SOVIET IMMIGRATION TO THE WEST BANK: IS IT LEGAL?

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Immigration by Soviet Jews to Israel, which began in large numbers in 1990, added a new element to the delicate political equation that is the Palestinian-Israeli conflict. The introduction of a new population of Jews reduced the likelihood of settlement between the Palestinians and Israel. In addition, the immigration caused problems for all the governments concerned. The impact on the Palestine Arabs in the West Bank concerned the U.S.S.R. Israel asked governments in eastern Europe to assist in transporting the immigrants to Israel, and some agreed. The number of immigrants taxed Israel's capacity to absorb them. As a financial contributor to Israel, the United States helped fund the immigration. It also influenced the numbers going to Israel, because the United States was the favored destination of most emigrating Soviet Jews.

The Palestine Arabs objected to the immigration, which arguably violated their legal rights. While in general a state may admit any foreigners it chooses, Israel was in an unusual situation. Part of the territory it controlled, in particular the West Bank, was under its military (belligerent) occupation, and an occupying power may not settle the territory it occupies. This article asks whether the Soviet immigration involves a breach of legal obligation towards the Palestine Arabs by any of the states involved, and if it does, what remedies are available.

I. THE SOVIET JEWISH IMMIGRATION TO ISRAEL

Under international law a person has, with certain exceptions, a right to leave her or his country to take residence abroad. But a
person has no corresponding right to immigrate to a particular state. A state has a duty to admit foreigners only if they are in danger in their home state, and the duty continues only while the danger persists. A state is, as a general rule, free to admit or refuse aspiring immigrants and to set the conditions for their admission.

Israel's legislation on immigration is unusual, in that it contains special provisions on immigration by Jews. Its Law of Return gives "every Jew . . . the right to come to this country." Its Nationality Law grants citizenship automatically to a Jew who settles in Israel. Israel's first prime minister, David Ben-Gurion, explained this legislation by saying that Israel was "a State for Jews wherever they are, and for every Jew who wants to be here." He said that the Law of Return embodies "a central purpose of our state, the purpose of the ingathering of exiles." This legislation is intimately related to Zionism, Israel's ideological foundation, which sought to create a Jewish state in Palestine.

Israel also has an unusual legal provision on potential immigrants. Under a 1971 amendment to the Nationality Law, any Jew who expresses a desire to migrate to Israel becomes, at that moment, an Israeli citizen. The apparent purpose was to grant citizenship to Soviet Jews who applied to emigrate to Israel. The amendment was


Goodwin-Gill, supra note 2, at 142-46.


Goodwin-Gill, supra note 2, at 97-122 (rules established by U.K.), at 123-135 (rules established by U.S.).

Law of Return, art. 1, 4 Laws of the State of Israel 114 (1950).

Nationality Law, art. 2, 6 Laws of the State of Israel 50 (1952).

6 Knesset Debates 2035 (July 3, 1950).

Id.


Claude Klein, Le caractère juif de l'état d'Israël 96 (1977). The legality
criticized as a violation of the rights of the U.S.S.R. because it purported to operate within the U.S.S.R. It was also criticized because not all Soviet Jews desiring to leave were entitled to do so under international law, since, as indicated, states have the right to prevent emigration on certain grounds.13

Israel has no obligation to admit Soviet Jews. The only situation in which Israel would have an obligation to admit Soviet Jews would be when a Soviet Jew was being persecuted for political or ethnic reasons.14 However, since Israel admits Soviet Jews under its Law of Return,15 it does not require them to prove a danger of persecution. Some might be able to substantiate a claim of persecution, but most leave for other reasons.16

The United States has been the destination of choice for most Soviet emigrants,17 and until September 1988 the United States government admitted Soviet Jews on the assumption that they were all in danger of persecution. In September 1988, however, the United States began to require applicants to show a well-founded fear of persecution.18 In October 1989 the United States government, concerned over the large numbers of Soviet Jews it was admitting, set a numerical limit of 50,000 per year, beginning in 1990.19

of such an extension of nationality is dubious, as it may violate the right of the territorial state, here the U.S.S.R. See 1 L. OPPENHEIM, INTERNATIONAL LAW 644 n.1 (8th ed. 1955) ("a State is not entitled to impose its nationality upon . . . persons resident abroad").


14 See supra note 2.

15 Allen E. Shapiro, A Big Aliya Needs a Little Common Sense, JERUSALEM POST (int’l ed.), week ending June 30, 1990, at 8, col. 1; Jackson Diehl, Soviet Migration Severely Strains Israel's Budget, WASH. POST, July 30, 1990, at A13, col. 1 (both indicating that Soviet Jews were being admitted under the Law of Return).

