directed against the civilian population as such, as well as against individual civilians. By using the words "directed" and "as such" it emphasizes that the population must never be used as a target or as a tactical objective.

1939 It should be noted that "attacks" are defined in Article 49 [Link] ' (Definition of attacks and scope of application), ' paragraph 1.

1940 In the second sentence the Conference wished to indicate that the prohibition covers acts intended to spread terror; there is no doubt that acts of violence related to a

state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here. (12) This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage. It is interesting to note that threats of such acts are also prohibited. This calls to mind some of the proclamations made in the past threatening the annihilation of civilian populations.

1941 Finally, it is worthy of note that Article 85 [Link] ' (Repression of breaches of this Protocol), ' paragraph 3(a), defines the act of making the civilian population or individual civilians the object of attack as a grave breach, when it results in death or serious injury to body or health.

Paragraph 3

1942 The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities. If the civilian is captured while he is committing hostile acts, the rules governing his fate are laid down in Article 45 ' (Protection of persons who have taken part in hostilities). '

1943 During the course of the discussions several delegations indicated that the expression "hostilities" used in this article included preparations for combat and the return from combat. (13) Similar problems arose in Article 44 [Link] ' (Combatants and prisoners of war) ' with regard to the expression "military deployment preceding the launching of an attack". It seems that the word "hostilities" covers not only the time that the civilian actually makes use of a weapon, but also, for example, [p.619] the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon. If a civilian is captured or arrested in such circumstances, he may have recourse to paragraph 1 of Article 45 [Link] ' (Protection of persons who have taken part in hostilities) ' and claim prisoner-of-war status; he must be treated as such pending determination of his status by a competent tribunal.

1944 What is the exact meaning of the term "direct" in the expression "take a direct part in hostilities"? A similar expression is already used in paragraph 2 of Article 43 [Link] ' (Armed forces). ' In general the immunity afforded civilians is subject to a very stringent condition: that they do not participate directly in hostilities, i.e., that they do not become combatants, on pain of losing their protection. Thus "direct" participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to

participate, the civilian regains his right to the protection under this Section, i.e., against the effects of hostilities, and he may no longer be attacked. However, there is nothing to prevent the authorities, capturing him in the act or arresting him at a later stage, from taking repressive or punitive security measures with regard to him in accordance with the provisions of Article 45 [Link] ' (Protection of persons who have taken part in hostilities) ' or on the basis of the provisions of the fourth Convention (assigned residence, internment etc.) if his civilian status is recognized. Further it may be noted that members of the armed forces feigning civilian non-combatant status are guilty of perfidy under Article 37 [Link] ' (Prohibition of perfidy), ' paragraph 1(c).

1945 There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context.

Paragraph 4

1946 This provision is very important; it confirms the unlawful character of certain regrettable practices during the Second World War and subsequent armed conflicts. Far too often the purpose of attacks was to destroy all life in a particular area or to raze a town to the ground without this resulting, in most cases, in any substantial military advantages.

1947 On this subject the general rule was formulated in Article 48 [Link] ' (Basic rule): ' belligerents may direct their operations only against military objectives. The first specification is added in paragraph 2 of the present Article 51 [Link] : attacks against the civilian population as such and against individual civilians are prohibited.

1948 Up to now the matter is fairly clear in theory, but it is less so in practice. In fact, civilians may be inside or in the immediate proximity of military objectives, whether these consist of persons or objects; moreover, purely civilian objects may in combat conditions become military objectives, thereby endangering the [p.620] persons near them. Paragraphs 4 and 5 attempt to cover such situations. The need to achieve a consensus has led those drafting these provisions to formulate them in a way that is sometimes ambiguous. Several delegates remarked on this when the article was adopted. (14)

1949 At a more general level, other delegations pointed out that, like the whole of the Section, this provision should not be such as to inhibit the capacity for defence of a State which has to counter aggression. Yet it is well-known how difficult it is in armed conflict to determine objectively who is the aggressor. Moreover, it should be recalled that the State which is a victim of aggression is in no way exempted from the obligations incumbent upon it under treaty or customary rules of law.

1950 The provision begins with a general prohibition on indiscriminate attacks, i.e., attacks in which no distinction is made. Some may think that this general rule should have sufficed, but the Conference considered that it should define the three types of attack covered by the general expression "indiscriminate attacks".

' Sub-paragraph (a) '

1951 This refers in the first place to attacks which are not directed at a specific military objective. Article 52 [Link] ' (General protection of civilian objects), ' paragraph 2, defines military objectives, as far as objects are concerned, limiting them

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

Obviously military objectives also include, indeed principally so, the armed forces, their members, installations, equipment and transports.

1952 The military character of an objective can sometimes be recognized visually, but most frequently those who give the order or take the decision to attack will do so on information provided by the competent services of the army. In the majority of cases they will not themselves have the opportunity to check the accuracy of such information; they should at least make sure that the information is precise and recent, and that the precautions and restrictions laid down in Article 57 [Link] ' (Precautions in attack) ' are observed. In case of doubt, additional information must be requested.

1953 The armed forces and their installations are objectives that may be attacked wherever they are, except when the attack could incidentally result in loss of human life among the civilian population, injuries to civilians, and damage to civilian objects which would be excessive in relation to the expected direct and specific military advantage. In combat areas (15) it often happens that purely civilian [p.621] buildings or installations are occupied or used by the armed forces and such objectives may be attacked, provided that this does not result in excessive losses among the civilian population. For example, it is clear that if fighting between armed forces takes place in a town which is defended house by house, these buildings -- for which Article 52 [Link] ' (General protection of civilian objects), ' paragraph 3, lays down a presumption regarding their civilian use -- will inevitably become military objectives because they offer a definite contribution to the military action. However, this is still subject to the prohibition of an attack causing excessive civilian losses.

1954 Outside the combat area the military character of objectives that are to be attacked must be clearly established and verified. Similarly the limits of such objectives must be precisely determined.

1955 The question arose what the situation would be if a belligerent in a combat area

wished to prevent the enemy army from establishing itself in a particular area or from passing through that area, for example, by means of barrage fire. There can be little doubt in such a case that the area must be considered as a military objective and treated as such. Yet, during the Diplomatic Conference several delegations insisted on confirming this interpretation in their statements. (16) Of course, such a situation could only concern limited areas and not vast stretches of territory. It applies primarily to narrow passages, bridgeheads or strategic points such as hills or mountain passes.

' Sub-paragraph (b) '

1956 This concerns attacks which employ a method or means of combat which cannot be directed at a specific military objective. (17)

1957 The term "means of combat" or "means of warfare" (cf. Article 35 [Link] -- ' Basic rules ') generally refers to the weapons being used, while the expression "methods of combat" generally refers to the way in which such weapons are used.

1958 As regards the weapons, those relevant here are primarily long-range missiles which cannot be aimed exactly at the objective. The V2 rockets used at the end of the Second World War are an example of this. It should be noted that most armies endeavour to use accurate weapons as attacks which do not strike the intended objective result in a loss of time and equipment without giving a corresponding advantage. Thereby the margin of error of missiles is gradually reduced. Here, military interests and humanitarian requirements coincide.

