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Loan Guarantees, Israeli Settlements, and Middle East Peace

John Quigley

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Loan Guarantees, Israeli Settlements, and Middle East Peace

*John Quigley**

ABSTRACT

Professor Quigley questions whether the United States should guarantee loans for Israel in light of Israel's continued occupation of the West Bank. The author believes that Israel's policies of displacing the local Palestinian population and transferring its own population into the West Bank violate the Geneva Civilian's Convention and the accepted principles of belligerent occupation. Consequently, Mr. Quigley argues that any aid the United States gives Israel might facilitate these illegitimate activities and make the aid grant itself an illegal act in the eyes of the international community. Professor Quigley concludes that the United States support of Israel's settlement activities aggravates the inherent conflict between Israel and Palestine and thereby diminishes the prospects of peace in the Middle East.

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* Professor of Law, Ohio State University. LL.B., M.A. 1966, Harvard Law School.

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I. INTRODUCTION

The United States decision in 1992 to stand as Israel's guarantor for \$10 billion in loans raised anew the question of the legality of aid used for unlawful ends. This issue arose dramatically because at the time of Israel's 1991 request for the guarantee, it accelerated the construction of civilian settlements in the occupied West Bank of the Jordan River at a time of large-scale migration from the Soviet Union.

The issue was complicated by the fact that the Israeli request came as the United States was maneuvering Israel, the Palestinians, and the Arab states into negotiations concerning the future of the West Bank. Settlement construction in the West Bank, which the United States had long criticized as an obstacle to Middle East peace, threatened to derail the negotiations because it suggested that Israel was filling the territory with its own citizens to preclude any future withdrawal.

Although the Bush administration acted cautiously in responding to Israel's request, it did not show concern that the United States might be acting illegally by granting the guarantees. Many observers, however, viewed Israel's settlement program as unlawful. The loan guarantees would enable Israel to expand that program. Thus, the United States, through the loan guarantees, would be promoting the performance of an unlawful act by another state. Under the law of state responsibility, a state may not promote an unlawful act by another state. This rule is comparable to the rule of complicity in domestic law. The Bush administration apparently sought no legal opinion on the issue from the State Department's Legal Advisor.

The loan guarantees, moreover, were not the United States only financial assistance to Israel. The United States was giving Israel military and economic aid exceeding \$4 billion annually. Were the loan guarantees to be illegal, then the annual aid would also be illegal because it also allowed Israel to build West Bank settlements.

Beyond the question of settlements, the loan guarantees and the annual aid permitted Israel to continue its occupation of the West Bank, which many viewed as unlawful. If the United States financing were unlawful because it permitted settlement construction, the financing might be unlawful as well because it permitted an unlawful occupation. In light of the complicity norm, and in the context of the West Bank

occupation, the Soviet immigration, and the settlement construction, this Article examines the legality of United States financing of Israel.

II. UNITED STATES FINANCING AND WEST BANK SETTLEMENTS

United States direct aid to Israel stood at three to four billion dollars per year during the 1980s.¹ In addition, Israel received several billion more annually from the United States as a result of various preferences.² The totality of United States aid to Israel led former Secretary of State Dr. Henry Kissinger to remark that Israel is "dependent on the United States as no other country is on a friendly power."³ The magnitude of the aid is indicated by the fact that the United States funds over ten percent of the Israeli governmental budget,⁴ and that United States aid to Israel represents nearly one-fourth of all its foreign aid worldwide.⁵

In addition, the United States indirectly gives Israel additional funds through an income tax deduction for contributions to Israel. The Internal Revenue Service allows taxpayers an income tax deduction for money contributed to the Jewish Agency and United Israel Appeal.⁶ These organizations funnel about \$800 million annually⁷ to Israel for immigrant settlement and other projects.⁸ The Jewish Agency places

1. See MOHAMMED EL-KHAWAS & SAMIR ABED-RABBO, *AMERICAN AID TO ISRAEL* 29 (1984).

2. JEANNE A. BUTTERFIELD, CENTER FOR POLICY ANALYSIS ON PALESTINE, \$10 BILLION IN LOAN GUARANTEES FOR ISRAEL? THE TANGIBLE DOMESTIC COSTS 2-3 (Special Report, No. 3 Winter 1992); see Thomas Stauffer, *Uncle Sam Keeps the Wolf from Israel's Door*, CHRISTIAN SCI. MONITOR, Dec. 29, 1981, at 7; George D. Moffett III, *U.S. Aid Cornucopia Flows to Israel*, CHRISTIAN SCI. MONITOR, June 21, 1991, at 3 (stating that 43 pieces of special Congressional legislation give preferences to Israel; noting a one-time grant of \$650 million in 1991 to compensate for damage done to Israel by Iraq during Persian Gulf War).

3. HENRY KISSINGER, *YEARS OF UPHEAVAL* 483 (1982); Peter Ford, *Israelis See Aid as Mixed Blessing*, CHRISTIAN SCI. MONITOR, June 24, 1991, at 3 (noting high degree of Israeli dependence on United States aid); George D. Moffett III, *Resettlement Costs Put Strain on Israeli Credit*, CHRISTIAN SCI. MONITOR, June 25, 1991, at 7 (observing the inability of financial institutions to judge Israel's creditworthiness with confidence because of its dependence on United States aid).

4. BUTTERFIELD, *supra* note 2, at 2; Jack Redden, *Israeli Economy under Pressure; Means More U.S. Influence*, Reuters Library Report, Sept. 2, 1991, BC Cycle, available in LEXIS, Nexis Library, Lbyrpt file (reporting Israel's annual state budget at \$33.8 billion).

5. George D. Moffett III, *U.S.-Israeli Bond Remains Firm*, CHRISTIAN SCI. MONITOR, June 20, 1991, at 6.

6. *Khalaf v. Regan*, 85-1 U.S. Tax Cas. (CCH) ¶9269 (D.D.C. 1989).

7. BUTTERFIELD, *supra* note 2, at 2.

8. Charles Hoffman, *Funding for the 'Drop-Outs': at Israel's Expense*, JERUSALEM

particularly substantial amounts into settlement construction.⁹ Because the United States must recover from other sources the revenue lost as a result of these income tax deductions, the deductions represent indirect United States aid.

The United States formerly gave aid to Israel as loans, and as a result, Israel accumulated a large interest bill. Congress decided in 1985 to aid Israel through outright grants, rather than loans.¹⁰ Since 1985 all of Israel's aid from the United States has been in the form of grants.¹¹

During the 1989 fiscal year, the State Department gave an accounting that showed \$3.7 billion in direct aid to Israel.¹² President Bush said that in fiscal 1991, "despite our own economic problems, the United States provided Israel with more than \$4 billion in economic and military aid, nearly \$1,000 for every Israeli man, woman and child, as well as with \$400 million in loan guarantees to facilitate emigrant absorption."¹³

By fiscal 1991 the annual aid package stood at \$5.256 billion.¹⁴ Because the United States ran a large annual budget deficit from the early 1980s, it had to borrow from private lenders in order to give money to Israel. In 1991 the United States had to pay over \$3 billion in interest to obtain the \$5.256 billion, bringing the total cost to taxpayers to \$8.5 billion.¹⁵

In 1989 a new element entered the United States-Israel financial relationship. Large numbers of Soviet Jews began moving to Israel, and Israel asked the United States for additional funds to assist in the settlement of the Soviets. In 1991 the United States gave Israel \$45 million for this purpose alone.¹⁶

POST (int'l ed.), Nov. 18, 1989, at 17; Stauffer, *supra* note 2, at 7.

9. Joost R. Hiltermann, *Settling for War: Soviet Immigration and Israel's Settlement Policy in East Jerusalem*, 20 J. PALESTINE STUD. 71, 77-78 (No. 2) (1991); BUTTERFIELD, *supra* note 2, at 4.

10. International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 202, 99 Stat. 190, 211.

11. See, e.g., *id.* (providing the entire annual amount be given during the first 30 days of the fiscal year). Israel is the the only United States aid recipient to receive aid at start of a year rather than in quarterly installments. Moffett, *supra* note 2, at 3.

12. 136 CONG. REC. E578, E579 (daily ed. Mar. 7, 1990) (information provided by Dep't of State to Rep. Lee Hamilton, Chair, Subcomm. on Europe & the Middle East).

13. The President's News Conference, 27 WEEKLY COMP. PRES. DOC. 1251, 1252 (Sept. 16, 1991).

14. Frank Collins, *Borrowing Money for Israel: Annual Interest Alone Exceeds \$3 Billion*, WASH. REP. ON MIDDLE E. AFF., Dec. 1991-Jan. 1992, at 33.

15. *Id.*

16. BUTTERFIELD, *supra* note 2, at 2.

In 1989 Israel asked the United States to guarantee repayment for \$400 million in loans from private banks to finance housing for the Soviet immigrants. Israel requested the guarantees because it has a low credit rating and banks therefore charge it high levels of interest.¹⁷ The interest rate that Israel can obtain in the commercial banking market would be so high that loans would not be feasible.¹⁸ Of course, the fact that Israel had a low credit rating made the guarantees risky for the United States. Were Israel to default, the United States Treasury would be liable.¹⁹

Israeli officials stated that they would probably build some of the new housing in the West Bank of the Jordan River.²⁰ The West Bank is a part of the territory that was Palestine prior to World War II. Israel captured the West Bank in 1967 along with the Gaza Strip, another segment of former Palestine.²¹ These two territories were the only sectors of Palestine that Israel did not take when it became a state in 1948. These were also the potential sites of a new Palestine state that the Palestinian people still hope to create.²²

17. *Id.*; Moffett, *supra* note 3, at 7 (noting that the Standard & Poor's rating of Israel's long term debt was "BBB-," its lowest rating, and that the Export-Import Bank's credit rating of Israel was a "D" on a scale of "A" to "F").

18. See Thomas L. Friedman, *U.S. Offering Compromise Terms to Israelis on Loan Guarantees*, N.Y. TIMES, Feb. 5, 1992, at A1 ("If Israel does not get the guarantees, it would have difficulty raising the money.").

19. See generally Marjorie Olster, *Israel Angered by U.S. Doubts Over Credit Rating*, Reuters Library Report, Oct. 18, 1991, BC Cycle, available in LEXIS, Nexis Library, Lbyrpt file) (reporting a study by the U.S. Export-Import Bank and Congressional Research Service that concluded Israel may be unable to repay its growing debt); Zeev B. Begin, *Housing-Loan Linkage Carries an Impossible Price*, L.A. TIMES, Sept. 19, 1991, at B7 (stating that 34% of Israel's annual budget was devoted to the servicing of debt); Frank Collins, *What Does Israel Cost U.S. Taxpayers?*, WASH. REP. ON MIDDLE E. AFF., June 1992, at 27 (stating that 40% of Israel's annual budget was devoted to the servicing of debt).

20. Robert Pear, *Israel Asking U.S. for Aid on Housing for Soviet Emigres*, N.Y. TIMES, Oct. 2, 1989, at A1.

21. See *infra* notes 121-31 and accompanying text.

22. *Palestine National Council: Political Communique and Declaration of Independence*, U.N. GAOR, 43d Sess., Annex 3, U.N. Doc. A/43/827, S/20278 (1988), reprinted in 27 I.L.M. 1660 (1988).

