

The Law of War in the Arab-Israeli Conflict: On Water and On Land

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Abstract: *International law, plagued by political interests, failed to govern the Arab-Israeli conflict triggered by the 1948 termination of the Mandate of Palestine. Considering no peace settlement is in prospect, laws should be written neutrally, void of political bias, with emphasis on protection of individuals and non-participant states. Moreover, international supervision should be executed by impartial entities, such as Protecting Powers, rather than political agencies, who have proven lack of credibility when inquiring into Israeli conduct. The history of the Straits of Tiran and Suez Canal demonstrate how armistices do not override rights, and that the belligerent that occupies a waterway may exercise the same rights, including seizure and denial of passage, as it can on the high seas. Additionally, the West Bank — despite the four Geneva Conventions of 1949 and the Hague Relations of 1907 — became de facto Israeli territory, although it was not overtly annexed, which would have broken international law. Israel argued that the Civilians Convention did not apply to the West Bank as the occupied territory, due to the 1949 Armistices, was never under Jordanian sovereignty; therefore, Israeli sovereignty could legitimately extend into the terra nullius. Furthermore, due to disputed territorial claims, the human rights of the population, especially combatants, in occupied lands have been contested and often considered violated.*

In the light of history, the conflict between Israel and the Arab States – now seen as a series of outbreaks of violence – will be viewed as one protracted war beginning with the termination of the mandate for Palestine in 1948. The duration of the violence may be such that the war will, like the Hundred Years War or the Thirty Years War, come to be identified by its duration.

The twenty-three years of the war have been rich in episodes and in drama. The conduct of the war in both its land and maritime dimensions has given rise to a correspondingly wide range of legal questions turning on the *ius in bello*. One might have expected that in a war fought by legally sophisticated states in full view of the international community and with ample discussion in the United Nations, international law would have played an important part in the restoration and maintenance of order. International law has bulked large, but disagreement about its application has not given it the stabilizing influence that might justifiably have been expected of it.

The grim fact is that narrow legal questions, such as the applicability of the Geneva Civilians Convention of 1949 in the areas occupied by Israel or the right of ships carrying goods of Israeli origin to pass through the Suez Canal, have not been approached on a narrow and technical basis. Instead, their resolution has turned on political determinations or mixed legal and political considerations. As I will have occasion to show, there is actually a hierarchy of questions, so ordered that what may lawfully be done in a particular instance depends on the answer to yet more general questions. And those general questions will be answered in one way or the other according to the view taken of the ultimate political question of the very existence of Israel itself.

Let me be more specific about this hierarchy of questions: In the case of the two major international waterways controlled at one time by the United Arab Republic – the Suez Canal and the Strait of Tiran – questions have arisen about the right of Israeli-flag vessels and neutral ships carrying goods to or from Israel to pass through the waterways. The United

Arab Republic naturally attempted to take advantage of its strategic position athwart these waterways to interdict the passage of ships and cargoes that might aid its enemies. Neither the customary law nor the treaty law on passage through these waterways is free of ambiguity and doubt. However, the central problem at a number of junctures has been whether the United Arab Republic is entitled to exercise what are essentially belligerent rights when conditions of peace had been or should have been established. Was there any continuing need to exercise rights of visit and search and to seize vessels and cargoes? Now that the Sharm el Sheikh area is controlled by Israel and the Suez Canal is blocked, these problems may seem to be of only historical interest. But with the reopening of the Canal and a shift of fortunes in the control of the Gulf of Aqaba, these issues could become live ones again. And consideration will certainly have to be given to them in any peace settlement that is worked out.

In the Six-Day War of 1967, Israel occupied large areas that had formerly been under the control of Arab States. It has refused, however, to acknowledge that it is under a legal duty to administer all of these areas in conformity with the rules laid down in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.¹ The legal case of Israel has been that much of these areas was never lawfully under the sovereignty of the Arab States that claimed them. Therefore there is no belligerent occupation of enemy territory, and the law of belligerent occupation and the Geneva Civilians Convention are not for application.

Legal issues such as these might seem on superficial examination to be ones that could fairly readily be resolved by resort to familiar legal techniques of amassing and analyzing the evidence of the law, interpretation of the treaties and so forth. But these are not narrow and technical questions. As has been seen, they can be answered only on the basis of answers to other questions with a higher political content. If there is no longer a state of war – or if there was never one – between Israel and the Arab States, there is no longer any basis for Egyptian interdiction of the passage of ships and cargoes through the waterways it controlled. The legality or illegality of Israel's administration of the occupied areas depends on where sovereignty over those areas lawfully rests. And one must also ask whether there has been only one prolonged conflict or, on the other hand, a series of conflicts such that each new outbreak of violence must be seen as a new act of aggression to be met by a new exercise of the right of self-defense. In the latter events, each new resort to force must be measured against the standards of article 2, paragraph 4, and article 51 of the United Nations Charter, prohibiting the use of force except in self-defense. Israel and the Arab States have quite different perspectives on the situation. Questions of this order turn out to be mixed legal and political ones. They cannot, however, be answered satisfactorily, under the present state of the law, without resolution of the fundamental issue that has been the cause of twenty-three years of intermittent fighting. That issue is the right of Israel to exist, to be recognized, and to be secure. And that ultimate issue is a political one.