1959 From the point of view of the protection of civilians, the use of land or sea mines raises some problems. There were lengthy discussions in the Ad Hoc Committee on Conventional Weapons of the Conference. The work of this Committee (18) served as a basis for the Conference convened by the United [p.622] Nations in 1979 and 1980. That Conference adopted a Convention (10 October 1980) and three Protocols, one of which was on the prohibition or restrictions on the use of mines, booby-traps and other devices. (19) Briefly, this Protocol requires Parties to take measures to keep adequate records and to give proper warning when minefields are laid, so that the population is not endangered. As regards mine-laying by aircraft or remotely-delivered mines, such operations are prohibited in principle unless such mines are only used in an area that constitutes a military objective or that contains military objectives; even in that situation the location of mines that are laid must be recorded, or the mines must be equipped with a remotely-controlled mechanism to detonate then or must self-destruct when they have lost their military value. (20)

1960 However, the question may arise at what point the use of mines constitutes an attack in the sense of this provision. Is it when the mine is laid, when it is armed, when a person is endangered by it, or when it finally explodes? The participants at the meeting of the International Society of Military Law and the Law of War (Lausanne, 1982) conceded that from the legal point of view the use of mines constituted an attack in the sense of the Protocol when a person was directly endangered by such a mine. (21) It

may be considered that mines also come within the scope of sub-paragraph (c) discussed below.

' Sub-paragraph (c) '

1961 This sub-paragraph concerns attacks which employ a method or means of combat the effects of which cannot be limited as required by this Protocol. Like sub-paragraph (b) this provision was not contained in such a precise manner in the ICRC draft; the Working Group of Committee III presented a more elaborate text which was referred back to the Working Group, and finally Committee III adopted an article which contains all the elements of the present article (22) although the wording has been revised and modified reasonably successfully by the Drafting Committee of the Conference.

1962 On this provision the report of Committee III contains the following passage:

"The main problem was that of defining the term ' indiscriminate attacks '. There was general agreement that a proper definition would include the act of not directing an attack at a military objective, the use of means or methods of combat which cannot be directed at a specific military objective, and the use of means or methods of combat the effects of which cannot be limited as required by the Protocol. Many but not all of those who commented were of the view that the definition was not intended to mean that there are means [p.623] or methods of combat whose use would involve an indiscriminate attack in all circumstances. Rather it was intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their use in those circumstances would involve an indiscriminate attack." (23)

1963 However, there are some means of warfare of which the effects cannot be limited in any circumstances. It is different with regard to other means, such as fire (24) or water (25) which, depending on the circumstances of their use, can have either a restricted effect or, on the contrary, be completely out of the control of those using them, causing significant losses among the civilian population and extensive damage to civilian objects. The nature of the means used is not the only criterion: the power of the weapons used can have the same consequences. For example, if a 10 ton bomb is used to destroy a single building, it is inevitable that the effects will be very extensive and will annihilate or damage neighbouring buildings, while a less powerful missile would suffice to destroy the building. There are also methods which by their very nature have an indiscriminate character, such as poisoning wells.

1964 Several delegations considered that it was necessary to confirm the views expressed by the Rapporteur (26) in their explanations of vote. According to these delegations the provision does not mean that there are means of combat of which the use would constitute an indiscriminate attack in all circumstances.

1965 This point was discussed above; it is true that in most cases the indiscriminate

character of an attack does not depend on the nature of the weapons concerned, but on the way in which they are used. However, as stated above, there are some weapons which by their very nature have an indiscriminate effect. The example of bacteriological means of warfare is an obvious illustration of this point. There are also other weapons which have similar indiscriminate effects, such as poisoning sources of drinking water. Of course, bacteriological means of warfare have been prohibited since 1925, and the use of poison was prohibited in 1899 by the Hague Regulations.

1966 Nevertheless, States in making such statements were more concerned with nuclear weapons. A thorough analysis of the connection between the Protocol and the use that may be made of nuclear weapons is included in the introduction to this Section, and we refer the reader to that text. (27)

Paragraph 5

1967 The attacks which form the subject of this paragraph fall under the general prohibition of indiscriminate attacks laid down at the beginning of paragraph 4. Two types of attack in particular are envisaged here.

[p.624] 1968 The ' first type ' includes area bombardment, sometimes known as carpet bombing or saturation bombing. It is characteristic of such bombing that it destroys all life in a specific area and razes to the ground all buildings situated there. There were many examples of such bombing during the Second World War, and also during some more recent conflicts. Such types of attack have given rise to strong public criticism in many countries, and it is understandable that the drafters of the Protocol wished to mention it specifically, even though such attacks already fall under the general prohibition contained in paragraph 4. According to the report of Committee III, the expression "bombardment by any method or means" means all attacks by fire-arms or projectiles (except for direct fire by small arms) and the use of any type of projectile. (28)

1969 This paragraph was adopted with some difficulty; the expression "clearly separated and distinct" in particular led to lengthy discussions. In their first report the Working Group had given Committee III a choice between various proposals: "widely separated", "distinct"; or alternatively the introduction of a final phrase, "unless the objectives are too close together to be capable of being attacked separately". (29)

1970 Rather than going on to vote on these various proposals, Committee III decided to refer the subject back to the Working Group and requested it to try and come up with an expression that might meet with general approval. The Group presented the Committee with a new draft which had been accepted by consensus within the Group.
(30) Committee III adopted this proposal without further discussion and it forms the present text of paragraph 5.

1971 It will be noted that the Conference adopted a wording very similar to that which the ICRC had proposed, namely, "at some distance from each other". It was decided

not to add the phrase cited above, no doubt through fear of encouraging area bombardment, for in such a case the attacking forces could use their own judgment, taking into account the weapons available and the circumstances, as to whether the individual objectives were too close together to be attacked separately.

1972 Having said that, the interpretation of the words "clearly separated and distinct" leaves some degree of latitude to those mounting an attack; in case of doubt they can refer to sub-paragraph (b) and assess whether the attack is of a nature to cause losses and damage which would be excessive in relation to the military advantage anticipated.

1973 The question may also arise whether the prohibition formulated here is not already covered by paragraph 4(a), which prohibits attacks not directed at a specific military objective. In fact, areas of land between military objectives are not themselves military objectives. It must be accepted that in open areas which are sparsely populated, such as forests, attacks may be mounted against the whole of the area if it has been established that enemy armed forces are present. On the other hand, in a town, village or any other area where there is a similar [p.625] concentration of civilian persons and objects, the military objectives in that area may only be attacked separately without leading to civilian losses outside the military objectives themselves. This also applies for temporary concentrations of civilians, such as refugee camps.

1974 As stated above, the size of the area over which military objectives are spread and the distance separating them are relatively subjective notions. In case of doubt, the general rule of respect for the civilian population must always be observed.

1975 When the distance separating two military objectives is sufficient for them to be attacked separately, taking into account the means available, the rule should be fully applied. However, even if the distance is insufficient, excessive losses that might result from the attack should be taken into account.

1976 The ' second type of attack ' envisaged in paragraph 5 includes those which have excessive effects in relation to the concrete and direct military advantage anticipated. Once again there were long discussions in the Diplomatic Conference and it was difficult to come to an agreement. The formula that was adopted is very similar to that proposed by the ICRC. (31) It is based on the wording of Article 57 [Link] ' (Precautions in attack) ' relating to precautionary measures. Committee III had suggested either a straightforward reference to Article 57 [Link] ' (Precautions in attack) ' or reproducing the formula used in that article. Finally, the Drafting Committee, which was requested to resolve the question, opted for the second solution. Thus reference may be made to Article 57 [Link] ' (Precautions in attack) ' for further details.