The United Nations General Assembly proposed in 1947 to divide Palestine among the Jews and Arabs in the region. G.A. Res. 181, 2 U.N. GAOR Res. at 131, U.N. Doc. A/519 (1947). Jewish leaders approved of the proposal, but the Palestinian Arabs rejected it on the grounds that it violated their rights to self-determination. 6 KESING'S CONTEMPORARY ARCHIVES 8979 (1946-1948) (Arab Higher Committee Resolution of Nov. 30, 1947, rejecting Res. 181). See generally John Quigley, *Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood*, 7

The West Bank included East Jerusalem, the site of Jerusalem's old walled city.²³ The international community, including the United States, believed it critical that the Palestinians achieve some control over the West Bank and felt that Israeli settlement construction threatened that goal.²⁴ Concerned that Israel would use borrowed funds to build more settlements, the Bush administration delayed acceding to Israel's request to guarantee \$400 million in loans and sought an assurance that Israel would not use the money to build settlement housing in the West Bank.²⁵

Concurrently, the Bush administration pressured Israel not to settle Soviet Jews in the West Bank. President Bush said that Israel should create no "new settlements in the West Bank or in East Jerusalem."²⁶ The State Department reaffirmed the position it had held since 1967 that East Jerusalem is part of the occupied territories.²⁷ The reference to East Jerusalem by the State Department was important because many Soviet Jews settled in East Jerusalem.

In fact, Secretary of State James Baker asked Israel to stop new settlement activity.²⁸ Baker told a Congressional committee that so long as Israel was building settlements, whether it used the United States money or other funds mattered little, because the United States aid would enable Israel to use other funds on settlements. Therefore, the United States would not grant the loan guarantees until Israel stopped building the settlements.²⁹ Baker's position angered Israel, and within hours the

B.U. INT'L L.J. 1, 18-21 (1989).

23. In this article, when the term "West Bank" is used, it includes East Jerusalem.

24. See *infra* notes 103-05 and accompanying text.

25. Joel Brinkley, *Israel Bristles Over U.S. Loan-Guarantee Terms*, N.Y. TIMES, Oct. 4, 1990, at A13.

26. *Excerpts of President Bush's Remarks at News Conference at End of Talks*, N.Y. TIMES, Mar. 4, 1990, at A22.

27. Thomas L. Friedman, *Bush Questions Israeli Claims to East Jerusalem, Creating Uproar*, N.Y. TIMES, Mar. 9, 1990, at A8.

28. Pear, *supra* note 20, at A1.

29. Norman Kempster & Daniel Williams, *Baker Steps Up Pressure on Israel; Diplomacy: The Secretary Warns that Settlement Activity in West Bank and Gaza Must End if U.S. Funds Are to be Used to House Soviet Emigres*, L.A. TIMES, Mar. 2, 1990, at A1 (reporting Baker's statement that it would be insufficient for Israel to promise not to spend United States money in occupied territories because the money would free up other money to use there); *U.S. Retreats on Baker Threat; Israel Upset by Curbs on Refugee Aid*, L.A. TIMES, Mar. 2, 1990, at P1. Baker stated, "If we provide housing guarantees, we have no assurance whatsoever that the housing guarantees provided will not simply supplant other money that's then used to support settlements in the occupied territories." *Id.*

State Department repudiated it.³⁰ Instead, the State Department said that Israel only had to agree not to use the United States money to build housing in order to receive the guarantees.³¹

United States pressure, however, yielded a response from Israeli officials. Housing Minister Ariel Sharon announced that the government would not settle Soviet Jews in the West Bank.³² The State Department called Sharon's statements "a hopeful development, as they respond to international concerns, including our own."³³ Baker demanded that Israel inform the United States periodically of the amounts various Israeli ministries were spending on West Bank settlements, but Israeli Foreign Minister David Levy refused to comply.³⁴

A few days later, however, Levy wrote the Bush administration a letter promising that "the government of Israel's policy is not to direct or settle Soviet Jews beyond the Green Line." The Green Line separates Israel from the West Bank. East Jerusalem falls beyond the Green Line. While Levy's commitment was far from precise, it sounded as if he meant that Israel would not view East Jerusalem as a site for settling Soviet Jews. Jerusalem Mayor Teddy Kollek interpreted the letter in this fashion and reacted angrily, stressing that plans were already afoot to build 12,000 units for Soviet Jews in Jewish-populated sectors of East Jerusalem.³⁵

Giving in to pressure from within the Israeli cabinet, Levy quickly backtracked on his commitment, sending the Bush administration a letter stating that the state of Israel "has an ideological foundation. . . . If you think that we will change our credo on the basis of which the government was elected because of these investment [loan] guarantees, you should know that this will not happen."³⁶

30. See *U.S. Retreats on Baker Threat; Israel Upset by Curbs on Refugee Aid*, L.A. TIMES, Mar. 20, 1990, at P1.

31. *Id.* Bush Administration Spokesperson Margaret Tutwiler stated that the United States would not require Israel to give any more assurances that Israel would not use the funds provided by the guarantees in the West Bank than the same assurances the United States required in its annual aid to Israel. *Id.*

32. Herb Keinon & Larry Cohler, *Sharon: Immigration Too Vital to Risk by Sending Soviet Olim to Territories*, JERUSALEM POST (int'l ed.), July 7, 1990, at 1.

33. *Id.*

34. Brinkley, *supra* note 25, at A13. After Baker said that Levy had privately agreed to give United States periodic information about settlement financing, Levy said Israel would not provide such information, but added that "[i]f our friends want to know from time to time, they can turn to the Foreign Ministry and receive the information." *Id.*

35. David Makovsky, *Levy Agreed to Bar East Jerusalem Settlers*, JERUSALEM POST (daily ed.), Oct. 12, 1990, at 1.

36. Daniel Williams, *Israel to Keep on Expanding Settlements in East Jerusalem*,

Despite the lack of an Israeli assurance about new settlement construction, or about using funds gained under United States loan guarantees for that purpose, Congress authorized the guarantee for \$400 million in loans,³⁷ and the Bush administration then extended the guarantees.³⁸

While receiving United States aid and loan guarantees, Israel devoted substantial sums to West Bank settlements. During the early 1980s, Israel allocated \$300 million annually for settlement construction and maintenance.³⁹ In 1991 that figure jumped above \$1 billion, as Israel dramatically stepped up settlement construction.⁴⁰ Between the years 1967 to 1990, Israel built 20,000 housing units in the occupied territories, but in 1991 alone built 13,650.⁴¹ By the start of 1992, Israel controlled 60 percent of the West Bank's land,⁴² and over 200,000 Israelis were living on that land.⁴³

Congressional concern over the settlement construction led to an effort to reduce Israel's annual aid by the amount it spent on settlements.⁴⁴ The House of Representatives considered a proposal to cut Israel's annual appropriation by the amount it spent annually on settlements but the idea was soundly defeated.⁴⁵

Levy Informs Baker, L.A. TIMES, Oct. 19, 1990, at A6.

37. See generally Act of May 25, 1990, Pub. L. No. 101-302, 104 Stat. 213, 223-24 (1990) (Israel's Notice to Potential Underwriters of the Law); Jackson Diehl, *Israel: Settlements Policy Unchanged*, WASH. POST, Oct. 4, 1990, at A38.

38. See Housing Guaranty Program, 56 Fed. Reg. 9369-70 (1991); *Israel: Housing Plans May Break Vow to U.S.*, L.A. TIMES, Mar. 11, 1991, at A16; Allison Kaplan et al., *U.S. Gave Loan Guarantees Without the Facts It Sought*, JERUSALEM POST (int'l ed.), Mar. 2, 1991, at 1; Hiltermann, *supra* note 9, at 79-81; Jonathan Schachter, *New York Buys Israel Bonds*, JERUSALEM POST (int'l ed.), Apr. 13, 1991, at 3 (indicating that as part of the guarantee, New York City purchased \$12 million in Israeli bonds for its civil service pension funds).

39. See GEOFFREY ARONSON, *CREATING FACTS: ISRAEL, PALESTINIANS AND THE WEST BANK* 268 (1987).

40. BUTTERFIELD, *supra* note 2, at 4; *Peace Now Exposes the Policy Behind the Settlements*, AL-FAJR, Jan. 27, 1992, at 1.

41. *Peace Now Exposes the Policy Behind the Settlements*, *supra* note 40, at 1. These figures include both the Gaza Strip and West Bank, with the vast majority being located in the West Bank. *Id.*

42. BUTTERFIELD, *supra* note 2, at 3.

43. Mark Taylor & Marty Rosenbluth, *West Bank Settlements: The Myth of Irreversibility*, NATION, Nov. 25, 1991, at 663.

44. Charly Wegman, *David Levy Begins Visit to Washington amid Israeli U.S. Tensions*, AGENCE FRANCE PRESSE, June 12, 1991, BC Cycle, available in LEXIS, Nexis Library, Lbyrpt file.

45. 137 CONG. REC. H4686 (daily ed. June 19, 1991) (proposal defeated 378-44);

After receiving the United States guarantee for \$400 million in loans, the Israeli government informed the Bush administration that it needed billions more to settle the Soviet immigrants.⁴⁶ Prime Minister Itzhak Shamir estimated that Israel might need \$40 billion to settle the immigrants.⁴⁷ Based on these projections, Israel asked the United States for another, much larger, loan guarantee.⁴⁸ Israel said that it wanted to take out \$10 billion in loans from private banks over a five-year period and asked the Bush administration to guarantee repayment.⁴⁹

Like the \$400 million in loans, Israel would use the \$10 billion to settle immigrants anywhere, not specifically in the West Bank. Israel, however, was building most of the new housing in the West Bank. Through financial incentives, it encouraged Israelis to move to the West Bank. This was necessary because most arriving Soviet Jews, like most other Israelis, preferred the urban areas along the Mediterranean coast. But the Israeli government built no new housing in Haifa, a favorite destination of the Soviets, and very little in Tel Aviv, another desired location. "Sharon decided to send people from Leningrad and Moscow to the far ends of the country," wrote an Israeli economics reporter.⁵⁰ "Most of them want to live in the center of the country; the billions invested in building elsewhere will go down the tube."⁵¹ Evidently Israel's housing program was aimed less at satisfying housing needs than at exerting control over the West Bank, a purpose in line with Levy's statement about his government's credo.

Some economists have doubted the viability of the Israeli building plan. The loans the United States was being asked to guarantee would be considered high risk. The Bush administration told Israel that if it continued to build new West Bank settlements, the United States might

U.S. Congress Refuses to Cut Israel Aid over Settlements, REUTERS, June 19, 1991, BC Cycle, available in LEXIS, Nexis Library, Lbyrpt file.