16 Jesse Zel Lurie, Russian Jews Hurry up and Wait to Leave, JERUSALEM POST (int’l ed.), week ending June 23, 1990, at 11, col. 1; Herb Keinon & Jacob Schreiber, 20,000 Immigrants a Month?, JERUSALEM POST (int’l ed.), week ending June 2, 1990, at 4, col. 2 (statement of Vladimir Glozman, Executive Director, Soviet Jewish Zionist Forum, that few Soviet Jews immigrating to Israel were motivated by Zionism).

17 Bruce W. Nelan, Soviet Union: Letting Their People Go, TIME, Oct. 9, 1989, at 51 (most emigrating Soviet Jews attempt to go to the United States).


same time, it closed offices it was operating in Italy and Austria, at which Soviet Jews emigrating with Israeli visas were able to apply to immigrate to the United States.20 Prior to these two changes, the percentage of departing Soviet Jews who migrated to Israel was low.21

Immigration by Soviet Jews to Israel became substantial in 1990, as a result of several circumstances.22 The U.S.S.R. removed its prior restrictions on emigration, leading a large number of Jews to emigrate.23 The tightening of United States' restrictions on their admission led to a higher percentage going to Israel. In 1988, only 2250 Soviet Jews immigrated to Israel,24 out of 22,000 who emigrated.25 In 1989, 4000 went to Israel in the first nine months, but 8000 went to Israel in the last three months, the increase coinciding with the United States' closing of its offices in Italy and Austria in early October.26 Israel had encouraged the United States to limit its intake of Soviet Jews to force them to Israel.27
In 1990, when the U.S. limitation of 50,000 took effect, the flow to Israel increased dramatically to 200,000 and continued at that level into 1991, despite a reduction during the Gulf war. Immigration at this rate held the potential of altering the Jewish-Arab demographic balance in Israel, whose population was less than four million.

Few states accepted emigrating Soviet Jews in substantial numbers, and Israel did not encourage them to do so. Germany, which took some emigrants, announced in 1991 that it would limit the admission of Soviet Jews to only those who could show ethnic German origin, those who had relatives in Germany, or those who were "hardship" cases. This change in policy was reportedly prompted by representations to Germany by Israel that Israel wanted to force emigrating Soviet Jews to Israel.

Israel in fact discouraged other states from accepting emigrating Soviet Jews. Michael Kleiner, head of the Knesset (parliament) Aliya (Immigration to Israel) and Absorption Committee, said after a visit to Germany that Germany's admission of Soviet Jews would play into the hands of the Arabs. Kleiner tried to convince Germany to subsidize the settlement of Soviet Jews of German ancestry in Israel.

II. THE SETTLEMENT OF SOVIET JEWS IN THE WEST BANK AND THE RIGHTS OF THE WEST BANK ARABS

Some of those Soviet Jews immigrating to Israel settled in the West Bank of the Jordan River. Until World War II, the territory of the present state of Israel, plus the West Bank and Gaza Strip, constituted Palestine, which was administered by Great Britain as a mandate...
territory under an arrangement with the League of Nations. In 1948 the Jewish Agency established the state of Israel, encompassing the territory of Palestine, less the West Bank and Gaza Strip. During the June 1967 Arab-Israeli war, Israel occupied the West Bank and Gaza Strip and has retained them since that time. After 1967 Israel's government founded settlements for its Jewish citizens in the West Bank, particularly in and around east Jerusalem, with the apparent aim of either asserting Israeli sovereignty there, or of blocking the establishment of a Palestine state there.

Israeli officials stated that 1400 Soviet Jews settled in West Bank areas in and around Jerusalem from mid-1989 to mid-1990, and another 300-400 in other parts of the West Bank. No substantial number of Soviet Jews settled in the Gaza Strip. As the Soviet immigration reached high levels in 1990, West Bank Palestinian leaders expressed concern that Israel "will seek to settle the new Jewish immigrants in our independent land." By early 1991, according to