1977 Paragraphs 4 and 5 were criticized in the Diplomatic Conference and subsequently. The criticism was directed particularly at the imprecise wording and terminology. For example, according to some, the Protocol fails to specify the size of the area over which military objectives may be spread and the distance which must separate them. It was also pointed out that modern electronic means made it

possible to locate military objectives, but that they did not provide information on the presence of civilian elements within or in the vicinity of such objectives.

1978 Such criticisms are justified, at least to some extent. Putting these provisions into practice, or, for that matter, any others in Part IV, will require complete good faith on the part of the belligerents, as well as the desire to conform with the general principle of respect for the civilian population.

1979 Comments were also made in various quarters that paragraph 5(b) authorized any type of attack, provided that this did not result in losses or damage which were excessive in relation to the military advantage anticipated. This theory is manifestly incorrect. In order to comply with the conditions, the attack must be directed against a military objective with means which are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in the way required by the Protocol; ' moreover, ' even after those conditions are fulfilled, the incidental civilian losses [p.626] and damages must not be excessive. Of course, the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem; in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail, as stated above.

1980 The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 [Link] ' (Basic rule) ' and with paragraphs 1 and 2 of the present Article 51 [Link] . The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.

1981 This clearly shows the importance attached by the drafters of the Protocol to this article; these provisions should therefore lead those responsible for such attacks to take all necessary precautions before making their decision, even in the difficult constraints of battle conditions.

Paragraph 6

1982 This provision is very important. In fact, the belligerents in the Second World War recognized in their public declarations that attacks may be directed only at military objectives, but on the pretext that their own population had been hit by attacks carried out by the adversary, they went so far, by way of reprisals, as to wage war almost indiscriminately, and this resulted in countless civilian victims. (32)

1983 The text is that proposed by the ICRC. During the discussions in the Conference the question of reprisals was examined with regard to several articles and in each of these a clause prohibiting reprisals was included (see also Articles 20 [Link] -- ' Prohibition of reprisals; ' 52 [Link] , ' General protection of civilian objects; ' 53 [Link] --

' Protection of cultural objects and of places of worship; ' 54 [Link] -- ' Protection of objects indispensable to the survival of the civilian population; ' 55 [Link] -- ' Protection of the natural environment ' and 56 [Link] -- ' Protection of works and installations containing dangerous forces). ' This is why several delegates raised the question during the discussions whether a single general provision might not suffice, while others considered that it was not very realistic to prohibit all reprisals, and that it was better to try and restrain them by laying down specific rules. Finally Committee I was charged with examining the general problem. (33) It decided to leave the specific clauses prohibiting reprisals in the articles where they occured, and not to draft a general prohibition. (34)

1984 The prohibition contained in this article is not subject to any conditions and it therefore has a peremptory character; in particular it leaves out the possibility of derogating from this rule by invoking military necessity. As in the 1949 [p.627] Conventions, this provision confirms the right of an individual not to be punished for acts which he has not himself committed.

1985 This prohibition of attacks by way of reprisals and other prohibitions of the same type contained in the Protocol and in the Conventions have considerably reduced the scope for reprisals in time of war. At most, such measures could now be envisaged in the choice of weapons and in methods of combat used against military objectives.

Paragraph 7

1986 This provision affords measures of protection to the whole of the civilian population and all civilians, thus extending to them measures which already exist for two categories of persons: prisoners of war and civilians protected by the fourth Convention. In fact, according to Article 23 [Link] of the Third Convention, prisoners of war may not be used to render certain points or areas immune from military operations.

1987 As regards persons protected by the fourth Convention, Article 28 [Link] of the latter provides that they may not be used to render certain points or areas immune from military operations. Article 19 [Link] of the first Convention and Article 12 [Link] of the present Protocol ' (Protection of medical units) ' contain a similar rule with regard to medical units. For its part, Article 58 [Link] of the Protocol ' (Precautions against the effects of attack) ' also deals with measures to be taken to remove the population from the vicinity of military objectives, and we refer the reader to the commentary thereon.

1988 This paragraph develops and clarifies these various rules. The term "movements" in particular is a new one; this is intended to cover cases where the civilian population moves of its own accord. The second sentence concerns cases where the movement of the population takes place in accordance with instructions from the competent authorities, and is particularly concerned with movements ordered by an Occupying Power, although it certainly also applies to transfers of prisoners of war, and civilian enemy subjects ordered by the authorities of a belligerent Power to move within its own territory.

Paragraph 8

1989 The ICRC had proposed in its draft the following provision which related to the provision contained in paragraph 7:

"If a Party to the conflict, in violation of the foregoing provision, uses civilians with the aim of shielding military objectives from attack, the other Party to the conflict shall take the precautionary measures provided for in Article 50." (35)

[p.628] 1990 It is fairly clear from the deliberations and the report of Committee III (36) that the prohibitions referred to in paragraph 8 are those contained in paragraph 7. Military objectives are defined as far as objects are concerned in Article 52 [Link] ' (General protection of civilian objects), ' paragraph 2. Thus, even if civilians were intentionally brought or kept in the vicinity of military objectives, the attacker should take the measures provided for in Article 57 [Link] ' (Precautions in attack), ' especially those set out in paragraph 2 (a)(ii) and (iii) and (c). It is clear that in such cases a warning to the population is particularly appropriate as civilians are themselves rarely capable of assessing the danger in which they are placed.

1991 This provision is concerned with the situation in which other provisions of the Protocol are not complied with. It is an attempt to safeguard the population even when the appropriate authorities do not take the required measures of protection with regard to them.

1992 Article 60 of the Vienna Convention on the Law of Treaties provides that a material breach of a multilateral treaty entitles a Party especially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State. Without even going into the question whether non-compliance with paragraph 7 constitutes a material breach of the Protocol, it is pleasing to note the tenor of the last paragraph of the same Article 60:

"5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties." (37)

1993 Thus, in the case of this Protocol, it is compulsory to apply it, even if another Party has committed a violation. It should be noted that provisions protecting the human person now bear the stamp of customary law.