46. Saul Friedman, *What's Next Step in Peace Effort?*, NEWSDAY, May 2, 1991, at 15; Shamir Looks for Housing Aid, JERUSALEM POST (int'l ed.), Dec. 15, 1990, at 1; Frank Collins, *Israel Calls for \$13 Billion More in Aid from the United States*, WASH. REP. ON MIDDLE E. AFF., Mar. 1991, at 9.

47. John Asfour, *Soviet Immigrants to Israel Cost Five Times More Than Immigrants to U.S.*, WASH. REP. ON MIDDLE E. AFF., Apr. 1991, at 31.

48. Sylvia Nasar, *For Israel, Navigator of Finance*, N.Y. TIMES, Aug. 6, 1991, at A8.

49. *Id.*

50. Daniel Williams, *Israeli Economic Woes Cast Doubt on Wisdom of Underwriting Loans*, L.A. TIMES, Oct. 14, 1991, at A6.

51. *Id.*; see also Moffett, *supra* note 3, at 7 (stating that if Israel took out \$10 billion in new loans, its ability to pay the debt would be reduced).

reject its request for the \$10 billion loan guarantee.⁵² The request required Congressional approval and President Bush asked Congress in September 1991 to defer action on the request for the loan guarantee for four months, "in the best interest of the peace process."⁵³ Bush hoped to pressure Israel into beginning negotiations with the Palestinians and the Arab states. Some analysts have agreed that the tactic worked and that the desired loan guarantee was a factor in Prime Minister Shamir's decision to enter the negotiations.⁵⁴

Prime Minister Shamir lashed out at President Bush for delaying action on the loan guarantee, telling the Knesset (Israel's parliament) that the delay "strikes against the deepest fundamentals of Jewish and Zionist consciousness."⁵⁵ Shamir stated that if the Bush administration "were aware of the scope of the struggle of our enemies since the beginning of the century, precisely against Jewish immigration to the land of Israel, they would have thought twice before pursuing the course that they did."⁵⁶

Shamir's reference to "Zionist consciousness" was to Zionism, the political movement that was formed in eastern Europe in the late nineteenth century to create a Jewish state.⁵⁷ By putting the loan guarantee issue in this context, Shamir showed that the settlement construction program was part of Israel's long-term plan to take the territory of historic Palestine, which included the West Bank.⁵⁸

In the 1992 Israeli elections, the Labor party replaced the Likud Party and announced a different direction in policy towards the West

52. David Makovsky, *All Sides Agree to Idea of Parley*, JERUSALEM POST (int'l ed.), Apr. 20, 1991, at 1.

53. Exchange with Reporters Prior to a Meeting with Secretary of State Baker, WEEKLY COMP. PRES. DOC. 1229 (Sept. 9, 1991).

54. Asher Wallfish, *Farce and Failure*, JERUSALEM POST (daily ed.), Nov. 8, 1991, at 18. Labor Party MK Shimon Shetreet stated that Shamir's relatively compliant performance at Madrid and in subsequent bilateral talks with the Arabs would be a factor in the U.S. decision on the loan guarantees. *Id.* See also Shamir: *I Would Have Dragged Negotiations for Ten More Years*, AL-FAJR, July 6, 1992, at 1. Shamir acknowledged that after he left office, he had no intention of coming to an agreement with the Palestinians, but planned to increase the settler population in the West Bank to ensure Israeli sovereignty there. *Id.*

55. Jackson Diehl, *Shamir Attacks Bush on Loans*, WASH. POST, Oct. 8, 1991, at A15.

56. *Id.*

57. *Id.*

58. 4 FOREIGN RELATIONS U.S.: PARIS PEACE CONFERENCE 1919, at 161-62 (1943) (statement of World Zionist Organization that it sought a state to include all Palestine).

Bank. Labor Prime Minister Itzhak Rabin said that his government would build new housing only in what he termed "strategic" settlements, but not in what he termed "political" settlements.⁵⁹ By "strategic" settlements, Rabin meant those located on the eastern side of the West Bank, along the border of Jordan, as well as those settlements that had been built in heavy concentrations on the western side of the West Bank, near Jerusalem.⁶⁰ Moreover, Rabin said that his government would end the financial benefits that the Likud Party had offered to attract Israelis to the "political" settlements in the West Bank.⁶¹ The Labor Party would not build any new settlements in the West Bank.⁶² As a result of these policy changes, the Bush administration asked Congress to approve Israel's request to guarantee \$10 billion in loans,⁶³ which it did.⁶⁴

III. THE INTERNATIONAL REACTION TO UNITED STATES FUNDING OF ISRAEL

Even prior to the loan guarantees, United States financing of Israel drew a negative reaction from the international community. When Israel and the United States arrived at an agreement in 1981 on strategic cooperation, resulting in a likely increase in military aid, the United Nations

59. Michal Yudelman, *Labor Guidelines Cautious on Settlements in Areas to Placate Meretz, Tsomet*, JERUSALEM POST (int'l ed.), July 11, 1992, at 1 (quoting Labor government statement that it would "act to strengthen the settlements along the confrontation lines").

60. *Id.*; see also *Government Decision for Partial Halt on Settlement Building Not Enough, Say Palestinians, Israelis*, AL-FAJR, July 27, 1992, at 1 (quoting MK Dedi Zucker criticizing the new Labor government on the grounds that the housing it would allow to be completed in the West Bank would accommodate an additional 50,000 settlers).

61. Michal Yudelman, *Rabin: I'll Set the Policy in Any Coalition Government*, JERUSALEM POST (int'l ed.), July 4, 1992, at 1 (quoting Rabin's statement that "[w]e will freeze all the incentives and all the benefits that are given at the expense of the Israeli taxpayer to the political settlements").

62. Yudelman, *supra* note 59, at 1. At that juncture, the need for additional West Bank housing was questioned because much recently built housing in the West Bank area remained empty for lack of home buyers. Bill Hutman & Alise Odenheimer, *Cabinet Decrees Massive Construction Cuts in Areas*, JERUSALEM POST (int'l ed.), Aug. 1, 1992, at 1. A sharp decline in Soviet immigration in 1992 cast further doubt on the need for more financing. Peretz Kidron, *The Loan Guarantees: a Boost or a Burden?*, MIDDLE E. INT'L, Aug. 21, 1992, at 5. In the first half of 1992, the Israeli government was forced to purchase 13,000 newly built West Bank homes because they could not otherwise be sold. *The Housing Freeze*, JERUSALEM POST (int'l ed.), Aug. 1, 1992, at 8.

63. Jackson Diehl & David Von Drehle, *Bush Approves Sale of F-15s to Saudis; Israelis Said to Be Due Compensation*, WASH. POST, Sept. 12, 1992, at A1.

64. 138 CONG. REC. S16,680 (daily ed. Oct. 5, 1992); *id.* at H11,364.

General Assembly said that the agreement would "encourage Israel to pursue its aggressive and expansionist policies and practices" in the West Bank and would have "adverse effects on efforts for the establishment of a comprehensive, just and lasting peace in the Middle East."⁶⁵ Thus, Israel's evident aim of permanently retaining the West Bank may lead to perpetual warfare in the Middle East.

Israel's settlements on the West Bank were a particular source of international concern. The United Nations Security Council, with the United States voting in the affirmative, asked states "not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories."⁶⁶ The United States accepted the language of this resolution because it stated that the specific dollar amounts it gave Israel were not used to build settlements.⁶⁷

The General Assembly, however, adopted a broader phrasing, asking states "to avoid actions, including those in the field of aid, which might be used by Israel in its pursuit of the policies of annexation and colonization."⁶⁸ The General Assembly's formulation was not concerned with whether Israel used aid money or other funds to build settlements in the West Bank. Further, the Assembly's formulation not only prohibited settlement construction, but also Israel's overall effort to retain the West Bank.⁶⁹ Israel and the United States cast the only negative votes on the Assembly's resolution.⁷⁰

The settlements drew even stronger international condemnation when the Soviet immigration began in 1990. The Organization of African Unity asked the United States "to do everything possible to prevent the settlement of migrant Jews in the occupied Palestinian . . . territories."⁷¹ At a summit meeting, the Arab states resolved to review their relations with states that facilitated the settling of Soviet Jews in Israel. "The conference," it was resolved, "holds the United States primarily responsible for this, as it provides Israel with the military means, financial help

65. G.A. Res. 36/226A, art. 12, U.N. GAOR, 36th Sess., at 47, U.N. Doc. A/36/51 (1982); G.A. Res. 38/180(D), art. 10, U.N. GAOR, 38th Sess., at 51, U.N. Doc. A/38/47 (1984).

66. U.N. SCOR, 35th Sess., Res. 465, U.N. Doc. S/INF/36 (1981).

67. See *infra* note 133 and accompanying text.

68. G.A. Res. 35/122C, art. 8, U.N. GAOR, 35th Sess., at 90, U.N. Doc. A/35/48 (1980).

69. *Id.*

70. U.N. GAOR, 35th Sess., 92d plen. mtg., at 1617, U.N. Doc. A/35/PV.92 (1984).

71. Resolution B, Council of Ministers, Organization of African Unity, July 3-7, 1990, ¶11, in U.N. DIVISION FOR PALESTINIAN RIGHTS, BULLETIN, July 1990, at 1.

and political cover without which it could not pursue these policies and defy so arrogantly the will of the international community."⁷²

In 1990 the Arab states called for a boycott of private companies that might facilitate Soviet Jewish immigration to Israel.⁷³ Some of these states suggested an oil embargo of the United States to pressure it to stop the facilitation of Soviet immigration through the financing of Israel.⁷⁴ Palestine Liberation Organization Chairman Yassir Arafat even proposed economic sanctions against states "aiding the passage of Soviet Jewish migrants to Israel."⁷⁵

After Iraq invaded Kuwait later in 1990, the Arab states divided into two camps, one of which was allied with the United States. That development left little chance of concerted Arab action against the United States on the Israeli settlement issue or the Soviet immigration issue.⁷⁶ However, Arab governments continued to criticize the United States as it granted Israel loan guarantees.⁷⁷

When Israel accelerated its settlement construction in 1991, some Israelis criticized the United States for aiding Israel. "It is with American money that the government of Israel can pursue its policies, which, regrettably, include the policy of gradually annexing the Occupied Territories of the West Bank and Gaza Strip," a group of Israeli intellectuals wrote in an open letter to Congress.⁷⁸ "Such annexation," the letter con-

72. U.N. DIVISION FOR PALESTINIAN RIGHTS, BULLETIN, May 1990, at 12; Nick B. Williams Jr., *Arab Leaders Rebuke Israel over Emigration*, L.A. TIMES, May 31, 1990, at A10.

73. *Chedli Klibi: Boycott Hardly an Arab Invention!*, JERUSALEM (Palestine Committee for NGOs, Tunis), July 1990, at 4.

74. Federal News Service, Hatem Hussaini, Palestine National Council, *News Briefing with Foreign Correspondents Association*, National Press Club, May 31, 1990, BC Cycle, available in LEXIS, Nexis Library, Currnt File.

75. Wafa Amr, *Arab Summit May Tone Down Mideast Resolutions*, UPI, May 29, 1990, BC Cycle, available in LEXIS, Nexis Library, Currnt File.