It is in the interest of Israel to consolidate its position as the State that has, in the perspective of today, prevailed in the war. For this reason it demands recognition of its existence by the Arab States, direct negotiations with those States to symbolize that recognition, and proper measures for its security. Over the course of the years, this has been a recurrent theme – that the war is over, that peace has been re-established, and that peaceful relations must be carried on. So long as Israel is looked upon as an interloper, an expansionist, and an aggressor, the Arab States desire to carry on the conflict. In their view, Israel must not be allowed to retire from the field of battle in secure possession of the spoils

¹ Dated at Geneva, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

of 1967. Either a peace settlement or force must deprive Israel of what it has gained.² The existence, dimensions, and security of the State of Israel are at stake. For that reason, Israel talks of peace, while the Arab States contemplate war. To leave the dimensions of Israel as they are now would be to the advantage of Israel. To change them, if necessary by force, would serve the interests of the Arab States.

And so the hierarchy may be observed: At the bottom, rules of international law to be applied to specific ships, specific people, specific buildings; in the intermediate rank, mixed legal and political questions about the recognition of the State of Israel, the extent of its territory, and the existence of war; and at the apex, like the *grund-norm* of Kelsen's system, the question of the existence and preservation of Israel. Thus, the answers to the majority of narrow legal questions have depended on the position taken on the paramount political question.

With this mode of analysis in mind, let us now turn to the question of passage through international waterways controlled by the United Arab Republic. When war broke out between Egypt and Israel in 1948, the Egyptian Government instituted inspection of ships passing through the Suez Canal and provided for the seizure of cargoes and ships in conformity with the normal law relating to prize and contraband in time of war. Egypt was not precluded from such action by the fact that it did not recognize the newly established State of Israel. So far as Israeli warships were concerned, it would have been foolhardy for any such ships to attempt passage through a narrow artificial waterway running through Egyptian territory. The waterway had been closed to enemy ships in previous conflicts, and the restrictions imposed by Egypt were in conformity with past practise, including that of Great Britain during the Second World War.

The Convention of Constantinople of 1888, which was and remains the basic instrument regulating international use of the Suez Canal, provided that the Canal is "to be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag."³ That this did not confer a right of passage on Egypt's enemies in time of war was made clear by article X of the Convention:

Likewise, the provisions of Articles IV [dealing with the passage of vessels of war of belligerents], V [dealing with the embarkation and disembarkation of troops in the Canal area], VII [prohibiting the stationing of vessels of war in the Canal], and VIII [charging the agents in Egypt of the signatory powers with supervision of the execution of the treaty] shall not stand in the way of any measures which His Majesty the Sultan and His Highness the Khedive in the name of His Imperial Majesty and within the limits of the Firmans granted, might find it necessary to take to assure by their own forces the defense of Egypt and the maintenance of public order.

But article XI stipulates that "the measures taken in the cases provided for by Articles IX and X of the present Treaty shall not interfere with the free use of the Canal..." These provisions of the Convention of Constantinople may seem to take away with one hand what is given by the other. But if they are read together, they appear to be susceptible to rational interpretation. "Measures... to assure... the defense of Egypt" must certainly extend to the exclusion of enemy warships. If they did not, then Israeli warships would have been able to

² This political problem is central to the dispute over the correct interpretation of Security Council Resolution 242, Nov. 22, 1967, U.N. Doc. S/RES/242 (1967), calling for "Withdrawal of Israeli armed forces from territories occupied..."

³ Art.1, 15 Martens, N.R.G. 2nd ser. 557 (1891).

pass with impunity through the very territory of Egypt and through the territorial waters of Egypt providing access to the Canal. Israeli warships, subject to attack by Egyptian warships on the high seas would have been legally immune from attack and capture only within the territory of Egypt itself. That interpretation of the Convention is on its face absurd. Similar considerations apply to the passage of Israeli-flag merchant ships and of neutral ships carrying contraband, such as military supplies destined for Israel, through the Canal. Egypt found it necessary to its own defense, as permitted by the Convention, to deal with enemy and neutral ships and cargoes within its territory in the same way in which it was permitted to deal with such ships and cargoes on the high seas or in its territorial sea. Again, it would be too much to expect that the Canal would be a permitted passage and a privileged sanctuary for ships and cargoes aiding the enemy. The freedom of passage guaranteed by the Convention "in time of war as in time of peace" is thus freedom for neutral ships not carrying contraband and does not extend to neutral ships carrying contraband and to Israeli-flag merchant vessels.⁴