' C.P./J.P. '

NOTES

(1) [(1) p.615] O.R. VI, pp. 165-166, CDDH/SR.41, para. 118;

(2) [(2) p.615] Ibid., p. 162. One delegation emphasized that the Charter of the United Nations recognizes the right of individual or collective self-defence in the case of armed attack and that international 1aw cannot restrict the legitimate right of a victim of aggression and occupation to defend itself (ibid., p. 196, Annex (Romania));

(3) [(3) p.616] See, for example, O.R. V, pp. 119-121, CDDH/SR.12, paras. 13-21, and O.R. VI, p. 196, CDDH/SR.41, Annex (Romania);

(4) [(4) p.616] See, for example, O.R. V, pp. 109-110, CDDH/SR.11, paras. 44-50; pp. 137-138, CDDH/SR.13, paras.51-57;

(5) [(5) p.616] O.R. X, p. 251, CDDH/405/Rev.1;

(6) [(6) p.616] Cf. introduction to Part VI, infra, p. 1061;

(7) [(7) p.616] O.R. VI, p. 167, CDDH/SR.41, paras. 135-137; p. 187, ibid., Annex (GDR); pp. 192-193 (Mexico);

(8) [(8) p.617] Cf. the definitions given supra, commentary Art. 48, note 13, p. 600;

(9) [(9) p.617] O.R. XV, p. 338, CDDH/II/266-CDDH/III/255, Annex A;

(10) [(10) p.617] We also refer to the commentary Art. 49, para. 4, supra, p. 606, and Art. 2, sub-para. (b), supra, p. 60;

(11) [(11) p.617] Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects.
- Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Art. 3, paras. 2, 3(c) and 4; Art. 4, para. 2; Art. 5, para. 2; Art. 7, para. 3(a)(i).
- Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Art. 2. For participation in this Convention, cf. infra, p. 1549;

(12) [(12) p.618] O.R. XV, p. 274, CDDH/215/Rev.1, para. 51;

(13) [(13) p.618] Ibid., p. 330, CDDH /III/224;

(14) [(14) p.620] See, for example, O.R. VI, pp. 164-165, CDDH/SR.41, para. 122;

(15) [(15) p.620] The Mixed Group defined this concept as follows: "In an armed conflict, that area where the armed forces of the adverse Parties actually engaged in combat, and those directly supporting them, are located". O.R. XV, p. 338, CDDH/II/266-CDDH/III/255, Annex A;

(16) [(16) p.621] See commentary Art. 52, para. 2, infra, p. 635;

(17) [(17) p.621] A note on the drafting of the French text: the use of the pronoun "on" is unusual in French legal draftsmanship as it is rather indeterminate. This is avoided in the English wording where the word "attacks" is the subject of the sentence;

(18) [(18) p.621] See O.R. XVI;

(19) [(19) p.622] Cf. supra, note 11;

(20) [(20) p.622] Art. 5 of the above-mentioned Protocol II. Also see Y. Sandoz, "A New Step Forward in International Law -- Prohibition and Restrictions on the Use of Certain Conventional Weapons", ' IRRC, ' January-February 1981, p. 3 (offprint available with the text of the Final Act of the said United Nations Conference, originally published ibid., pp. 41-55);

(21) [(21) p.622] See "Forces armées et développement du droit de la guerre", op.cit., p. 303;

(22) [(22) p.622] O.R. XV pp. 304-305, CDDH/215/Rev.1, Annex;

(23) [(23) p.623] Ibid., p. 274, para. 55;

(24) [(24) p.623] Cf. the Protocol II referred to supra, note 11;

(25) [(25) p.623] On this subject reference may be made to Article 56 of this Protocol;

(26) [(26) p.623] See O.R. VI, pp. 168-172, CDDH/SR.41;

(27) [(27) p.623] See supra, p. 589;

(28) [(28) p.624] Cf. O.R. XV, p. 275, CDDH/215/Rev.1, para. 56;

(29) [(29) p.624] Ibid, p. 329, CDDH/III/224;

(30) [(30) p.624] O.R. XIV, p. 30, CDDH/III/SR.31, para. 5;

(31) [(31) p.625] "to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated" (draft, Art. 46, para. 3 (b));

(32) [(32) p.626] Cf. G. Best, ' Humanity in Warfare, ' London, 1980, pp. 273-277;

(33) [(33) p.626] O.R. XIV, p. 414, CDDH/III/SR.38, para. 65; O.R. V, p. 375,

CDDH/SR.31, paras. 20-23; O.R. X, pp. 184-185, CDDH/405/Rev.1, paras. 21-30;

(34) [(34) p.626] On the general question of reprisals, cf. infra, p. 981, introduction to Part V, Section II;

(35) [(35) p.627] Now Art. 57 of the Protocol;

(36) [(36) p.628] O.R. XV, p. 275, CDDH/215/Rev.1, para. 59;

(37) [(37) p.628] For more details, see commentary Art. 1, para. 1, supra p. 34, and the introduction to Part V, Section II (section concerning reprisals), infra, p. 981;

Israel-Palestinian Interim Agreement of 1995 (“Oslo II”)
Annex III

Article 17: **Health**

1. Powers and responsibilities in the sphere of Health in the West Bank and the Gaza Strip will be transferred to the Palestinian side, including the health insurance system.

2. The Palestinian side shall continue to apply the present standards of vaccination of Palestinians and shall improve them according to internationally accepted standards in the field, taking into account WHO recommendations. In this regard, the Palestinian side shall continue the vaccination of the population with the vaccines listed in Schedule 3.

3. The Palestinian side shall inform Israel of any Israeli hospitalized in a Palestinian medical institution upon his or her admission. Arrangements for moving such hospitalized Israelis shall be agreed upon in the joint committee.

4. The Palestinian side, on the one hand, and the Israeli Ministry of Health or other Israeli health institutions, on the other, shall agree on arrangements regarding treatment and hospitalization of Palestinians in Israeli hospitals.

5. The Israeli authorities shall endeavor to facilitate the passage of Palestinian ambulances within and between the West Bank and the Gaza Strip and Israel, subject to the provisions of Annex I.

6. Israel and the Palestinian side shall exchange information regarding epidemics and contagious diseases, shall cooperate in combating them and shall develop methods for exchange of medical files and documents.

7. The health systems of Israel and of the Palestinian side will maintain good working relations in all matters, including mutual assistance in providing first aid in cases of emergency, medical instruction, professional training and exchange of information.

8. a. The Palestinian side shall act as guarantor for all payments for Palestinian patients admitted to Israeli medical institutions, on condition that they receive prior approval from the Palestinian health authorities.

   b. Notwithstanding the above, in all cases of the emergency hospitalization in Israel of a sick or injured Palestinian not arranged in advance via the Ministry of Health of the Council, the Israeli hospital shall report to the Palestinian side directly and immediately, and in any case not more than 48 hours after the admission, the fact of the admission and the person's condition and diagnosis.

The report shall be made by telephone and fax and the Israel Ministry of Health shall be informed at the same time.

Within 24 hours of the receipt of the said report, the Palestinian side must either give an undertaking to cover all the costs of the hospitalization or remove the patient, by its own means, to a Palestinian hospital.

Should the Palestinian side have done neither of these in the given time, the Israeli hospital shall remove the patient in an Israeli vehicle and charge all costs to the Palestinian side at the accepted Israeli rate.

In all cases, the Palestinian side shall cover all hospitalization costs from admission to discharge to the territory of the Palestinian side.

Should the Israeli hospital not report as required to the Palestinian side, the hospital itself shall bear all costs.

9. A committee established through the CAC shall facilitate coordination and cooperation on health and medical issues between the Palestinian side and Israel.

10. Imports of pharmaceutical products to the West Bank and the Gaza Strip shall be in accordance with general arrangements concerning imports and donations, as dealt with in Annex V (Protocol on Economic Relations).

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Annotations

International Law and Gaza: The Assault on Israel's Right to Self-Defense

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- International law authorizes Israel to initiate military countermeasures in Gaza. If Gaza is seen as having independent sovereignty, Israel's use of force is permissible on the grounds of self-defense. If Gaza is seen as lacking any independent sovereignty, Israel's use of military force is permissible as in other non-international conflicts.