76. In 1991 an Islamic state summit conference urged other states to do nothing that might facilitate the settlement of Soviet Jews in the West Bank. *PLO Isolated in Insisting on Moslem Holy War*, REUTERS, Dec. 11, 1991, BC Cycle, available in LEXIS, Nexis Library, Currnt File.

77. Jonathan Ferziger, *Israel to Proceed with \$10 Billion Loan Guarantee Request*, UPI, Sept. 5, 1991, BC Cycle, available in LEXIS, Nexis Library, Currnt File.

78. *Israeli Loan Justice*, IN THESE TIMES, Sept. 25, 1991, at 17 (letter signed by, among others, General Mattityahu Peled, former member of Israel's general staff).

While this Article focuses on the West Bank, similar issues could be raised regarding the Gaza Strip, which Israel also occupied in 1967, and where it has also built settlements. The Article addresses the West Bank because that is where Israel began accelerated settlement construction in 1991. On land confiscation for settlement construction in the Gaza Strip, see SARA ROY, *THE GAZA STRIP* 134-35 (1986).

tinued, "is effected by setting up new settlements and creating an expanding Jewish presence in those territories. With the help of American money, the government is able to offer Jewish settlers, native-born or newly arrived Israeli Jews, extremely generous subsidies, amounting practically to free housing, as well as other benefits." The letter also stated that Israel could not afford all these expenditures without United States aid, and that the United States "cannot shrug off a degree of responsibility for the way its money is used."⁷⁹

Although widely condemned, United States financing of Israel would be illegal only if the settlement construction or the occupation itself were illegal and if, in addition, the United States financing facilitated the settlement construction or the occupation. The following sections explore these issues.

IV. THE LEGALITY OF THE SETTLEMENTS

After taking the West Bank in 1967, the government of Israel used broad land confiscation laws⁸⁰ to acquire large tracts of West Bank land.⁸¹ In 1983 the Israeli Ministry of Agriculture and the World Zionist Organization⁸² jointly prepared a Master Plan and Development Plan for Settlement in Samaria and Judea.⁸³ The plan envisaged the practical incorporation of the West Bank into Israel, aiming "*to disperse maximally large Jewish population* in areas of high settlement priority, using small national inputs and in a relatively short period by using the settlement potential of the West Bank and to achieve the incorporation [of the West Bank] into the [Israeli] national system."⁸⁴

79. *Israeli Loan Justice*, *supra* note 78, at 17.

80. TREATMENT OF PALESTINIANS IN ISRAELI-OCCUPIED WEST BANK AND GAZA: 1977 REPORT OF THE NATIONAL LAWYERS GUILD, MIDDLE EAST DELEGATION 4-8 (1978); RAJA SHEHADEH, OCCUPIER'S LAW: ISRAEL AND THE WEST BANK 17-49 (1985); RAJA SHEHADEH & JONATHAN KUTTAB, THE WEST BANK AND THE RULE OF LAW 107-12 (1980).

81. MERON BENVENISTI, THE WEST BANK DATA PROJECT: A SURVEY OF ISRAEL'S POLICIES 30-36 (1984); ANTOINE MANSOUR, PALESTINE 34-37 (1983).

82. The World Zionist Organization, which works in conjunction with the Jewish Agency, acts as a worldwide leader for Israeli concerns. *See, e.g.*, JOHN QUIGLEY, PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE 118-122 (1990).

83. *See generally* BENVENISTI, *supra* note 81, at 19-28. "Judea" and "Samaria" are ancient names for sectors of the West Bank of the Jordan River, and their usage is a reflection of an Israeli claim to the West Bank. *See, e.g.*, *Emergency Regulations Law*, 32 LAWS OF THE STATE OF ISRAEL 58 (1977).

84. BENVENISTI, *supra* note 81, at 27 (quoting MINISTRY OF AGRICULTURE, WORLD ZIONIST ORGANIZATION, MASTER AND DEVELOPMENT PLAN FOR SETTLEMENT IN SAMARIA AND JUDEA § 1.1 (1983) (emphasis added)).

Prime Minister Shamir pledged in his 1983 inaugural speech to pursue what he called the "holy work" of settlement in the West Bank.⁸⁵ Shamir's Likud Party, which first came to power in Israel in 1977, considered the West Bank to belong to Israel on the ground that it formed part of the ancient Hebrew kingdom in Palestine. The party asserted the right for Israel to establish settlements anywhere in the West Bank. Regarding Israel's future plans for the West Bank and the possibility that it might annex the area, the Likud's Menachem Begin, who became Prime Minister in 1977, said, "you can annex foreign land. You cannot annex your own country. Judea and Samaria," he said, "are part of the land of Israel, where the nation was born."⁸⁶

Based on the "permanent character" of many of the settlements, and on the "pronouncements of Israeli leaders to the effect that they are permanent," the International Commission of Jurists concluded that the settlements were "a step towards eventual assertion of sovereignty over the territories or part of them."⁸⁷ The Commission said that this aim violated the self-determination rights of the Palestinian Arabs.⁸⁸ Israel's land acquisition and settlement activity in the West Bank created, according to one analyst, "an elaborate network of vested interests."⁸⁹ Israeli government officials acknowledged that Israel intended settlement construction to create a presence to prevent the Palestine Arabs from forming a state.⁹⁰ The apparent aim was to build so many settlements that no future government of Israel would remove them.

In a court action challenging the construction of one settlement in the West Bank, the Supreme Court of Israel said that the Israeli cabinet, in approving the settlement, was "decisively influenced by reasons stemming from the Zionist world-view of the settlement of the whole land of Israel."⁹¹ Judge Moshe Landau cited an affidavit of the State Attorney General that quoted Prime Minister Menachem Begin as affirming "the

85. DAVID HIRST, *THE GUN AND THE OLIVE BRANCH: THE ROOTS OF VIOLENCE IN THE MIDDLE EAST* 453 (1984).

86. William Claiborne, *Israel Turns to West Bank*, WASH. POST, Apr. 26, 1982, at A19.

87. REVIEW OF THE INTERNATIONAL COMMISSION OF JURISTS, *ISRAELI SETTLEMENTS IN OCCUPIED TERRITORIES* 27, 30-32 (No. 19, 1977).

88. *Id.* at 32.

89. Ian Lustick, *Israel and the West Bank after Elon Moreh: The Mechanics of De Facto Annexation*, 35 MIDDLE E. J. 557, 558 (1981).

90. ROY, *supra* note 78, at 137.

91. 17 Residents of the Village of Rujeib v. Israel, (Elon Moreh Case) High Court of Justice 390/79, 34(1) *Piskei Din* 1 (1980), reprinted in 1 PALESTINE Y.B. INT'L L. 134, 145 (1984).

Jewish people's right to settle in Judea and Samaria."⁹² Judge Landau said that this "view concerning the right of the Jewish people" was "based on the fundamentals of Zionist doctrine."⁹³

In the same case, the Supreme Court of Israel ruled illegal the construction of the projected settlement. The military government of the West Bank argued that the settlement would promote security, but the settlers told the court that their purpose was to help Israel solidify its territorial claim to the West Bank.⁹⁴

Although the Supreme Court of Israel typically deemed settlements lawful, other states found them illegal. The international community held Israel, in its administration of the West Bank, to the standards set by the law of belligerent occupation. These standards applied because Israel came into control of the West Bank through hostile actions. The law of belligerent occupation provides protection for an occupied population, while ceding to the occupying power the right to preserve its temporary tenure. The law of belligerent occupation is found in customary law, in the 1907 Hague Regulations,⁹⁵ and in the 1949 Geneva Civilians Convention.⁹⁶

The law of belligerent occupation requires an occupying power to preserve, to the extent feasible, the existing order, in the expectation that the occupying power will ultimately withdraw. The occupant must preserve the "civil life" of the territory⁹⁷ and apply existing legislation as the law in force in the territory.⁹⁸

An occupying power must leave the territory to the population it finds there and may not bring in its own people to inhabit the territory.⁹⁹ The Hague Regulations require the occupying power to administer public lands to benefit the local population¹⁰⁰ and instruct it not to confiscate

92. *Id.* at 146 (in reprint).

93. *Id.* (in reprint).

94. *Id.* at 141 (in reprint).

95. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex: Regulations Respecting the Laws and Customs of War on Land, art. 43, 36 Stat. 2277 (1910) [hereinafter Hague Regulations].

96. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Civilians Convention].

97. Hague Regulations, *supra* note 95, art. 43, 36 Stat. at 2306. *Cf.* the term "*vie publics*" in the French, and only official, text of the Regulations. *Id.*

98. *Id.*; Geneva Civilians Convention, *supra* note 96, art. 64, 75 U.N.T.S. at 328.

99. Article 49 of the Geneva Civilians Convention states: "The Occupying Power shall not . . . transfer parts of its own civilian population into the territory it occupies." *Id.* art. 49, at 318.

100. Hague Regulations, *supra* note 95, art. 55, 36 Stat. at 2309.

private property.¹⁰¹ Some of the land taken in the West Bank for settlement construction was state land, while other land was confiscated from private persons.¹⁰²

Regardless of whether the land involved was public or private, the erection of settlements on it was illegal under the law of military occupation, and many states criticized the settlement policy on that basis. The United Nations Security Council, armed with United States support, adopted a resolution stating that Israel's settlement policy regarding the territories occupied in 1967 "constitute[d] a flagrant violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War" (Geneva Civilians Convention) and that the policy also "constitute[d] a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East."¹⁰³

The General Assembly, also referring to the Geneva Civilians Convention, resolved that it "strongly condemns . . . [the] [e]stablishment of new Israeli settlements and expansion of the existing settlements on private and public Arab lands, and transfer of an alien population thereto."¹⁰⁴ The United Nations Commission on Human Rights criticized Israel for the "settlement of alien populations brought from other parts of the world in the place of the original Palestinian owners of land," as a violation of the rights of the Palestinian population.¹⁰⁵

The United States State Department similarly noted that the settlements were "[i]n contravention of the generally accepted interpretation of the Convention's Article 49," referring again to the Geneva Civilians Convention.¹⁰⁶ According to a 1978 opinion of the State Department's Legal Advisor, the settlements violated the Convention as an unlawful "transfer of parts of its own civilian population" into the West Bank.¹⁰⁷ The Legal Advisor also referred to limits on an occupying power under

101. *Id.* art. 46, at 2309; ESTHER COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967-1982, at 43 (1985) (stating that while Israel is not a party to the Regulations, they are generally taken to reflect customary law binding on all states, and Israel concurs in that view).

102. SHEHADEH, OCCUPIER'S LAW, *supra* note 80, at 21-22.

103. S.C. Res. 476, *supra* note 65.

104. G.A. Res. 37/88C, U.N. GAOR, 37th Sess., Supp. No. 93, U.N. Doc. A/37/51 (1982).

105. U.N. COMM'N ON HUMAN RIGHTS, Res. 1987/2, art. 8(e), U.N. ESCOR, 43d Sess., Supp. No. 5, at 13, U.N. Doc. E/1987/18, E/CN.4/1987/60 (1987).

106. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1979, ISRAEL AND OCCUPIED TERRITORIES 756, 760 (1980).

107. Opinion of the Legal Advisor of the U.S. Dep't of State (1978), 1980 DIG. U.S. PRAC. INT'L L. 1575, 1577.

the customary law of belligerent occupation and said that Israel's civilian settlements exceed the limits on Israel's authority as a belligerent occupant "in that they do not seem intended to be of limited duration or established to provide orderly government of the territories, and, though some may serve incidental security purposes, they do not appear to be required to meet military needs during the occupation."¹⁰⁸

In 1981, however, President Ronald Reagan disputed this view, saying that the West Bank settlements were not illegal "under the U.N. resolutions that leaves [sic] the West Bank open to all people, Arab and Israeli alike."¹⁰⁹ From that time, the United States criticized the settlement program in policy terms but did not say that they were illegal.¹¹⁰

Two contentions were made on behalf of Israel to argue that the settlement construction did not violate the Geneva Civilians Convention. The first was that the settlers themselves established the settlements, and therefore that Israel had not "transferred" population.¹¹¹ The second contention was that the Convention prohibited settlement only to the extent that settlement displaced local residents.¹¹² Those arguments were ill-founded, however, because the government provided the land and funding for the settlements.¹¹³ Further, the Convention did not prohibit settlement only where incoming settlers displaced local residents but prohibited it under any circumstances.¹¹⁴

108. *Id.*

109. *President Reagan Talks About Economy, Soviets, Iran, PLO*, CHRISTIAN SCI. MONITOR, Feb. 4, 1981, at 22 (characterizing settlement construction, however, as "ill advised" and "unnecessarily provocative" in light of need for a peace settlement).

110. *See e.g.*, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1981, at 1000 (1982).

111. JULIUS STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS 177-81 (1981).

112. THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL 54-55 (Israel National Section, International Commission of Jurists 1981).

113. 1980 DIG. U.S. PRAC. INT'L L., *supra* note 107, at 1577 (stating that the settlements were unlawful because article 49 "seems clearly to reach such involvements of the occupying power as determining the location of settlements, making land available and financing of settlements").

114. *Id.* (stating that the view that local population be displaced before the Convention is violated is incorrect, that the Convention applies "whether or not harm is done by a particular transfer," and that "transfers of a belligerent occupant's civilian population into occupied territory are broadly proscribed as beyond the scope of interim military administration"); W. THOMAS MALLISON & SALLY V. MALLISON, THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER 264-65 (1986) (stating that neither the text nor drafting history of article 49 give reason to believe that the Convention limits the prohibition on settlement to situations in which local residents are displaced).

Israel also argued that the Geneva Convention did not apply to its administration of the West Bank because the Convention by its terms applies only in "the territory of a High Contracting Party."¹¹⁵ Israel contended that this means only territory lawfully held by a contracting party and that Jordan did not have good title to the West Bank.¹¹⁶ The international community rejected Israel's view on this point,¹¹⁷ because the Convention also states that it applies "in all circumstances,"¹¹⁸ and to "all cases of declared war or of any other armed conflict."¹¹⁹ An occupied population has a right to the integrity of its territory pending the withdrawal of the occupying power. Israel, therefore, unlawfully used the West Bank as a territory in which to settle its citizens.¹²⁰

The law of belligerent occupation does not let an occupying power alter the occupied territory. Rather, the occupying power holds a posi-

115. Geneva Civilians Convention, *supra* note 96, art. 2, 75 U.N.T.S. at 288.

116. Amb. Netanel Lorch, *Human Rights in Time of War*, 1 ISRAEL Y.B. ON HUMAN RIGHTS 366 (1971) (statement at symposium Faculty of Law, Tel Aviv University); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279 (1968).

117. U.S. Dep't of State, *United States Reaffirms Position on Jerusalem*, 61 DEP'T ST. BULL. 76 (1969); 1980 DIG. U.S. PRAC. INT'L L., *supra* note 107, at 1576; U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1983, at 1292 (1984); U.N. SCOR, 22d Sess., Res. 237, U.N. Doc. S/INF/22/Rev.2 (1968); G.A. Res. 2443, U.N. GAOR, 23d Sess., at 50 U.N. Doc. A/7218 (1969); Wendy Olson, *U.N. Security Council Resolutions Regarding Deportations from Israeli Administered Territories: The Applicability of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 24 STAN. J. INT'L L. 611, 620 (1988).

118. Geneva Civilians Convention, *supra* note 96, art. 1, 75 U.N.T.S. at 288.

119. *Id.* art. 2, at 288.

120. Cf. Eugene Rostow, *Palestinian Self-Determination*, 5 YALE STUD. WORLD PUB. ORD. 147, 159 (1979); Eugene Rostow, *Don't Strongarm Israel*, N.Y. TIMES, March 19, 1991, at A23. In both pieces, Rostow argues that the West Bank settlements are lawful on the basis of the mandate that Great Britain held from the League of Nations to administer Palestine after World War I. MANDATE FOR PALESTINE, PERMANENT MANDATES COMMISSION, No. 466, 8 LEAGUE OF NATIONS O.J. 1007 (1922), reprinted in TERMS OF LEAGUE OF NATIONS MANDATES: REPUBLISHED BY THE UNITED NATIONS, U.N. Doc. A/70 (1946) (incorporating the Balfour Declaration of 1917, in which Britain committed to promote a Jewish national home in Palestine). Even if Israel could still claim rights based on the mandate instrument, which is doubtful, the establishment of Israel in 1948 in three-fourths of the territory of Palestine satisfied the call for a Jewish national home, and thus no basis exists for saying that the mandate instrument gives Israel a right to settle citizens in other parts of Palestine. Further, the mandate instrument also said that, in promoting a Jewish national home, Britain should do nothing to prejudice the rights of the Palestinians. To permit Jewish settlement everywhere in Palestine after the establishment of a Jewish state would prejudice Palestinian rights.

tion of trust to protect and preserve the territory pending its withdrawal. Israel's practice, which involved engineering a situation to tie the territory permanently to itself, demonstrates the vice of civilian settlements.

V. THE LEGALITY OF ISRAEL'S OCCUPATION OF THE WEST BANK

The settlements aided Israel in taking territory seized by force of arms. Beyond the question of settlements and their legality lies the issue of the occupation itself. United States aid facilitates not only settlement construction but Israel's other expenditures, military and administrative, to maintain its control of the West Bank. If Israel is illegally occupying the West Bank, United States financing of Israel may be illegal.

Both the United Nations Security Council and General Assembly have demanded that Israel withdraw from the West Bank because territory may not lawfully be acquired in hostilities.¹²¹ Neither body ever determined who was responsible for the 1967 hostilities, but territory taken in hostilities may not be retained regardless of fault.

If Israel took the territory by unlawful aggression, it must be returned because a state may not retain the fruits of its aggression.¹²² If Israel took the territory defensively, it should have been returned as soon as Israel repelled the aggression because force used in defense must be proportional to the need for the force.¹²³

Some scholars have questioned this latter proposition. One commentator noted that Israel might lawfully retain the territories pending a peace

121. U.N. SCOR, 22d Sess., Res. 242, U.N. Doc. S/INF/22/Rev.2 (1968) ("Emphasizing the inadmissibility of the acquisition of territory by war. . . . Affirms that the fulfillment of Charter principles requires. . . . [w]ithdrawal of Israel armed forces from territories occupied in the recent conflict; Termination of all claims or states of belligerency [among states in the region]."); U.N. SCOR, 35th Sess., Res. 476, U.N. Doc. S/INF/36 (1980) ("Reaffirming that acquisition of territory by force is inadmissible. . . . Reaffirms the overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem."); G.A. Res. 3414, U.N. GAOR, 30th Sess., 6, U.N. Doc. A/10034 (1975) ("Reaffirms that the acquisition of territory by force is inadmissible and therefore all territories thus occupied must be returned; Condemns Israel's continued occupation of Arab territories in violation of the Charter of the United Nations, the principles of international law and repeated United Nations resolutions."); G.A. Res. 37/86E, U.N. GAOR, 37th Sess., U.N. Doc. A/37/51 (1983) (demanding, "in conformity with the fundamental principle of the inadmissibility of the acquisition of territory by force, that Israel should withdraw completely and unconditionally from all the Palestinian and other Arab territories occupied since June 1967, including Jerusalem, with all property and services intact").

122. U.N. CHARTER art. 2, ¶4.

123. ROBERT JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 55-56 (1963); MALLISON & MALLISON, *supra* note 114, at 259.

agreement.¹²⁴ Another argued that when territory is taken defensively, the state taking the territory (such as Israel) may require the institution of security measures reasonably designed to ensure that hostile neighbors (such as the surrounding Arab states) shall not again use that territory to mount a threat or a use of force against the state taking the territory as a condition of that state's withdrawal from the territory.¹²⁵

These positions, however, disregarded the necessity and proportionality requirements in the law of self-defense. Even if Israel's actions were in response to a threat to its security, once it repelled the threat, it had no grounds to anticipate an imminent attack, to use further military force, or to retain territory it seized while repelling the attack. As the 1967 hostilities ended, Jordan and Egypt could not militarily mount a counteroffensive. In the first day of hostilities, Israel destroyed nearly all their fighter aircraft as they stood parked at their bases.¹²⁶ Thus, Israel had an obligation to withdraw from the occupied territory.¹²⁷

It is doubtful, moreover, that Israel acted defensively in taking the West Bank, at least as the international community understands the concept of self-defense.¹²⁸ Israel initiated the 1967 hostilities by invading Egypt, and when Jordan came to Egypt's defense, Israel attacked it as well.¹²⁹ Prime Minister Levi Eshkol said that Israel attacked Egypt to

124. Michael Akehurst, *The Arab-Israeli Conflict and International Law*, 5 NEW ZEALAND U. L. REV. 231, 242 (1973).

125. Stephen M. Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344, 345-46 (1970); see also John Norton Moore, *The Arab-Israeli Conflict and the Obligation to Pursue Peaceful Settlement of International Disputes*, 19 KAN. L. REV. 403, 425 (1971).

126. NADAV SAFRAN, *FROM WAR TO WAR: THE ARAB-ISRAELI CONFRONTATION, 1948-1967*, at 328 (1969); DONALD NEFF, *WARRIORS FOR JERUSALEM: THE SIX DAYS THAT CHANGED THE MIDDLE EAST* 203 (1984); ROBERT STEPHENS, *NASSER: A POLITICAL BIOGRAPHY* 498 (1971); EZER WEIZMAN, *ON EAGLES' WINGS: THE PERSONAL STORY OF THE LEADING COMMANDER OF THE ISRAELI AIR FORCE* 243 (1976).

127. John L. Hargrove, *Abating the Middle East Crisis Through the United Nations (And Vice Versa)*, 19 KAN. L. REV. 365, 367 (1971). Other commentators argue that Israel might lawfully retain the territories permanently, on the theory that Jordan and Egypt had not held lawful title and no sovereign could recover the territories. See, e.g., Blum, *supra* note 116, at 294; STONE, *supra* note 111, at 52; Stephen M. Schwebel, *Remarks*, 1 ISRAEL Y.B. HUM. RTS. 374 (1971) ("Where the prior holder of territory has seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title."); Antonio Cassese, *Legal Considerations on the International Status of Jerusalem*, 3 PALESTINE Y.B. INT'L L. 13, 23-24 (1986) (stating that uncertainty over sovereignty in these areas gave Israel no basis to retain them).