The legal position was altered by the conclusion of the General Armistice Agreement at Rhodes on February 24, 1949.⁵ Egypt maintained its restrictions after that agreement entered into force. On its face, the Agreement might seem to forbid Egypt to do so. It provided that "no aggressive action by the armed forces – land, sea, or air – of either Party shall be undertaken, planned, or threatened against the people or the armed forces of the other..." and that "no element of the land, sea, or air military or paramilitary forces of either Party, including non-regular forces, shall commit any warlike or hostile act against the military or para-military forces of the other Party, or against civilians in territory under the control of the Party..."⁶ In 1951 Israel complained to the Security Council that the Egyptian controls, which had been further refined and developed, were in violation of the General Armistice Agreement, which had been adopted "with a view to promoting the return of permanent peace in Palestine." Here we see one of the first appearances of the theme to which I alluded earlier. It was the position of Israel that the purpose of the General Armistice Agreement has been to bring about peace and that Egypt no longer had the right to impede the passage of Israeli ships and goods.⁷ It was also pointed out that the Armistice was of an exceptional character by reason of its having been concluded under the auspices of the United Nations. It was not the ordinary agreement calling for the temporary suspension of hostilities concluded by belligerents in the past.

Egypt was not at the time interested in terminating its belligerency against Israel or in recognizing the existence of that State – measures which were necessarily interdependent. It could point to the recognized law concerning armistices, which only suspend hostilities and do not bring about a termination of the state of war between the belligerents. Moreover, according to the established law, an armistice does not terminate the right of visit, search, and seizure unless it expressly so provides.⁸ Egypt could point to the fact that free passage for Israeli ships and cargoes could assist preparations for a resumption of hostilities by Israel and would strengthen its capacity to make war.

In the event, the Israeli position turned out to be the more persuasive one in the Security Council. A resolution adopted on September 1, 1951 recited that "since the

⁴ Baxter, Richard R., *The Law of International Waterways*, 1964, p. 222-224.

⁵ 42 U.N.T.S. 251.

⁶ Art. 1, para. 2, and art. 2, para 2.

⁷ U.N. Security Council Off. Rec. 6th year, 549th meeting 2-24 (S/PV. 549) (1951).

⁸ 2 Oppenheim, *International Law* 848-49 (7th ed. Lauterpacht 1952); Castrén, *The Present Law of War and Neutrality* 130 (1954); 2 Rolin, *Le Droit modern de la guerre* 294 (1920); and see Baxter at 227, n 189.

Armistice regime which has been in existence for nearly two and a half years is of a permanent character, neither party can reasonably assert that it is actively a belligerent or required to exercise the right of visit, search, and seizure for any legitimate purpose of self-defense.”⁹ The resolution went on to call upon Egypt to terminate its restrictions. Egypt, invoking its right of self-defense, did not comply. It continued to visit and search vessels and to seize offending cargoes. Israel continued its protests. A curious juridical situation was produced by a Russian veto in 1954 of a resolution, which would have called upon Egypt to comply with the resolution of September 1, 1951.¹⁰ But the situation remained fundamentally unchanged until the nationalization of the Suez Canal Company and the outbreak of hostilities in 1956. The majority of the members of the Security Council were prepared to urge Egypt to comply with the resolution of September 1, 1951. Egypt continued to maintain that the state of war had not ended and that its controls in the Canal were essential to the defense of Egypt against a possible renewal of active hostilities by Israel.

After the Suez Canal Company had been nationalized in 1956, the Security Council declared in its resolution of October 13, 1956:¹¹

[T]here should be free and open transit through the Canal without discrimination, overt or covert – this covers both political and technical aspects.

But it was at pains to add that “The sovereignty of Egypt should be respected.” The resumption of hostilities in the form of a concerted attack on Egypt by Israel, France, and Great Britain later in that year indicated that there was a solid foundation for the Egyptian contention that the war was not yet over and that measures for the protection of the Canal were still necessary. Once actual hostilities had resumed, it is difficult to say that the need for the right of visit, search, and seizure no longer existed. Nevertheless, states continued even in 1957, after a major resumption of hostilities in the Six-Day War, to allude to the resolution of September 1, 1951, which had been adopted on the assumption that a gradual transition to peace had taken place.

The Canal was reopened in 1957. Egypt declared that it would “afford and maintain free and uninterrupted navigation for all nations within the limits of and in accordance with the provisions of the Constantinople Convention of 1888.”¹² However, no Israeli-flag vessels were thereafter allowed through the Canal. Quiet arrangements were nevertheless made for the passage of vessels flying other flags, even though they were chartered to Israeli firms and even though they carried Israeli cargoes.¹³

A more severe policy was initiated in 1959. Ships chartered to Israeli firms were halted and goods of Israeli origin were removed. Goods were condemned but there was no condemnation of the vessels in prize. Later years saw an unclear situation, although it seemed that certain arrangements had been made that goods title to which has already passed to the purchaser would be let through the Canal even though they might be of Israeli origin. There were continued detentions of neutral vessels and condemnation of their cargoes.¹⁴

So the situation remained until 1967, when the Six-Day War closed the Canal

⁹ U.N. Doc. No. S/2298/Rev. 1 (1951).