- The rule of "distinction" includes elements of intent and expected result: so long as one aims at legitimate targets, the rule of distinction permits the attack, even if there will be collateral damage to civilians. The rule of "proportionality" also relies upon intent. If Israel plans a strike without expecting excessive collateral damage, the rule of proportionality permits it. Israeli attacks to date have abided by the rules of distinction and proportionality.

- Israel's imposition of economic sanctions on the Gaza Strip is a perfectly legal means of responding to Palestinian attacks. Since Israel is under no legal obligation to engage in trade of fuel or anything else with Gaza, or to maintain open borders, it may withhold commercial items and seal its borders at its discretion.

- The bar on collective punishment forbids the imposition of criminal-type penalties to individuals or groups on the basis of another's guilt. None of Israel's actions involve the imposition of criminal-type penalties.

- There is no legal basis for maintaining that Gaza is occupied territory. The Fourth Geneva Convention refers to territory as occupied where the territory is of a state party to the convention and the occupier "exercises the functions of government" in the territory. Gaza is not territory of another state party to the convention and Israel does not exercise the functions of government in the territory.

- The fighting in Gaza has been characterized by the extensive commission of war crimes, acts of terrorism and acts of genocide by Palestinians, while Israeli countermeasures have conformed with the requirements of international law. International law requires states to take measures to bring Palestinian war criminals and terrorists to justice, to prevent and punish Palestinian genocidal efforts, and to block the funding of Palestinian terrorist groups and those complicit with them.

Since Israel's withdrawal from the Gaza Strip in August 2005, Palestinian groups including Hamas, Fatah, Palestinian Islamic Jihad, the Popular Democratic Front for the Liberation of Palestine, and the Popular Resistance Committees have launched thousands of rocket attacks at Israel. All the attacks have been on civilian targets, with no more than a handful of possible exceptions. The brunt of the Palestinian assault has been borne by the town of Sderot. The attacks have killed several residents and injured dozens, struck houses and public buildings like kindergartens, and so

traumatized residents that three-quarters of all Sderot children between the ages of 7 and 12 suffer from post-traumatic anxiety.

Faulty Arguments Made by Opponents of Israel

Unsurprisingly, in the wake of Israeli countermeasures, persistent critics of Israel have strongly objected to Israel's defensive actions to date, while remaining mostly mute on the crime under international law committed daily by the Gazan militias' attacks on Israeli civilians. As will be explained below, it is evident that the criticisms are without legal basis. Israeli responses to the Palestinian terror attacks emanating from Gaza correspond to the requirements of international law, and the claims that Israel has violated international law are without merit.

One widely reported criticism came from John Dugard, a professor of international law who has accepted a permanent appointment as special rapporteur on human rights in the "occupied Palestinian territories" from the discredited UN Commission on Human Rights and its successor UN Human Rights Council. Dugard has publicly and repeatedly interpreted his mandate as requiring him to criticize only Israel and, true to form, Dugard criticized Israeli defense measures for alleged illegality in the high-profile Sunday *New York Times* (Jan. 20, 2008).

First, Dugard claimed that Israel's attack on Hamas headquarters in a Palestinian Interior Ministry building in Gaza was illegal because the target was "near a wedding venue with what must have been foreseen loss of life and injury to many civilians." However, contrary to Dugard's insinuation, the building was certainly a legitimate target under the international humanitarian legal rule of distinction as it makes a definite contribution to Hamas' hostilities. That one Palestinian civilian lost her life in the Israeli strike is unfortunate, but not a violation of the rule of proportionality, which authorizes collateral damage to civilians where justified by military necessity.

Second, Dugard asserted that Israel's closure of its borders with the Gaza Strip constitutes illegal "collective punishment." Yet there is nothing in international law that requires Israel to maintain open borders with such a hostile territory, whatever its sovereign status. Exercising legal counter-measures against a hostile entity does not constitute "collective punishment" under international law. Dugard's refusal to level the same charge against Egypt, which also kept closed its border with the Gaza Strip, underlines the bias that accompanies the legally inaccurate statement.

Dugard was not alone. UN High Commissioner for Human Rights Louise Arbour denounced Israel's "disproportionate use of force." UN Undersecretary-General for Political Affairs Lynn Pascoe told the UN Security Council that collective penalties were prohibited under international law (*Financial Times,* Jan. 22, 2008). UNRWA Commissioner General Karen Koning Abu Zayd joined the chorus by criticizing Israel's "sporadic" electricity supply to Gaza and its border closures and called on the international community to act (*Guardian*, Jan. 23, 2008).

Unfortunately, these skewed assertions and misstatements of international law by UN officials framed how international public opinion views the illegal Palestinian actions in Gaza and the merits of Israeli defensive actions, and especially Israel's legal right to defend itself.

Some parties had the courage to reject the one-sided and faulty arguments. In the UN Human Rights Council in Geneva, Canada, a state that prides itself in making the defense of human rights and international law a significant factor in its foreign policy, voted against a resolution condemning Israel for the Gaza fighting. While the European state members abstained in the Human Rights Council vote, some European officials, such as Franco Frattini, European Commissioner for Justice, Freedom and Security, correctly defended the legality of the Israeli actions, and others, such as Dutch Foreign Minister Maxime Verhagen, criticized UN bias against Israel. Finally, U.S. Ambassador to the UN Zalmay Khalilzad told the UN Security Council on January 22, 2008, that Hamas was "ultimately responsible" for the current situation in Gaza.

This essay nevertheless attempts to construct a rational legal basis for evaluating Israeli behavior and potential criticisms. This is no easy task as many of the criticisms of Israel's conduct are made in conclusory fashion, without reference to legal doctrines or legal materials in support of the charges, or, alternatively, based on a misunderstanding of the requirements of the law and the factual context.

This essay examines, in turn, the six distinct bodies of law that could potentially affect the legality of Israeli counterstrikes:

1. the laws of initiating hostilities (*jus ad bellum*);
2. international humanitarian law, which governs the conduct of military actions;
3. the laws of occupied territory, which some have argued applies to Israeli actions against Gaza-based terrorists;
4. human rights laws;
5. laws on genocide; and
6. anti-terror laws.

A careful examination of the relevant law demonstrates that Israeli counterstrikes to date, and its potential future counterstrikes (both economic and military), conform to the requirements of international law. Moreover, Palestinian commission of war crimes and acts considered under international conventions to be terrorist acts and acts of genocide require Israel and other countries to take steps to punish Palestinian criminals for their acts in the Gaza fighting.

A final preliminary note is in order. The legal status of the Gaza Strip is an extremely complex puzzle in international law and is beyond the scope of this essay. Fortunately, it turns out that many of the legal conclusions regarding the Gaza fighting are not affected by the precise nature of Gaza's status. The essay notes those instances where Gaza's status does affect the ultimate legal determination.

1. The Legality of Israeli Military Actions under *Jus ad Bellum*

The law of *jus ad bellum*, as codified by the UN Charter, prevents using military force against another state. However, Article 51 of the Charter excludes self-defense from this ban on the use of force. Furthermore, *jus ad bellum* does not restrict the use of force in non-international conflicts.

Israel's right to use force in defending itself against Palestinian attacks from Gaza is clear, notwithstanding the uncertain legal status of the Gaza Strip, which makes it difficult to determine the grounds on which Israel's actions should be analyzed. If Gaza should be seen as having independent sovereignty, Israel's use of force is permissible on the grounds of self-defense. On the other hand, if Gaza is properly seen as lacking any independent sovereignty, Israel's use of military force is permissible as in other non-international conflicts.