128. U.N. CHARTER art. 51.

129. SYDNEY D. BAILEY, *THE MAKING OF RESOLUTION 242*, at 68 (1985);

prevent an imminent attack by Egypt, and therefore it acted in "legitimate defence."¹³⁰ Egypt denied that it intended to attack Israel; Israeli military officials and cabinet members said that when the Israeli cabinet voted to invade Egypt, they understood that Egypt would not attack Israel.¹³¹ Regardless, however, of the cause of the 1967 hostilities, Israel retains the areas it captured in violation of international law because territory may not be acquired by offensive or defensive force.

VI. THE LEGALITY OF UNITED STATES FINANCING OF ISRAEL

The question remains regarding the United States liability for financing the unlawful settlement construction and the occupation. At first blush, the question may sound absurd. Governments typically rationalize aid-giving as benevolent in purpose.

States, however, give aid for a variety of motives. A state may give aid to establish a political foothold in a state. It may seek to flood markets with consumer goods of its own production in order to encourage consumers to rely on them. Another motive may be a quest for reciprocal

SAFRAN, *supra* note 126, at 320-30; STEPHENS, *supra* note 126, at 493. Israel initially stated, falsely, that Egypt had attacked first. U.N. SCOR, 22d Sess., 1348th mtg., at 15, U.N. Doc. S/PV.1348 (1967) (statement of Foreign Minister Abba Eban, Israel). The June hostilities followed a period of tension between Israel and Syria that led Egypt to take the position that if Israel attacked Syria, Egypt would respond by attacking Israel. Even though there was no indication of an imminent invasion of Israel, the government of Israel could have been concerned that one day these states might attack it. QUIGLEY, *supra* note 82, at 158-60.

130. *Admission on Attack*, THE TIMES (London), July 8, 1967, at 3.

131. *Le général Rabin ne pense pas que Nasser voulait la guerre*, LE MONDE, Feb. 29, 1968, at 1. Chief of Staff General Itzhak Rabin stated: "I do not believe that [Egyptian President Gamel Abdul] Nasser wanted war. The two divisions he sent into Sinai on May 14 would not have been enough to unleash an offensive against Israel. He knew it and we knew it." *Id.* General Matitahu Peled, a member of the general staff, said that the "thesis according to which the danger of genocide weighed on us in June 1967, and that Israel struggled for its physical existence is only a bluff born and developed after the war. . . . our General Staff never told the government that the Egyptian military threat represented any danger to Israel" Amnon Kapeliouk, *Israël était-il réellement menacé d'extermination?*, LE MONDE, June 3, 1972, at 4. Menachem Begin, a cabinet minister in 1967, stated, "The Egyptian Army concentrations in the Sinai approaches do not prove that Nasser was really about to attack us. We must be honest with ourselves. We decided to attack him." *Excerpts from Begin Speech at National Defense College*, N.Y. TIMES, Aug. 21, 1982, at A6. For arguments on both sides of the issue of who was responsible for the 1967 war, compare John Quigley, *The United Nations Action Against Iraq: A Precedent for Israel's Arab Territories?*, 2 DUKE J. COMP. & INT'L L. 195 (1992), with Eugene Rostow, *The Perils of Positivism: A Response to Professor Quigley*, 2 DUKE J. COMP. & INT'L L. 229 (1992).

advantage from the recipient state, such as the use of its territory for a military base. Thus, an aid-giving state does not necessarily act out of entirely charitable motives.¹³²

If aid enables the recipient to carry out unlawful acts, the aid-giving state may be in legal jeopardy. Addressing this issue, the International Law Commission found that customary international law prohibits aiding a violation. The Commission stated that the recent practice of states shows that customary international law prohibits participation in the internationally wrongful act of another by providing "aid or assistance."¹³³ In its Draft Articles on State Responsibility, the International Law Commission codified this rule.¹³⁴

States have recognized the obligation not to aid states if the aid facilitates unlawful conduct. A number of donor states, for example, stopped their economic aid to Chile because of the significant violation of rights that accompanied the overthrow of Chile's civilian government in 1973 and the establishment of military rule there.¹³⁵

The United States recognizes the obligation to stop aid to states that act unlawfully, even if the state does not specifically use the funds contributed to commit unlawful acts. Congressional legislation requires the United States to cut off aid to states whose governments engage in "a consistent pattern of gross violations of internationally recognized human rights."¹³⁶ To keep itself informed whether aid recipients are human rights violators, Congress mandated that the State Department prepare annual reports on human rights in states receiving United States aid.¹³⁷

132. FELIX GREENE, *THE ENEMY: WHAT EVERY AMERICAN SHOULD KNOW ABOUT IMPERIALISM* 122-147 (1970).

133. *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 33d Sess., Supp. No. 10, at 252, U.N. Doc. A/33/10 (1978), *reprinted in* [1978] 2 Y.B. INT'L L. COMM'N 103, U.N. Doc. A/CN.4/SER.A/1978/Add.1 (pt. 2).

134. The Commission's rules state that:

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

Report of the International Law Commission to the General Assembly, U.N. GAOR, 33d Sess., Supp. No. 10, at 187, § 27, U.N. Doc. A/33/10 (1978), *reprinted in* [1978] 2 Y.B. INT'L L. COMM'N 80, U.N. Doc. A/CN.4/SER.A/1978/Add.1 (pt. 2).

135. Antonio Cassese, *Foreign Economic Assistance and Respect for Civil and Political Rights: Chile—A Case Study*, 14 TEX. INT'L L.J. 251 (1979).

136. 22 U.S.C. § 2304 (1988) (military aid); 22 U.S.C. § 2151 (1988) (economic aid).

137. See U.S. DEP'T OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990* (1991).

In 1990, for example, the United States suspended military aid to Guatemala because of human rights violations.¹³⁸

As indicated, Israel has been constructing settlements in the West Bank in violation of international law.¹³⁹ Thus, the United States assumed liability for its aid, if it rendered the aid "for the commission" of that act. That question in turn has two aspects: whether the aid facilitated settlement construction, and whether the United States knew that it facilitated settlement construction. Donor states, under principles of state responsibility, are liable for giving aid to violators only where the aid facilitates the violation, and where the donor state knows that its aid will facilitate the violation.¹⁴⁰

The matter would be simple if the United States had earmarked the aid for settlement construction. The United States, however, allowed the aid to be used in Israel's discretion. Unlike aid that it gives other states, the United States did not tie the aid to Israel to particular projects or programs.¹⁴¹ The United States, however, maintains that it has an agreement with Israel that Israel will not use United States aid money for settlement construction or for any other purpose in the West Bank.¹⁴²

This agreement has been cited to argue that United States aid to Israel does not facilitate settlement construction. In 1980 Senator Adlai Stevenson proposed in the United States Senate that the annual appropriation to Israel be decreased by \$150 million, an amount he estimated Israel spent on settlements.¹⁴³ The State Department justified the aid on the grounds of its private agreement with Israel that the aid not be used in the West Bank.¹⁴⁴ Stevenson pointed out that the provision of aid to Israel for any purpose made available other funds that Israel could use

138. John M. Goshko, *Military Aid to Guatemala Suspended; U.S. Cites Failure to Curb Rights Abuse*, WASH. POST, Dec. 22, 1990, at A9; COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990, *supra* note 137, at 631-45.

139. See *supra* notes 103-08 and accompanying text.

140. John Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRIT. Y. B. INT'L L. 77, 108-114 (1986).

141. Moffett, *supra* note 2, at 3. The substantial aid that the United States has given Egypt since it signed the 1978 Camp David agreement, for example, is project-specific.

142. Interview with Joseph Sullivan, Deputy Political Officer, U.S. Embassy, in Tel Aviv, Israel (May 28, 1986).

143. 126 CONG. REC. S15,046 (June 17, 1980) (amend. no. 1895) ("Purpose: To condition the provision of certain economic support fund assistance on the cessation of the expansion of certain Israeli settlements.").

144. *Id.* at S15,048. Senator Stevenson referred to the agreement, but suggested that "we have no reason to believe that the administration would enforce the agreement if it were violated." *Id.* See also *id.* at S15,058 (agreement referenced in statement of Sen. Dole).

for settlements.¹⁴⁵

The United States Comptroller General agreed with Stevenson on the issue of aid to Israel that might be used for illegal purposes. In an analysis of United States aid to Israel, the Comptroller General said that it did not matter which Israeli account the United States money entered, so long as Israel was spending any money on settlements.¹⁴⁶ Secretary of State Baker, as indicated, took this position as well.¹⁴⁷ The receipt of United States aid allowed Israel to use other available funds for settlement construction.¹⁴⁸

Regarding the second issue, that of United States awareness of the unlawful use, there seems little doubt that when it has given Israel annual aid or loan guarantees, the United States has been aware that Israel has continued spending on settlements. The United States has made repeated representations to Israel to urge it to stop these expenditures, a fact that indicates its awareness.¹⁴⁹ Thus, under the complicity norm, the United States action satisfies the prerequisites for liability set by the International Law Commission.

Like its construction of settlements, Israel's occupation of the West Bank is also unlawful.¹⁵⁰ Because United States financing permits Israel to continue to hold the West Bank, and because the United States knows of Israel's retention of it, the United States financing of Israel is unlawful on that ground as well. Israel, as indicated, depicted the loan guarantees as humanitarian in purpose because they were to help the Soviet immigrants. Given the illegal expenditures Israel contemplated, however, the United States unlawfully financed Israel's activities. Moreover, given Israel's use of the immigrants to expand West Bank settlements, the en-

145. *Id.* at S15,048. Senator Stevenson stated that "economic support funds made available to Israel free Israeli resources for use elsewhere, including the West Bank. There is no way to isolate or insulate this aid so that it does not provide indirect aid to Israel in the furtherance of its settlements policy." *Id.*

146. REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES: U.S. ASSISTANCE TO THE STATE OF ISRAEL 28 (1983) ("[T]he United States is faced with the possibility of indirectly supporting Israeli actions, with which it does not necessarily agree, through the bolstering of Israeli budget needs. Furthermore, the Israeli Government's liberal subsidies granted to its people for settling on the West Bank must be absorbed at the cost of other needs.").

147. *See supra* note 29 and accompanying text.

148. Friedman, *supra* note 18 (reporting Israeli officials' acknowledgment that "money is fungible," and thus that even if Israel promises not to spend money received from requested United States-guaranteed loans on settlements, the loan frees up other funds that can be used on settlements).

149. *See supra* notes 26-31 and accompanying text.