¹⁰ U.N. Security Council Off. Rec. 9th year, 664th meeting (S/PV.664) (1951).

¹¹ U.N. Doc. No. S/3675 (1956).

¹² Art. 3 (a), Egyptian Declaration of April 24, 1957, annexed to letter to the Secretary-General of the United Nations from the Egyptian Minister for Foreign Affairs of the same date (U.N. Doc. No A/3576, S/3818) (1957).

¹³ Baxter, *op. cit.*, p. 234.

¹⁴ *Ibid.*, p. 235.

altogether. The renewed combat offered further evidence that hostilities had only been suspended and that the war had not terminated. The Canal remains closed. The President of the United Arab Republic has declared that the Canal will be reopened if Israel agrees to carry out the Security Council Resolution of November 22, 1967, which calls for Israeli withdrawal from territories that it occupies.¹⁵

The various stages of the Arab-Israeli War were similarly reflected in the changing status of the Straits of Tiran. These straits afford access to the Gulf of Aqaba, a body of water ranging from three to seventeen miles in width. At the mouth of the Gulf are the two islands of Tiran and Senafir, claimed by both Saudi Arabia and Egypt but occupied by Egypt during the earlier phases of this history. Entrance into the Gulf through the straits thus involved passage through the territorial sea of Arab states.

In the eyes of the Arab states, the littoral state of the Gulf are three, all of them Arab – Egypt, Jordan, and Saudi Arabia. Israel possessed an outlet to the sea at Eilat, but its right to this area was not recognized by the Arab states. They therefore contended that the Gulf was entirely made up of Arab waters and that there was no right of free entry into it.¹⁶ The situation afforded a further illustration of how sharply focused legal questions actually turn on wider political considerations – in this case, the non-recognition of the State of Israel and its territorial claims.

In principle, under the Geneva Convention on the Territorial Sea and Contiguous Zone of 1958, there is to be no suspension of the right of innocent passage in “straits which are used for international navigation between one part of the high seas and another part of the high seas *or the territorial seas of a foreign State*.”¹⁷ The United Arab Republic was not, however, a party to this treaty. The Convention said nothing about the situation in time of war.

As in the case of the Suez Canal, it would be difficult to believe that the rights of visit, search, and seizure might be exercised on the high seas but not in the territorial seas of a belligerent state. On the assumption that Egypt had sovereignty over Sinai, although this was disputed, and Egypt was validly in occupation of Tiran and Senafir, a ship entering the Gulf would be subject to visit, search, and seizure while passing through the territorial seas of an Arab state that was at war with Israel. The exercise of those rights was facilitated in this case by the Egyptian command of the Straits through its shore batteries.

As has previously been observed, an armistice does not of itself terminate the rights of visit, search, and seizure. The armistice provided that no element of the Israeli sea forces could pass within three miles of the coastline of Egypt, but this provision applied only to warships, and nothing was said as to merchant vessels.¹⁸

No legal problems about passage through the Straits arose until after the conclusion of the armistice in 1949. At that time contraband control was established, as in the case of the Suez Canal.¹⁹ The Security Council Resolution of September 1, 1951 did not clarify the situation.²⁰ By its terms, it applied only to the Suez Canal, but the statement in the resolution that there was no further need for the exercise of belligerent rights in the Suez Canal pointed toward a similar conclusion as to the Straits. Israel protested the restraints that were placed on

¹⁵ U.N. Doc. S/RES/242 (1967)

¹⁶ Hammad, *The Right of Passage in the Gulf of Aqaba*, 15 *Revue égyptienne de droit international* 118, 123-140, (1959).

¹⁷ Emphasis supplied. Art. 16, para. 4, 15 U.S.T. 1606, T.I.A.S. No. 5639.

¹⁸ Egyptian-Israeli General Armistice Agreement, signed at Rhodes, Feb. 24, 1949, art. 2, para 2, 42 U.N.T.S. 251.

¹⁹ Baxter, *op. cit.*, p. 210.

²⁰ U.N. Doc. No. S/2322 (1951).

passage through the Straits, as it had with respect to the denial of passage through the Canal.²¹ An attempt was made to refer the matter to the Mixed Armistice Commission, but the Soviet Union cast its veto in the Security Council against this reference.²²

Control of the Straits was one of the Israeli objectives in the hostilities of 1956. Israeli forces seized the Sharm el Sheikh area and the islands commanding the entrance to the Gulf. The Israeli troops were withdrawn and replaced by those of the United Nations Emergency Force only when Israel received assurances that free and unimpeded passage would be allowed through the Straits.²³ On February 11, 1957, the United States declared that it was "On behalf of vessels of United States registry... prepared to exercise the right of free and innocent passage and join with others to secure general recognition of this right."²⁴ Israel warned that it would regard any attack on an Israeli-flag vessel as an attack entitling Israel to exercise its inherent right of self-defense under Article 51 of the Charter.²⁵ The first test passage of a United States vessel was successful, and Israeli-flag vessels continued to pass through the Straits. Egypt and the other Arab states protested but there was nothing that they could do.²⁶