2. The Legality of Israeli Military Actions under International Humanitarian Law

International humanitarian law regulates the use of force once military action is underway, irrespective of its legality under *jus ad bellum*. The two most basic principles of international humanitarian law are the rules of distinction and proportionality. Israel's counterstrikes have abided by both these rules.

Distinction:

The rule of distinction requires aiming attacks only at legitimate (e.g., military and support) targets. The rule of distinction includes elements of intent and expected result: so long as one aims at legitimate targets, the rule of distinction permits the attack, even if there will be collateral damage to civilians and even if, in retrospect, the attack was a mistake based on faulty intelligence. Israel has aimed its strikes at the locations from which rockets have been fired, Palestinian combatants bearing weapons and transporting arms, Palestinian terrorist commanders, and support and command and control centers. Locations such as Interior Ministry buildings from which Hamas directs some military activities are objects that make a contribution to Hamas' military actions and are therefore legitimate targets, even though they also have civilian functions.

By contrast, the Palestinian attacks are aimed at Israeli civilians and therefore violate the rule of distinction. Moreover, one of the corollaries of the rule of distinction is a ban on the use of weapons that are incapable, under the circumstances, of being properly aimed at legitimate targets. The rockets and projectile weapons being used by the Palestinian attackers are primitive weapons that cannot be aimed at specific targets, and must be launched at the center of urban areas. This means that the very use of the weapons under current circumstances violates international humanitarian law.

***Proportionality*:**

The rule of proportionality places limits on collateral damage. While collateral damage to civilian and

other protected targets is permitted, collateral damage is forbidden if it is expected to be excessive in relation to the military need. Prosecutions for war crimes on the basis of disproportionate collateral damage are rare, and it is difficult to see how a credible claim can be made that any of Israel's counterstrikes have created disproportionate collateral damage. Moreover, like distinction, the rule of proportionality relies upon intent. If Israel plans a strike without expecting excessive collateral damage, the rule of proportionality permits it, even if, in retrospect, Israel turns out to have erred in its damage estimates.

All reported Israeli strikes in the latest round of fighting have been aimed at legitimate targets and none has caused excessive collateral damage. Legal advisors attached to Israeli military units review proposed military actions and apply an extremely restrictive standard of both distinction and proportionality, in accordance with expansive Israeli Supreme Court rulings. It is thus likely that future Israeli measures will continue to abide by the rules of distinction and proportionality.

***Retorsion*:**

Israel's imposition of economic sanctions on the Gaza Strip, such as withholding fuel supplies and

electricity, does not involve the use of military force and is therefore a perfectly legal means of responding to Palestinian attacks, despite the effects on Palestinian citizens. The use of economic and other non-military sanctions as a means of "punishing" other international actors for their misbehavior is a practice known as "retorsion." It is generally acknowledged that every country may engage in retorsion so long as the underlying acts are themselves legal. Indeed, it is acknowledged that states may even go beyond retorsion to carry out non-belligerent reprisals-non-military acts that would otherwise be illegal (such as suspending flight agreements) as countermeasures. Since Israel is under no legal obligation to engage in trade of fuel or anything else with the Gaza Strip, or to maintain open borders with the Gaza Strip, it may withhold commercial items and seal its borders at its discretion, even if intended as "punishment" for Palestinian terrorism.

***Collective Punishment*:**

While international law bars "collective punishment," none of Israel's combat actions and retorsions may be considered collective punishment. The bar on collective punishment forbids the imposition of criminal-type penalties to individuals or groups on the basis of another's guilt. None of Israel's actions involve the imposition of criminal-type penalties.

Examples of retorsions are legion in international affairs. The United States, for example, froze trade with Iran after the 1979 Revolution and with Uganda in 1978 after accusations of genocide. In 2000, fourteen European states suspended various diplomatic relations with Austria in protest of the participation of Jorg Haider in the government. Numerous states suspended trade and diplomatic relations with South Africa as punishment for apartheid practices. Obviously, in none of these cases was a charge raised of "collective punishment."

3. The Legality of Israeli Military Actions under the Laws of Occupation

Some groups have claimed that the Gaza Strip should be considered "occupied" by Israel according to the Fourth Geneva Convention, in which case Israel would be required to "ensure the food and medical supplies of the population," as well as "agree to relief

schemes on behalf of the…population" and maintain "public health and hygiene."

Due to internal political considerations as well as rulings by the Israeli Supreme Court, Israel continues to maintain the flow of basic humanitarian supplies such as food, medicine and water to the Palestinian population of Gaza. In a recent case (Albassiouni v. Prime Minister, HCJ 9132/07), the Israeli Supreme Court implied that it interpreted domestic Israeli administrative law to require the Israeli government to maintain a minimum flow of Israeli-supplied necessary humanitarian goods when engaging in retorsional acts such as cutting off the Israeli supply of electricity to Gaza. Thus, even if there were a legal basis for considering Gaza Israeli-occupied territory, Israel would be fulfilling its duties under the Fourth Geneva Convention.

However, there is no legal basis for maintaining that Gaza is occupied territory. The Fourth Geneva Convention refers to territory as occupied where the territory is of another "High Contracting Party" (i.e., a state party to the convention) and the occupier "exercises the functions of government" in the occupied territory. The Gaza Strip is not territory of another state party to the convention and Israel does not exercise the functions of government-or, indeed, any significant functions-in the territory. It is clear to all that the elected Hamas government is the de facto sovereign of the Gaza Strip and does not take direction from Israel, or from any other state.

Some have argued that states can be considered occupiers even of areas where they do not declare themselves in control so long as the putative occupiers have effective control. For instance, in 2005, the International

Court of Justice opined that Uganda could be considered the occupier of Congolese territory over which it had "substituted [its] own authority for that of the Congolese Government" even in the absence of a formal military administration. Some have argued that this shows that occupation may occur even in the absence of a full-scale military presence and claimed that this renders Israel an occupier under the Fourth Geneva Convention. However, these claims are clearly without merit. First, Israel does not otherwise fulfill the conditions of being an occupier; in particular, Israel does not exercise the functions of government in Gaza, and it has not substituted its authority for the de facto Hamas government. Second, Israel cannot project effective control in Gaza. Indeed, Israelis and Palestinians well know that projecting such control would require an extensive military operation amounting to the armed conquest of Gaza. Military superiority over a neighbor, and the ability to conquer a neighbor in an extensive military operation, does not itself constitute occupation. If it did, the United States would have to be considered the occupier of Mexico, Egypt the occupier of Libya and Gaza, and China the occupier of North Korea.

Moreover, it is difficult to avoid the conclusion that foes of Israel claiming that Israel has legal duties as the "occupier" of Gaza are insincere in their legal analysis. If Israel were indeed properly considered an occupier, under Article 43 of the regulations attached to the Fourth Hague Convention of 1907, it would be required to take "all the measures in [its] power to restore, and ensure, as far as possible, public order and safety." Thus, those who contend that Israel is in legal occupation of Gaza must also support and even demand Israeli military operations in order to disarm Palestinian terror groups and militias. Additionally, claims of occupation necessarily rely upon a belief that the occupying power is not the true sovereign of the occupied

territory. For that reason, those who claim that Israel occupies Gaza must believe that the border between Israel and Gaza is an international border between separate sovereignties. Yet, many of those claiming that Gaza is occupied, like John Dugard, also simultaneously and inconsistently claim that Israel is legally obliged to open the borders between Israel and Gaza. No state is required to leave its international borders open.