150. *See supra* notes 121-27 and accompanying text.

ture immigration program was of dubious legality.¹⁵¹

The United Nations Commission on Human Rights found aid to Israel unlawful on the basis of the Geneva Civilians Convention, which provides that states-parties must "ensure respect" for the Convention by other states-parties.¹⁵² Israel and the United States are both states-parties to the Convention. The Commission asked "all states, in particular the States parties to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, in accordance with Article 1 of that Convention," to avoid "extending any aid which might be used by Israel in its pursuit of the politics of annexation and colonization."¹⁵³ The Commission has a sound rationale. An obligation to ensure respect requires states to oversee compliance by other states. Helping another state violate the Convention works in the opposite direction.

The United States undertook from 1991 to bring Israel and the Palestinians together to work out an accommodation regarding the West Bank. This effort might be regarded as mitigating United States liability for its illegal financing of Israel. The United States, however, continued its annual aid to Israel while it organized the negotiations. At a crucial juncture, when the negotiations were moving from procedural issues into a substantive phase, the administration negotiated separately with Israel to guarantee the \$10 billion in loans that Israel sought.¹⁵⁴ And in late 1992, when the negotiations had yet to reach specifics, the United States, as indicated, granted Israel those guarantees.¹⁵⁵

VII. CONSEQUENCES OF THE UNITED STATES VIOLATION

In 1956, when Israel invaded Egypt and occupied the Gaza Strip, it withdrew only after President Dwight Eisenhower threatened to cut off United States aid.¹⁵⁶ Similar financial pressure from the United States in

151. John Quigley, *Soviet Immigration to Israel: Is It Legal?* 22 GA. J. INT'L & COMP. L. 387 (1992).

152. Geneva Civilians Convention, *supra* note 96, art. 1, 75 U.N.T.S. at 288.

153. U.N. Comm'n on Human Rights, Res. 1984/1, art. 12, U.N. ESCOR, 38th Sess., Supp. No. 4, at 21, U.N. Doc. E/1984/14, E/CN.4/1984/77 (1984).

154. Friedman, *supra* note 18.

155. See *supra* notes 63-64 and accompanying text.

156. DONALD NEFF, WARRIORS AT SUEZ 431-35 (1981); CHERYL RUBENBERG, ISRAEL AND THE AMERICAN NATIONAL INTEREST 80-87 (1986); Benny Morris, *Creeping Withdrawal*, JERUSALEM POST (int'l ed.), Dec. 10, 1988, at 9. Israel had declared its intent to stay in the Gaza Strip. *Aide-memoire on the Israel Position on the Sharm el-Sheikh Area and the Gaza Strip*, U.N. GAOR, 11th Sess., Annex, Agenda Item 66, at 45, U.N. Doc. A/3511, (1957) (stating that in a memorandum to the Secretary-General, Israel proposed taking over the administration of the Gaza Strip). See also *Report by the*

1967, had it been applied, might well have forced Israel to withdraw from the West Bank.¹⁵⁷ To date, however, the United States has shown little inclination to do this.

The Israeli-Palestinian negotiations initiated by the United States took the West Bank as a central focus. Before the negotiations even started, however, the issue of the settlements threatened to derail them. In the face of Israel's stepped-up settlement campaign, the Palestinian negotiators objected that Israel was taking over the territories whose cession was supposedly the topic of the talks.¹⁵⁸ The United States pressured Israel to stop building settlements.¹⁵⁹ At the same time, however, the United States negotiated loan guarantees with Israel and continued its annual aid, even as Israel furiously built new settlements.¹⁶⁰

If the United States achieves an Israeli withdrawal through negotiations, the question of the harm it has occasioned during the occupation will remain. That harm flowed in the first instance from the settlement construction. Israel deprived thousands of Palestinians of the use of their land, and this deprivation ravaged the Palestinian agricultural economy. Thousands of Palestinians lost their livelihood.¹⁶¹ Moreover, many of the ideologically motivated settlers carried out physical attacks on Palestinians.¹⁶²

In addition, the Israel Defense Force (IDF) committed serious violations against the West Bank Palestinians in an apparent effort to drive the Palestinians out.¹⁶³ In 1988, as United States aid continued, the government of Israel ordered the IDF to beat Palestinian demonstrators as

Secretary General in Pursuance of the Resolution of the General Assembly Res 1123(xi), U.N. GAOR, 11th Sess., Annex, Agenda Item 66, at 47, U.N. Doc. A/3512 (1957) (rejection of Israel's proposal by Secretary General).

157. *Israeli Loan Justice*, *supra* note 78, at 17.

158. Tom Hundley & Terry Atlas, *Israelis, Arabs Start Direct Talks*, CHI. TRIB., Nov. 4, 1991, at A1.

159. *See supra* notes 28-31 and accompanying text.

160. Friedman, *supra* note 18 (reporting an alleged offer by the U.S. to let Israel complete 9,000 housing units under construction if it would agree not to build additional units).

161. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1983, at 1303 (1984) (stating that, as result of land confiscations, many Palestinian farmers had to take labor jobs).

162. *Settlers Take Over Where Army Stops*, AL-FAJR, Feb. 14, 1988, at 3; *see also* ISRAEL, MINISTRY OF JUSTICE, INVESTIGATION OF SUSPICIONS AGAINST ISRAELIS IN JUDEA AND SAMARIA: REPORT OF THE INQUIRY TEAM (KARP REPORT), in 1 PALESTINE Y.B. INT'L L. 185 (1984).

163. *See* BENVENISTI, *supra* note 81, at 11.

summary physical punishment.¹⁶⁴ Hundreds of Palestinians were "methodically beaten, many with the bones of their hands and arms broken."¹⁶⁵

United Nations Secretary-General Javier Pérez de Cuellar, at the request of the Security Council, examined Israel's treatment of the West Bank Palestinians.¹⁶⁶ These beatings did not occur incident to an arrest; instead, Israel calculated that these acts would subdue the Palestinian population. Following demonstrations, the IDF collected names of likely participants, visited their homes, and beat them.¹⁶⁷ These acts constitute a violation of the Geneva Civilians Convention, which outlaws "physical or moral coercion"¹⁶⁸ and "measures of brutality."¹⁶⁹

Israeli violations of the law of belligerent occupation extended as well to its treatment of detainees. With Palestinians arrested on resistance-related charges, Israel authorized police interrogators to administer physical beatings and other forms of physical force to extract confessions.¹⁷⁰ An Israeli government commission found that police often employed physical force in interrogation and considered such force necessary and proper.¹⁷¹ The commission approved what it termed "moderate measures of physical force" against detainees,¹⁷² thereby sanctioning what by international standards is torture.¹⁷³ Commonly used torture techniques

164. Jonathan Randal, *New Tactic: Beatings, Not Bullets: Israel Moves to Curb Death Toll in a Crackdown on Arab Protest*, WASH. POST, Jan. 21, 1988, at A1; John Kifner, *Israel's New Violent Tactic Takes Toll on Both Sides*, N.Y. TIMES, Jan. 22, 1988, at A10; Joshua Brilliant, *Rabin: Use of Blows Instills Fear of IDF*, JERUSALEM POST (daily ed.), Jan. 26, 1988, at 1.

165. John Kifner, *Israeli Officers Ordered to Watch Tape of 4 Soldiers Beating Arabs*, N.Y. TIMES, Feb. 29, 1988, at A1. See also U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1988, at 1377 (1989).

166. S.C. Res. 605, U.N. SCOR, 42d Sess., U.N. Doc. S/INF/43 (1987).

167. See Kifner, *supra* note 165, at A1.

168. Geneva Civilians Convention, *supra* note 96, art. 31, 75 U.N.T.S. at 308.

169. *Id.* art. 32, at 308.

170. REPORT OF THE COMMISSION OF INQUIRY INTO THE METHODS OF INTERROGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY, excerpted in *Excerpts from the Landau Commission's Report on the Shin Bet's Practices*, JERUSALEM POST (daily ed.), Nov. 1, 1987, at 4 [hereinafter REPORT OF THE COMMISSION OF INQUIRY]; THE INTERROGATION OF PALESTINIANS DURING THE INTIFADA: ILL-TREATMENT, "MODERATE PHYSICAL PRESSURE" OR TORTURE? 30 (B'tselem, Israel 1991).

171. REPORT OF THE COMMISSION OF INQUIRY, *supra* note 170, at 4.

172. *Id.*

173. THE INTERROGATION OF PALESTINIANS DURING THE INTIFADA, *supra* note 170, at 107; John Quigley, *International Limits on Use of Force to Elicit Confessions: A Critique of Israel's Policy on Interrogation*, 14 BROOK. J. INT'L L. 485 (1988).

included beatings, electrical shock, keeping a tight-fitting hood over a person's head for long periods, sleep deprivation, and tying a person's hands to a bar behind the person's back, making standing impossible.¹⁷⁴

The IDF detained thousands of suspects without charge or trial under Israeli regulations authorizing such a practice.¹⁷⁵ Those detained without charge could appeal to a military court.¹⁷⁶ The detainees, however, had no right to learn the reasons for the government's suspicion, but bore the burden of disproving them to gain release.¹⁷⁷ Most detentions without charge violate the Geneva Civilians Convention.¹⁷⁸

The IDF also expelled Palestinians from the West Bank to foreign states on unspecified charges of opposition activity.¹⁷⁹ Those expelled could appeal to a civil court,¹⁸⁰ but again with no right to learn the nature of the evidence.¹⁸¹ The Geneva Civilians Convention prohibits expulsions from occupied territory.¹⁸²

174. THE INTERROGATION OF PALESTINIANS DURING THE INTIFADA, *supra* note 170, at 54-74; PALESTINE HUMAN RIGHTS INFORMATION CENTER, ISRAEL'S USE OF ELECTRIC SHOCK TORTURE IN THE INTERROGATION OF PALESTINIAN DETAINEES 4-23 (1991).

175. Joel Greenberg, *Should IDF Fire at Stone-throwers?* JERUSALEM POST (int'l ed.), Sept. 10, 1988, at 1; *Defense (Emergency) Regulations*, PALESTINE GAZETTE, No. 1442, Supp. No. 2, Sept. 27, 1945, at 1055, reprinted in GOVERNMENT OF PALESTINE, THE DEFENCE (EMERGENCY) REGULATIONS, 1945 (as amended until Mar. 2, 1947) (1947).

176. THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL, *supra* note 112, at 73.

177. *Id.*

178. Geneva Civilians Convention, *supra* note 96, arts. 6, 78, 75 U.N.T.S. at 292, 336-38.

179. Joel Brinkley, *U.S. Criticism Sets Off a Furor in Israel*, N.Y. TIMES, Aug. 25, 1988, at A3; *Israel Sends Four Palestinians into Exile in Lebanon*, AL-FAJR, Aug. 21, 1988, at 1; *Defense (Emergency) Regulations*, *supra* note 175, at 1055 (permitting deportation if "it is necessary or expedient to make the order for securing the public safety, the defence of Palestine, the maintenance of public order or the suppression of mutiny, rebellion or riot").

180. Cohen, *supra* note 101, at 107.

181. Joost R. Hiltermann, *Israel's Deportation Policy in the Occupied West Bank and Gaza*, 3 PALESTINE Y.B. INT'L L. 154, 182-183 (1986); COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1988, *supra* note 165, at 1379; see also Cohen, *supra* note 101, at 107 (indicating that although deportees have frequently sought court review, none has been successful).