On May 18, 1967, President Nasser dramatically called for the withdrawal of UNEF from the Sharm el Sheikh area, and the Secretary-General reluctantly ordered the troops out.²⁷ For days later, Nasser announced that the Straits were again closed to Israeli vessels.²⁸ The United Arab Republic was prepared once more to exercise the normal right of a belligerent controlling straits to interdict the passage of enemy ships and of contraband. In the Six-Day War of June 5 to 10, 1967, Israeli Forces drove out the Egyptians and once more occupied the Sharm el Sheikh area. Freedom of navigation was restored, not on the basis of any legal resolution of the matter but through the military power of Israel. Since then, Israeli ships, including tankers carrying oil from the oilfields in Sinai seized by Israeli, have passed freely through the Gulf and the Straits.

The history of the Straits of Tiran since 1949 has not really made any substantial contribution to the law of straits, but it has lent emphasis to the strategic importance of these narrow waterways. The belligerent that occupies the land commanding strategic straits may exercise there the same rights of visit, search, and seizure as it can on the high seas. It has no lesser right in its own waters than it has elsewhere on the sea. In this lies the significance of the Straits of Tiran to Egypt. A belligerent may also use its command of the land bordering the straits to secure freedom of passage for its own vessels and cargoes. In this lies the significance of the Straits of Tiran to Israel.

Having thus observed the law and practise of passage through a canal and a strait in time of war, we must now turn to the law governing the conduct of warfare between Israel and the Arab States on land. The governing law is essentially the four Geneva Conventions of

²¹ Letter of Jan. 28, 1954 from the Permanent Representative of Israel to the President of the Security Council (U.N. Doc. No. S/3168) (1954).

²² U.N. Security Council Off. Rec. 9th year, 664th meeting 12 (S/PV.664) (1954).

²³ Statement in the U.N. General Assembly by Foreign Minister Golda Meir, March 1, 1957, U.N. Gen. Ass. Off. Rec. 11th Sess., Plenary 1275 (A/PV.666) (1957).

²⁴ Aide-Memoire handed to Israeli Ambassador Eban by Secretary of State Dulles, Feb. 11, 1957.

²⁵ Statement by Foreign Minister Meir, *supra* n. 27.

²⁶ N.Y. Times, July 8, 1957, p. 1, col. 8.

²⁷ Special Report of the Secretary-General on the United Nations Emergency Force, May 18, 1967 (A/6669) (1957).

²⁸ U.A.R. Statement on Withdrawal of U.N.E.F. and Closing of Strait of Tiran to Israeli Ships, 6 Int. Legal Materials 573 (1967).

1949 for the Protection of War Victims – the Wounded and Sick; the Wounded, Sick and Ship-wrecked; Prisoners of War, and Civilians²⁹ - and the Hague Regulations of 1907.³⁰ The Arab States and Israel are all parties to the Geneva Conventions of 1949; the Hague Regulations are binding on all states by reason of their having passed into customary international law.³¹

The institution which exists to supervise the carrying out of the Conventions and to facilitate communication between the belligerents is that of the Protecting Power.³² The Protecting Power is a state designated by a belligerent to look after the interests of its personnel who are under the control of its adversary. A Protecting Power may be designated by each belligerent, or the same Protecting Power may act on behalf of both of the belligerents. But in either event, the Protecting Power must be designated by the State upon whom the prisoners of war or civilians depend and must be accepted by the other belligerent. No Protecting Power has been designated throughout the protracted hostilities between Israel and the Arab States. Israel is not recognized as a state by its Arab neighbors, which on that account refuse to deal with it. This is thus a further instance in which recognition policy has made impossible the application of technical rules of international law. Aside from the problem of non-recognition, it is not in any event easy in these days to find a state or states that are willing to take on the thankless task of being intermediary between two implacable opponents.

It must be noted, however, that there are instances in Arab-Israeli relations in which practise has taken account of the realities of the existence of the State of Israel. There have been exchanges of prisoners between the adversaries. Armistice agreements have been concluded between officers of the armed forces acting on behalf of their governments, although those concluding the agreements are referred to only as “parties”. And there has been both Israeli and Arab participation in the Mixed Armistice Commissions under the four Armistices concluded between the Arab States and Israel.

The most interesting problems of the law of land warfare have arisen out of the Six-Day War and the events that have followed.

Israel has refused to concede the applicability of the Geneva Civilians Convention of 1949 to the areas that it occupies as the result of this conflict, although it carries out many of the provisions of the treaty. The justification that has been advanced for Israel’s unwillingness to invoke the Civilians Convention is that that country is not in what is technically known as “belligerent occupation” of the West Bank, because the law of belligerent occupation applies only to sovereign territory of the enemy that has been occupied and the West Bank is not subject to the sovereignty of Jordan.

To understand this argument, one is forced to go back to the Mandate over Palestine, concluded under the auspices of the League of Nations. The subject of where sovereignty over a mandated area lies used to be a favoured subject of academic disputation – In the people of the area? The mandatory power? The League of Nations? The Principal Allied and Associated Powers? Sovereignty, the argument went, must lie somewhere; territory cannot be left in a vacuum.