4. The Legality of Israeli Military Actions under International Human Rights Law

Under the International Covenant on Civil and Political Rights, Israel is required to ensure the protection of certain rights "within its territory" including the right to life. The application of the covenant to Israeli activities in the Gaza Strip is questionable as it is unlikely that the Gaza Strip should be considered Israel's territory. Nonetheless, Israel has abided by the requirements of the convention, if it applies to Gaza. In combat situations the meaning of the rights in the convention is established by the rules of international humanitarian law. Thus, Israel is protecting the human rights of Palestinian residents of the Gaza Strip by abiding by international humanitarian law.

5. Duties of Israel under the Genocide Convention

Article Two of the Convention on the Prevention and Punishment of Genocide defines any killing with intent "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" as an act of genocide. Given expressions of intent by some of the Palestinian terrorist groups to kill Jews as a group due to their ethnic identity (such as the Hamas charter's call for an armed struggle against all Jews until judgment day), all the members of such groups who carry out killings are guilty of the crime of genocide under the convention. Under Article One of the convention, Israel and other signatories are required to "prevent and punish" not only persons who carry out such genocidal acts, but those who conspire with them, incite them to kill, and are complicit with their actions. The convention thus requires Israel to prevent and punish the terrorists themselves, as well as public figures who have publicly supported the Palestinian attacks.

6. Duties of Israel under Anti-Terrorism Conventions

The International Convention for the Suppression of the Financing of Terrorism requires Israel (like other state parties to the convention) to prevent the collection of funds intended to support terrorist attacks. The Palestinian attacks fall under the definition of terrorist attacks under Article 2(1)(b) of the convention because they are aimed at Israeli civilians in violation of the rule of distinction, and they are intended to kill or seriously injure civilians in order to intimidate a population. If Gaza is considered "territory of [the] state" of Israel, Israel is legally required to establish jurisdiction over Palestinian terrorist crimes under the convention; if Gaza is not Israeli territory, Israel is permitted to establish jurisdiction over the terrorist crimes.

Additionally, the convention establishes that Israel is not only permitted to impose certain economic sanctions on the *de facto* rulers of the Gaza Strip, it is required to do so.

Under a related convention, the International Convention for the Suppression of Terrorist Bombings, it is a crime to bomb public places (such as city streets) with the intent to kill civilians, by persons who are non-nationals of the state of which the victims are nationals. Under this convention too, the Palestinian attackers must be considered international

terrorists and Israel is either required or permitted (depending on whether Gaza is Israeli "territory") to assume criminal jurisdiction over the Palestinian terrorists committing these acts. Additionally, other states signed on the convention-such as the United States, Russia, Turkey and France-must cooperate in helping to combat such Palestinian terrorist acts.

Finally, Security Council Resolution 1373 requires states to "deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens" and "prevent the movement of terrorists or terrorist groups." The resolution was adopted under Chapter VII and is therefore apparently binding on all states, although some have argued that the resolution is not binding because the Security Council is not authorized to enact quasi-legislation. While the resolution does not define terrorism, it references the International Convention for the Suppression of the Financing of Terrorism, making it clear that the Palestinian attackers from Gaza fall within the scope of the international terrorists covered by the resolution. Consequently, if binding, this resolution requires Israel to take steps to deny safe haven to Palestinian attackers from Gaza and to prevent their free movement.

Conclusion

The Palestinian-Israeli fighting in Gaza has been characterized by the extensive commission of war crimes, acts of terrorism and acts of genocide by Palestinian fighters, while Israeli countermeasures have conformed with the requirements of international law.

International law requires states to take measures to bring Palestinian war criminals and terrorists to justice, to prevent and punish Palestinian genocidal efforts, and to block the funding of Palestinian terrorist groups and those complicit with them.

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KOHELET FORUM ›

Annotations

Understanding the Current Sheikh Jarrah (Jerusalem) Property Dispute

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Many of the media accounts of the recent court judgments regarding the properties in Sheikh Jarrah have distorted the facts. Here are the real facts.

I. A call for discrimination

The current dispute in Sheikh Jarrah involves several properties with tenants whose leases have expired, and in a few cases squatters with no tenancy rights at all, against owner-landlords who have successfully won court orders evicting the squatters and overstaying tenants. The litigation has taken several years, and the owners have won at every step. The squatters and overstaying tenants have appealed against the eviction orders to the Supreme

Court. The only decision that stands before the Israeli government is whether to honor the courts' decisions and enforce the eviction orders if affirmed by the Supreme Court, or whether to defy court orders and deny the property owners their legal rights.

Critics claim that the Israeli government should (or even that international law requires the Israeli government to) deny the owners their property rights, but these claims are not based on any credible legal argument. Rather, the critics focus on the fact that the owners in the disputed cases are Jews while the squatters and overstaying tenants are Palestinian Arabs. The critics demand that Israel discriminate against and disregard the property owners' lawful property rights due to their Jewish ethnicity. It's obvious that critics of Israel would pay no notice to the dispute if the owners were Palestinian and the squatters and overstaying tenants were Palestinian. Likewise, it's clear that critics of Israel would demand rather than oppose Israeli enforcement of the courts' judgments if the owners were Palestinian and the squatters and overstaying tenants Jewish.

Critics of Israel in this case have adopted the bigoted position that property rights should depend on ethnicity and that Jewish ethnicity should be the grounds for denying legal property rights. In doing so they have distorted the facts, perverted international law, and attempted to intimidate Israel's courts and law enforcement officials into adopting the critics' bigotry.

II. The legal basis of the parties' property rights

The legal rights of the parties themselves were resolved decades ago, in favor of the property owners. The owners in these disputes acquired their rights through an uninterrupted chain of transactions from predecessors in title in

the 19th century. These legal rights were acquired under Ottoman law, and remained good through all different government regimes since then (British Mandatory, Jordanian occupation and purported annexation, and Israeli). No one seriously disputes the validity of the transactions through which the current owners acquired rights from their predecessors in title.

The tenants in these disputes acquired their leasehold rights through a chain from the Jordanian Custodian of Enemy Property in the 1950's. Their rights as leaseholders (not owners) were reaffirmed in several court rulings culminating in 1982, when Israel's civil courts issued rulings adopting settlement agreements between the leaseholders' predecessors in title and the owners. The rulings and settlement agreements established that the tenants had "protected leaseholds" under Israeli law (a status superior to ordinary leaseholds under Israeli, Jordanian and British law) but that the owners still had good title ownership. The tenants enjoyed and continue to enjoy the benefits of the protected tenancies until today; this is why their leaseholds continued uninterrupted for more than half a century, until the recent expiration of the leases (in some cases due to serious breaches of the terms of the lease, in others due to the natural expiration of the lease rights). The squatters, of course, possess no legal rights at all.