182. Geneva Civilians Convention, *supra* note 96, art. 49, 75 U.N.T.S. at 318 ("Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."). See Cohen, *supra* note 101, at 110; COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1988, *supra* note

In addition, Israel unlawfully excluded the Palestinians it forced out during the 1967 hostilities from the West Bank. When it captured the West Bank, the IDF intensively bombed Palestinian refugee camps, frightening Palestinians to flee to Jordan.¹⁸³ As the fighting subsided, the IDF organized bus transport to Jordan and threatened Palestinians to convince them to leave.¹⁸⁴ Israel has resisted repeated demands by the United Nations to repatriate these Palestinians,¹⁸⁵ who numbered two hundred thousand,¹⁸⁶ as well as several tens of thousands more who happened to be abroad during the war and were not permitted by Israel to return.¹⁸⁷ Refusal to repatriate inhabitants violates the Geneva Civilians Convention.¹⁸⁸ The United States knew of all these Israeli violations of Palestinian rights, as indicated by the fact that the State Department

165, at 1379; S.C. Res. 607, U.N. SCOR, 43d Sess., U.N. Doc. S/INF/44 (1989); U.N. SCOR, 43d Sess., plen. mtg. at 19-20, U.N. Doc. S/PV.2780 (prov. ed. 1988) (U.S. statement that article 49 prohibits all expulsions).

183. *Report of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East 1 July 1966 - 30 June 1967*, U.N. GAOR, 22d Sess., Supp. No. 13, at 11, U.N. Doc. A/6713 (1967); PETER DODD & HALIM BARAKAT, *RIVER WITHOUT BRIDGES: A STUDY OF THE EXODUS OF THE 1967 PALESTINIAN ARAB REFUGEES* 40 (1969); FRED J. KHOURI, *THE ARAB-ISRAELI DILEMMA* 150 (1976).

184. *Report of the Secretary-General under General Assembly Resolution 2252 (ES-V) and Security Council Resolution 237*, U.N. Doc. S/8158 (1967), U.N. SCOR, 22d year, Supp. Oct.-Dec. 1967, at 92, U.N. Doc. S/Supplements (1967). *See also* DODD & BARAKAT, *supra* note 183, at 47; KHOURI, *supra* note 183, at 150.

185. *See e.g.*, G.A. Res. 2252, U.N. GAOR, 5th Emerg. Spec. Sess., Supp. No. 1, at 3, U.N. Doc. A/6798 (1967); S.C. Res. 237, U.N. SCOR, 22d Sess., U.N. Doc. S/INF/22/Rev.2 (1968).

186. *Report of the Secretary-General, supra* note 184, at 80, 119 (giving figure of 200,000 fleeing from West Bank to Jordan); *Report of the Commissioner-General, supra* note 183, at 11 (stating that 200,000 fled from West Bank to Jordan during war); U.N. GAOR Special Polit. Comm., 23d Sess., 622d mtg. at 5, U.N. Doc. A/SPC/SR.622 (1968) (statement of Israeli government that number of West Bankers who fled to Jordan during war was under 250,000); *Need for Permits for Jordan Visits May End*, JERUSALEM POST (daily ed.), June 20, 1972, at 10. (statement of Defense Minister Moshe Dayan that 200,000 West Bankers left during war); Janet Abu-Lughod, *The Continuing Expulsions from Palestine: 1948-1985*, in *PALESTINE: CONTINUING DISPOSSESSION* 17, 30, 32 (Glenn E. Perry ed., 1986) (estimating, including persons temporarily absent during the war, 300,000 displaced from West Bank).

187. *The Middle East Activities of the International Committee of the Red Cross June 1967 - June 1970*, 10 INT'L REV. RED CROSS 424, 450 (1970); COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990, *supra* note 138, at 1491 (noting statements of Israeli officials that the laws of belligerent occupation did not require Israel to permit the return of West Bank residents who were abroad during the 1967 hostilities).

188. Geneva Civilians Convention, *supra* note 96, art. 4, 75 U.N.T.S. at 290 (enumerating the qualifications of protected persons).

recounted them annually in its human rights reports to Congress.¹⁸⁹ Over and above the illegality of the settlement policy and the occupation itself, the human rights violations rendered United States aid to Israel unlawful.¹⁹⁰

International law obligates a state, when it has violated internationally protected rights, to restore the status quo ante, or, if necessary, to provide compensation. Under customary law, an offending state must "restore the situation exactly as it was before being altered by the illegal action, or, if there is no longer a possibility of this being done, to repair the damage by making compensation in some other manner."¹⁹¹

If the Israeli-Palestinian peace negotiations do not achieve an Israeli withdrawal from the West Bank, the United States violation will continue. The United Nations Security Council must then deal with the situation as a threat to the peace under chapter VII of the United Nations Charter. Both Israel and the United States are responsible for this threat. The Council, exercising its powers under chapter VII, could bring sanctions to bear against both the United States and Israel to procure a just solution. The Charter legally obliges the Council to do so, because the Council bears primary responsibility for world peace.¹⁹² The Charter requires the Council to act on breaches of the peace,¹⁹³ and to take all possible measures to restore the peace.¹⁹⁴ When Iraq occupied Kuwait in 1990, the Security Council quickly dealt with the situation, but since 1967 it has adopted only verbal resolutions critical of Israel for its West Bank occupation.¹⁹⁵

The United States veto power, which it has in virtue of its permanent membership in the Security Council,¹⁹⁶ presents an obvious obstacle to action against Israel. The United Nations General Assembly, however,

189. See, e.g., *supra* notes 106, 110, 117, 161, 165, 178, 181-87 and accompanying text.

190. Rosaline Mandine, *Groups Call for Suspension of Aid to Israel*, AL-FAJR, June 1, 1992, at 7. The American-Arab Anti-Discrimination Committee and Palestine Human Rights Information Center asked the United States State Department to suspend aid to Israel in the wake of rash of arbitrary killings of Palestinians by undercover Israeli police. *Id.*

191. CLYDE EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* 82 (1928); see *Chorzów Factory (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 13, at 47, *reprinted in* 1 W.C.R. (Hudson) 677 (1922-1926).

192. U.N. CHARTER art. 24, ¶1.

193. *Id.* art. 39.

194. *Id.* arts. 39-42.

195. See generally Quigley, *supra* note 131 (analyzing the difference in the Security Council's reaction to occupations of Kuwait and the West Bank).

196. U.N. CHARTER arts. 23, 27, ¶3.

could take the matter under its jurisdiction through its Uniting for Peace procedure.¹⁹⁷ The Assembly could ask member states to observe sanctions against the United States and Israel.¹⁹⁸ While these are severe measures, the international community has long sat by while Israel and the United States have deprived the Palestinians of their former territory and of their right to determine their political destiny in Palestine. United States aid is a critical element in that deprivation, rendering the United States an appropriate and necessary target for concerted international action.

VIII. CONCLUSION

As seen by the focus in recent years on so-called "drug kingpins,"¹⁹⁹ the law may consider those who fund unlawful activity more culpable than those who commit the acts. The United States, by providing large sums to Israel, permits serious rights violations. Israel's hold on the West Bank and its construction of civilian settlements there impede a peaceful resolution of the long-standing Arab-Israeli conflict. Yet the United States, for reasons of its own,²⁰⁰ has funded these violations over a period

197. *Uniting for Peace*, G.A. Res. 377A, U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950) (authorizing Assembly to recommend economic or military action when the Security Council has failed to deal with a breach of the peace "because of lack of unanimity of the permanent members").

198. MALLISON & MALLISON, *supra* note 114, at 420.

199. *See generally* 21 U.S.C. § 848 (1981) (authorizing capital punishment).

200. The reasons for United States financing of Israel are beyond the scope of this Article. At least three explanations have been suggested. The first could be the United States desire for a strategic ally in the Middle East. RUBENBERG, *supra* note 156, at 2; 126 CONG. REC. S15,054 (June 17, 1980) (Sen. Javits stating, regarding aid to Israel, that the United States has "a good security reason, why we want this enclave of stability in the Middle East"); cf. George D. Moffett III, *Israel's Role as U.S. Ally Debated*, CHRISTIAN SCI. MONITOR, June 27, 1991, at 6 (stating opinion of experts that Persian Gulf War showed Israel is not useful to United States as strategic asset). The second reason may be the United States desire to promote a pro-Western state during the Cold War. Moffett, *supra* at 6 (stating that the Israeli air force deters the U.S.S.R.). A third reason may be the lobbying of pro-Israel political action committees that give large contributions to members of Congress who support Israel, and to challengers of incumbents who do not. RUBENBERG, *supra* note 156, at 375 (stating that "the power of the Israeli lobby over the formation and execution of U.S. Middle East policy has become a virtual stranglehold"); *Win a Battle, Lose a War*, THE ECONOMIST, Sept. 21, 1991, at 25 (reporting annual budget of American Israel Public Affairs Committee (AIPAC) to be \$12 million); George D. Moffett III, *Israeli Lobby Virtually Unmatched*, CHRISTIAN SCI. MONITOR, June 28, 1991, at 3 (stating that AIPAC controls network of 60 to 90 smaller PACs). *See generally* PAUL FINDLEY, THEY DARE TO SPEAK OUT: PEOPLE AND INSTITUTIONS CONFRONT ISRAEL'S LOBBY (1985).

of years, knowing the deleterious impact of the Israeli policy and of its own aid in contributing to that policy.

The matter reached a crisis point after 1989, as Israel used the arrival of Soviet Jews as an excuse to expand settlement construction in the West Bank. Even as it asked Israel and the Palestinians to negotiate, the United States financing allowed Israel to adopt the intransigent posture it took.

The law of state responsibility renders United States financing illegal. Israel's violations of Palestinian rights are particularly egregious because these rights are not readily remediable. Israel is preventing the Palestinian people from exercising their right to self-rule. It is taking over the Palestinians' territory in a such fashion that the chances of redress diminish as time passes. The United States is funding the expulsion of a people by financing the takeover of their territory.

"Out of these troubled times," President Bush said in 1990, "a new world order . . . can emerge; a new era, freer from the threat of terror, stronger in the pursuit of justice, and more secure in the quest for peace."²⁰¹ United States financing of Israel, however, has violated international law and has jeopardized the quest for peace in the Middle East. It has contributed to the instability and strife that have cost thousands of lives and prevented millions from leading normal lives. If the emerging world order encompasses the pursuit of justice, and a search for peace, the international community must ensure that United States aid to Israel be stopped, and that Israel remedy the wrongs it has occasioned.

201. *Confrontation in the Gulf; Transcript of President's Address to Joint Session of Congress*, N.Y. TIMES, Sept. 12, 1990, at A20. See also *Confrontation in the Gulf; Excerpts from President's News Conference on Gulf Crisis*, N.Y. TIMES, Aug. 31, 1990, at A11 (quoting President Bush's observation that "as I look at the countries that are chipping in here now, I think we do have a chance at a new world order").