²⁹ All dated a Geneva, Aug, 12, 1949; 6 U.S.T. 3114, 3217, 3316, 3516, T.I.A.S. No. 3362, 3363, 3364, 3365.

³⁰ Annexed to Convention No. IV of The Hague, 18 Oct. 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631.

³¹ Under the Judgement of the Nuremberg Tribunal. Nazi Conspiracy and Aggression; Opinion and Judgement 83 (1947).

³² Arts. 8/8/8/9 common to the four Geneva Conventions of 1949; see Levie, Prisoners of War and the Protecting Power, 55 Am. J. Int’l L. 374 (1961).

When Great Britain terminated the Mandate over Palestine in 1948, hostilities broke out. In the course of these the Kingdom of Transjordan and Egypt sent troops into Palestine. In doing so, they were, according to the legal case made out for Israel, guilty of an act of aggression against the newly established State of Israel in violation of Article 2, paragraph 4, of the United Nations Charter. The Armistices that were concluded in 1949 continued similar provisions, of which the following is typical:

It is ... recognized that no provision of this Agreement shall in any way prejudice the rights, claims and provisions of either party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military, and not by political considerations.

According to this line of argument, the West Bank remained under belligerent occupation – belligerent occupation by the forces of the Arab States. It is by no means clear whether under the Charter, an aggressor can claim the rights of a belligerent occupant, but it is not necessary to decide that question.

If these premises are accepted, then Israel during the Six-Day War drove a belligerent occupant out of the Old City of Jerusalem and the West Bank. Its forces and administration filled a vacuum left by the expulsion of the belligerent occupant unlawfully present there. Israeli sovereignty, the argument continues, may lawfully be extended to these areas, since no state may lawfully oppose it. No state can show a better title, as Dr. Yehuda Blum puts it.³³ The logical consequence of this line of argument is that Israel is not legally obliged to comply with the Geneva Civilians Convention of 1949 and the Hague Regulations.

This view is not shared by the majority of the members of the United Nations. In response to complaints that Israel was changing the status of the Old City, the General Assembly adopted resolutions on July 4 and 14, 1967, calling upon Israel “to rescind all measures already taken and to desist forth-with from taking any action that would alter the status of Jerusalem.”³⁴ That injunction indicates that the occupied portion of Jerusalem was not territory to which Israel has a better title than any other state.

The Israeli conduct particularly complained of, was the application of Israeli laws to the occupied areas and the expropriation of property.³⁵ As early as 1968, the Security Council asserted that all legislative and administrative measures, including expropriation of land and properties, which tended to change the legal status of Jerusalem are invalid.³⁶ The same assertion was made more urgently in Security Council Resolution 267 of July 3, 1969.³⁷ There were complaints of the violation in particular of Articles 53 and 54 of the Geneva Civilians Convention, respectively forbidding the destruction of property and alteration of the status of public officials.

The burning of the Holy Al Aqsa Mosque on August 21, 1969 led to a resolution on the Security Council which for the first time expressly mentioned the Geneva Conventions,

³³ Blum, Y. Z., *The Missing Revisioner: Reflections on the Status of Judea and Samaria*, 3 *Israel L. Rev.* 279 (1968). at 294.

³⁴ Res. 2253 (ES-V), July 4, 1967, and Res. 2254 (ES-V), July 14, 1967, U.N. Gen. Ass. Off. Rec., 5th Emerg. Sp. Sess., Supp. No. 1, at 4 (A/6798) (1967).

³⁵ For a defense of the Israeli administration of occupied areas generally, see *Legislation and Administration of Justice in the Israel-Held Areas*, 8 *International Problems* 36 (1970).

³⁶ Res. 252, May 21, 1968, U.N. Security Council Off. Rec. 23rd year, Resolutions and Decisions 9 *S/INF/23/Rev. 1) (1970).

³⁷ U.N. Security Council Off. Rec. 24th year, Resolutions and Decisions 3 (S/INF/24/Rev. 1) (1970).

which Israel was called upon “scrupulously to observe.”³⁸

In justice to Israel, it must be observed that these resolutions of the Security Council and of the General Assembly were largely politically motivated. They do not necessarily constitute authentic interpretations of the proper scope of application of the Geneva Civilians Convention. But law and politics can never be separated, and what is decided in a political forum like the Security Council must inevitably have some effect on the law.

Enough has been said to show the nature of the fundamental difference between Israel and the Arab States about the law applicable to Israel’s occupation forces and administration. It is unfortunate that Israel has not been persuaded to act on the basis of the situation *de facto* that existed in mid-1967 – that is to say, the long occupation of the area by Jordan – and accordingly, to apply the law governing belligerent occupation. Perhaps the law should operate on the principle that territory in dispute should be regarded as protected by the law of belligerent occupation as against any which displaces the authority of the state which is normally in control of the area or has been long in control of it. Alternatively, both parties might be held to an obligation to respect the laws in force within the disputed area.