The only break in the owners' uninterrupted chain is the sequestration of the properties from 1948-1967 by the Jordanian Custodian of Enemy Property. Jordan, which had illegally occupied east Jerusalem and the West Bank during its illegal invasion of Israel in 1948, denied Jews the right to exercise any property rights over land in the Kingdom during the entirety of its 19-year occupation (Jordan has continued this discriminatory practice to date). Having expelled all Jews from the lands it occupied, Jordan transferred

custody over all Jewish-owned property to the Jordanian Custodian of Enemy Property. In accordance with the British legislation on enemy property on which the Jordanian law was based, Jordan's sequestration of enemy property only extinguished owners' rights completely if the state seized title by eminent domain or if the Custodian transferred title to someone else. Importantly, in the case of the Sheikh Jarrah properties, the Jordanian Custodian did not purport to transfer ownership of the properties to anyone else. Instead, the Custodian leased some of the properties to Palestinian Arabs (the predecessors in title to the current overstaying tenants).

After the Six Day War of 1967 ended Jordan's occupation of east Jerusalem, Israel adopted legislation that vindicated the private property rights of persons of all ethnicities. The 1970 Law and Administrative Arrangements Law (Consolidated Version) preserved the rights of private parties who received title from the Jordanian Custodian of Enemy Property, notwithstanding the illegality of Jordan's occupation. (Persons who received rights from the Jordanian Custodian were all Arabs, since Jordanian law denied property rights to Jews.) Where the Jordanian Custodian had held custody over the sequestered properties through 1967, the 1970 law assigned custody to the Israeli Administrator General and Official Receiver with instruction to release custody to the property owners. And where Jordan had seized the property by eminent domain for public use, the 1970 law assigned ownership of the property to the state of Israel for continuation of the public use.

Ironically, if the Jordanian Custodian of Enemy Property had assigned title to the predecessors of the current Palestinian Arab holdover tenants over the

lands it seized from Jewish owners, Israeli law would have respected the resulting title. The reason the holdover tenants in Sheikh Jarrah lack ownership today is not because the state of Israel has denied the Palestinian Arabs any rights they acquired, but, rather, because the government of Jordan declined to give the Palestinian Arabs title to the land Jordan had seized.

III. Media distortions of the dispute

Many of the media accounts of the recent court judgments regarding the properties in Sheikh Jarrah have distorted the facts. Contrary to claims in some media accounts, Israel did not grant anyone ownership to any of the affected properties on the basis of ethnicity. Israeli law respects and upholds the property rights of persons of all ethnicities. Israel has even respected the property rights created by prior regimes that explicitly discriminated against Jews in their property laws—the Ottoman Empire, the British Mandate of Palestine, and the Jordanian occupation regime.

Contrary to claims in some media accounts, Israel has not created different rules for "enemy property" based on ethnicity. The ethnic dimension to the current-day property disputes is historic discrimination against Jews by a country other than Israel: Jordan denied Jews all ability to exercise property rights during its illegal occupation of east Jerusalem 1948-1967. Israel has declined to continue Jordan's discriminatory practice, but it has respected the legal results of Jordan's actions. Ironically, Israel has been so respectful of the private property rights of Palestinian Arabs that it continues to uphold private Palestinian Arab property rights that are based on Jordanian discrimination against Jews.

Contrary to claims in some media accounts, the Israeli government has not decided to evict anyone in the current disputes. It is private parties, rather than the government of Israel, that have brought their claims to court. Landowners have done what they do throughout the civilized world—they have exercised their private rights to evict holdover tenants by going to court and winning an eviction order. The landowners rightly expect that Israeli police and enforcement authorities will respect the law and carry out eviction orders. Contrary to claims by pro-Palestinian advocates, the state of Israel has not issued any eviction orders against Palestinians in these disputes.

Contrary to the impression created by some media accounts, there has been no recent adjustment of the parties' property rights in favor of Jews or to the disadvantage of Palestinian Arabs. The parties' rights were established by voluntary transactions over many years and reaffirmed in a legal compromise and court rulings many decades ago. The Palestinian Arab litigants in these cases are now attempting to overturn more than a century of property transactions and overturn long-settled law in order to prevent the Jewish owners exercising their lawful rights. The only involuntary transaction in the chain is the Jordanian 1948-1967 sequestration of Jewish property which is the source of the Palestinian Arab lease rights that have been upheld by the courts.

Contrary to the impression created by some media accounts, the property disputes do not involve any exotic or unusual Israeli laws. The leasehold and trespass legal issues at stake are similar to those found throughout the world, other than the unusually strong rent control and tenant protections given to the protected tenants (Palestinian Arabs in this dispute). The ownership laws at issue are likewise similar to those found throughout the world, and simply

follow the chain of voluntary transactions. The only exotic element in the case is Jordan's 19-year sequestration of all Jewish-owned properties as "enemy property," which has been respected to the detriment of the Jewish property owners.

Contrary to the statements in some media accounts, none of the properties in the current dispute has been seized by the state of Israel. None of the property disputes turns on Israeli laws of land use or land planning or absentee property.

Contrary to the statements in some media accounts, the question in the land disputes is not whether "Jews owned the property prior to 1948." The ethnicity of the owners is not legally relevant to the dispute, and does not serve as the basis of any legal rights in this case. The historical ownership is relevant only because it is part of the chain of title leading to the current owners' title. What has been litigated is the current rights of current property owners.

IV. Official distortions of international law

Likewise, many critics of Israel have fabricated provisions of international law to insist that Israel is required to discriminate against Jews in east Jerusalem because, in the critics' view, east Jerusalem is territory belligerently occupied by Israel. These claims are not only without foundation in international law, they also undermine international legal authority by creating a fake international law intended to be used in bigoted fashion.

Contrary to the claims of the critics, nothing in the law of belligerent occupation, or any other provision of international law, requires Israel to adopt and enforce the racial and ethnic land discrimination that is part of Jordanian law. In fact, Israel would violate international law (such as provisions in the Covenant on Civil and Political Rights) were it to continue

the Jordanian ethnic discrimination, or adopt the distorted views of international law proposed by critics of Israel.

Contrary to the claims of the critics, there is nothing in the Geneva Conventions or any other part of the laws of belligerent occupation that forbids Israel to carry out court orders enforcing private property rights of landlords to evict their overstaying tenants. The claim that property rights of Jews must be disregarded while other property rights must be upheld or even enhanced has no basis in the law and is morally offensive.
Contrary to the claims of critics, international law does not require, or even permit ethnically-based denials of the legal rights of property owners due to alleged flaws in other Israeli laws. Some critics have claimed that Israel's land planning laws, land use regulations and 1950 Absentee Property Law are problematic or biased. Whatever the merits of such claims, the claims of the parties in the current Sheikh Jarrah disputes have nothing to do with Israel's land planning laws, land use regulations or the 1950 Absentee Property Law. Nothing in international law permits Israel to deny individual Jewish landowners their legal rights as punishment for the alleged guilt of their polity in adopting other, unrelated laws.

Contrary to the claims of the critics, permitting private Jewish landowners to exercise their rights in court does not constitute "illegal settlement activity." No reasonable interpretation of the various provision of the Geneva Conventions and other treaties cited with respect to the legal dispute on "settlements" could possibly lead to the conclusion that international law requires stripping Jews of all private property rights in land in areas that critics of Israel call "Occupied Palestinian Territories." While critics of Israel like to pretend that international law forbids Jews to reside in

any lands claimed as part of the “Occupied Palestinian Territories,” that claim has no foundation in international law.