Against this background of controversy about the applicability of the Geneva Civilians Convention of 1949, the precise measure of the obligations of Israel is not altogether clear. Although it is undisputed law that the annexation of enemy territory which is belligerently occupied is forbidden while the war is still in progress, Israel would maintain that the rule does not apply to the West Bank, which in its view of history constitutes *terra nullius*.³⁹ Israel has thus far avoided the overt annexation of territory, which could properly take place only at the time of a final peace settlement, but there has been a certain creeping annexation. This has been accomplished through extension of the law of Israel to the occupied areas, the transfer of population to the areas over which it exercises military control, and by integration of the economy of the occupied areas with that of Israel. Israeli destruction of buildings from which hostile activities have been carried on has been one of the more dramatic ways of asserting authority in the occupied areas.⁴⁰ It has been asserted that this conduct is in violation of article 22 of the Civilians Convention, which forbids collective penalties and reprisals. The response of Israel has been that the destruction has not been accomplished by way of punishment but as a measure for the protection of its occupying forces and its nationals.

There can be no doubt about the applicability of the Geneva Prisoners of War Convention of 1949 to the continuing war between Israel and the Arab States. The record here is not a perfect one, although probably superior on the whole to the record of compliance with the Civilians Convention. There were charges, for example, that Egyptian soldiers whose positions has been overrun and who had been disarmed had simply been allowed to wander in the desert during and after the Six-Day War, until they were returned to the United Arab Republic through the assistance of the International Committee of the Red Cross.⁴¹

The guerrilla warfare that has been waged against the occupying forces of Israel has given rise to problems – not altogether novel – about the eligibility of captured persons for treatment as prisoners of war under the pertinent Geneva Convention. There is a question about whether guerrillas meet the qualifications of lawful combatants under Article 4 of the Prisoners of War Convention. Their status is also affected by whether they operate in Israeli territory or in occupied territory or whether they are based on Arab territory that is not

³⁸ Res. 271, Sep. 15, 1969, *id.* at 5.

³⁹ The principle was expressly recognized by the International Military Tribunal at Nuremberg. *Nazi Conspiracy and Aggression; Opinion and Judgment* 82 (1947).

⁴⁰ *N.Y. Times*, Nov. 6, 1969, p. 1, col. 2; *The Economist*, March 16, 1968, p. 26.

⁴¹ International Committee of the Red Cross, *Annual Report*, 1967, at 7.

occupied by Israel but enter Israeli-held territory on raids. If members of Al Fatah or the Popular Front for the Liberation of Palestine come from within Israeli territory and operate there, they are engaged in non-international armed conflict with Israel and are therefore covered only by Article 3 common to the four Geneva Conventions of 1949. This article provides minimum safeguards for persons involved in civil conflict but makes no reference to treatment of combatants as prisoners of war. If the attacks come from persons within the occupied areas, then the position of the combatants will turn on the political status of the territory, illustrating once more how the operation of legal rules may be dependent upon the political perspective taken on the status of territory. If the occupied areas are assumed to be Israeli territory, then those persons who attack the occupying forces are participants in a civil conflict and are protected only by Article 3. But if the territory is actually, for example, Jordanian, then they participate in an international conflict, and it is necessary to decide whether they qualify for treatments as prisoners of war under Article 4 of the Prisoners of War Convention. Irregulars must meet four requirements if they are to be held as prisoners of war: They must be “commanded by a person responsible for his subordinates,” they must have “a fixed distinctive sign recognizable at a distance,” they must carry arms “openly,” and they must conduct “their operations in accordance with the laws and customs of war.” While the first of these requirements can probably be satisfied by most “freedom fighters” or guerrillas, the others are incompatible with the policy of stealth and surprise which is essential to the successful conduct of irregular warfare. The General Assembly in its Resolution 2621 (XXV) called for treatment in conformity with the Geneva Prisoners of War Convention of 1949 of all “freedom fighters under detention.”⁴² Although the main thrust of the resolution was against colonialism, a sufficiently latitudinarian construction of “freedom fighter” would permit the inclusion of those who fight against foreign occupation. And that might sweep up members of Al Fatah or the Popular Front for the Liberation of Palestine.

The investigations that have been conducted by United Nations organs of the Israeli occupation have been strongly politically colored. They have been inspired by the Arab States and have received the support of developing countries. As early as 1968, the Security Council has asked that a humanitarian mission in the Middle East be conducted by the Secretary-General.⁴³ The Arab States allowed in the Special Representative of the Secretary-General, but he was refused entrance into “the Arab territories under military occupation by Israel.”⁴⁴

The General Assembly also established a special committee to “investigate Israeli practises affecting the human rights of the population of the occupied territories,” made up of Ceylon, Somalia, and Yugoslavia – none of which was friendly to Israel or could even be regarded as neutral in this policy.⁴⁵ On the basis of the report submitted by the body, the General Assembly called on Israel to comply with the Geneva Conventions of 1949, the Universal Declaration of Human Rights, and various resolutions adopted earlier.⁴⁶ The Committee called for further investigations and for cooperation with the International Committee of the Red Cross. It proposed in particular a new form of investigation, in which each occupied state and Israel would each nominate a neutral state. The General Assembly

⁴² Para. 3(6)(a), U.N. Gen. Ass. Off. Rec. 25th Sess., Supp. No. 28, at 1 (A/8028) (1971).

⁴³ Res. 259, Sep. 27, 198, U.N. Security Council Off. Rec. 23rd year, Resolutions and Decisions 11 (S/INF/23/Rev. 1) (1970).

⁴⁴ Report by the Secretary-General in accordance with the Security Council Resolution 259 (S/8851) (1968).

⁴⁵ Res. 2443 (XXIII), Dec. 19, 1968, U.N. Gen. Ass. Off. Rec. 23rd Sess., Supp. No. 18, at 50 (A/7218) (1969).

⁴⁶ Res. 2546 (XXIV), Dec. 11, 1969, U.N. Gen. Ass. Off. Rec. 24th Sess., Supp. No. 30, at 55 (A/7630) (1970).

would arrange that the interests of the Palestinian people would be represented by a state or by an international organization. The complaint would then be investigated by representatives of the complaining and responsible states. Nothing has come of this proposal.

The Human Rights Commission established in 1969 a sub-committee with the same membership as the working group on the treatment of political prisoners in Southern Africa.⁴⁷ In 1970, it reported that, although it has not been allowed into the areas concerned, it had heard of unlawful detentions, denials of a fair trial, and pillage. It called for the return of their proper place of residence of persons who had been deported or transferred and for the compensation of those whose houses had been unlawfully demolished.⁴⁸ It is not clear that all of the acts complained of were actually violations of international law, even under the assumption that they took place in belligerently occupied areas. An occupant can intern inhabitants of the occupied area, assign residence, and may move individuals about for military purposes, within the limits established by the Geneva Civilians Convention.⁴⁹

* * *

The facile response to all of this tangled history of dealings between the Arab States and Israel is to say that all of these problems will be resolved when the peace settlement is reached. This conclusion is true but trivial, when there is no peace settlement in prospect. One must rather look to the lessons which should be learned for today.

The first task in any legal analysis of these issues is to segregate the purely legal questions from the political context in which they arise. How the two elements are intermingled has been a recurrent theme of these remarks. In the course of performing this operation of distinguishing the legal from the political, it will be seen that different views of the political situation and different recognition policies are at the root of controversies about when and where certain accepted bodies of law apply. Whether a state of war exists or not will determine whether the law of visit, search, and seizure is operative. Whether territory is Israeli, Jordanian, or *res nullius* will dictate what body of law governs the treatment of combatants placed *hors de combat*. The most satisfactory criteria for the applicability of law are thus seen to be factual ones – not political ones and not for that matter legal ones, for political and legal criteria governing the application of legal rules unfailingly turn out to be subjective criteria dictated by policy or prejudice.

The content of the law must also be neutral. The governing rules are unsatisfactory if, in time of war, they turn on the legality or morality of the cause for which the war is fought. The belligerents must be on a basis of equality, and no preference should be given to one side over the other. Preferential treatment strikes at the root of the reciprocity which is the main support – under certain circumstances the only support – of compliance with the law.

In time of war, particular emphasis must be placed on the protection of individuals and of non-participant states, for both human beings and governments can be caught in the cross-fires of war. It must be a particular task of the law to limit the scope of war and to free as many persons and entities as possible from its effects. If the situation is seen in this light, there is a relationship between protecting civilians from unnecessary suffering and the protection of neutral states from unnecessary interference. At this point the law of war and the

⁴⁷ Res. 6 (XXV), March 4, 1969, Commission on Human Rights. Report of the Twenty-fifth Session 183 (E/4621, E/CN.4/1007) (1969).

⁴⁸ Report of the Special Working Group of Experts. Feb. 11, 1970 (E/CN.4/1016/Add.2) (1970).

⁴⁹ Geneva Convention relative to the Protection of Civilian Persons in Time of War, dated at Geneva, Aug. 12, 1949, arts 78 and 49, 6 U.S.T. 3516, T.I.A.S. No. 3365.

law of neutrality – the law of belligerent occupation and the law relating to the passage of neutral merchant ships – reflect a similar policy.

And finally, if there are to be supervision, scrutiny, and control exercised over the conduct of belligerents, those functions must be performed by impartial international entities, such as Protecting Powers or the International Committee of the Red Cross, rather than through political agencies, even though they be constituted under the auspices of the Security Council or the General Assembly of the United Nations. Again, neutrality and detachment must be the dominant themes. The bodies that have been set up to inquire into Israeli conduct in the occupied areas have lacked credibility because they were politically motivated and politically constituted.

These are the standards that should be applied. Without them the law can falter and then collapse under the weight of the political problems, as, one regrets to say, the law often seems to have done in the Arab-Israeli conflict.