32 In 1947, the United Nations General Assembly recommended that Palestine be split into a Jewish and an Arab state with an economic union between them in a plan that would have given 56% of Palestine to the Jewish sector, even though Arabs constituted 70% of the population and owned 94% of the land. G.A. Res. 181, 2 U.N. GAOR 2d Sess. at 131, U.N. Doc. A/519 (1947). The recommendation, which was not intended by the Assembly to be binding, was rejected by the Palestine Arabs, following which the Jewish Agency forces took 75% of the territory of Palestine by force and established Israel there. See generally Netanel Lorch, The Edge of the Sword: Israel's War of Independence, 1947-1949 (1961).
34 Israeli Settlements in Occupied Territories, Rev. Int'l Comm. Jurists, Dec. 1977 (no. 19), at 30 (on the basis of the permanent character of most of the settlements and statements by officials, this article views settlement policy as a step toward assertion of Israeli sovereignty in the West Bank). A more immediate concern of the Palestine Arabs was that the new Jewish settlers were likely to make significant demands on the scarce water resources of the West Bank, much of which had already been taken over from the native Palestine Arabs by Jewish settlers there. 70,000 immigrants to Israel so far this year, Reuters, AM cycle, July 23, 1990, available in LEXIS, Nexis Library, Reuter file.
35 Herb Keinon & Walter Ruby, Warsaw Now Transit Point for Soviets, Jerusalem Post (int'l ed.), week ending June 9, 1990, at 3, col. 1 (statements reported by William Lehman (D.-Fl.) and Peter Defazio (D.-Or.)).
36 Settlements Vie for Soviet Immigrants, The Return, Mar. 1990, at 18 (stating that 15 Soviet Jewish families resided in a Gaza settlement). This article will refer only to the West Bank, although the same legal issues would be raised by the settling of Soviet Jews in the Gaza Strip.
37 PLO Radio Broadcasts Intifadah Call No. 58, British Broadcasting Corp.,
the U.S. Department of State, over 8000 Soviet Jews had settled in the West Bank, the majority of these—over 5000—in east Jerusalem.\textsuperscript{38} The Israeli government gave Soviet Jews who moved into settlements in the West Bank a monthly housing allowance of $300-$350\textsuperscript{39} and, like all Israeli Jews settling in the West Bank, better terms for buying or renting housing than if they bought or rented in Israel.\textsuperscript{40}

In 1991 Israel undertook a major effort to build more housing to settle Israeli Jews in the West Bank. Housing Minister Ariel Sharon estimated that 13,000 new units would be built by 1993, boosting the Jewish population of the West Bank by 40\%. Israel, which already had half the West Bank's land under Israeli ownership, confiscated large new tracts of Palestinian Arab-owned land for the projected new construction.\textsuperscript{41} U.S. Secretary of State James Baker asked Prime Minister Shamir to declare a freeze on settlement construction, but Shamir refused.\textsuperscript{42} Israeli officials said that the stepped-up program would alter the population balance in the West Bank and thereby ensure that any future Israeli government, of whatever political persuasion, would be unable to withdraw from it.\textsuperscript{43} This would eliminate the possibility of the "land for peace" formula that is widely viewed as a mechanism for the establishment of a Palestinian state in the

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\textsuperscript{40} Better News from Israel, N.Y. TIMES, June 26, 1990, at A22, col. 1.


West Bank and for an overall Palestinian-Israeli settlement.\textsuperscript{44}

The settling of Soviet Jews in the West Bank threatened the plan of its Arab population to establish a state there.\textsuperscript{45} Simcha Dinitz, head of the Jewish Agency, which organizes and finances Jewish immigration to Israel,\textsuperscript{46} said that the Soviet immigrants would ‘‘give Israel the numbers it needs to go to the negotiating table from a position of strength,’’\textsuperscript{47} a statement that suggested that the immigration would help Israel resist demands for the establishment of a Palestinian state.

In 1990 Prime Minister Itzhak Shamir predicted that there would be one million immigrants to Israel, principally from the U.S.S.R., by the year 2000.\textsuperscript{48} He called for a ‘‘big’’ Israel to accommodate ‘‘a big immigration,’’ a remark interpreted as a call for the annexation of the West Bank, and as an encouragement to Soviet Jews to settle there.\textsuperscript{49} Shamir said, however, that his government would not encourage immigrating Soviet Jews to live in the West Bank.\textsuperscript{50} This statement did not indicate that Israel would not continue financial incentives to Soviet Jews who chose to move into settlements in the West Bank. Further, his reference to ‘‘settlements in Judea and Samaria’’\textsuperscript{51} apparently did not cover east Jerusalem,\textsuperscript{52} which, as indicated, attracted most of the Soviet Jews who settled in the West Bank.\textsuperscript{53}

\textsuperscript{44} Id.

\textsuperscript{45} John Quigley, Palestine’s Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood, 7 B. U. INT’L L.J. 1 n.6 (1989).

\textsuperscript{46} Herb Keinon & Eitan Milgram, Cabinet Gives Sharon Emergency Powers, JERUSALEM POST (int’l ed.), week ending July 7, 1990, at 1, col. 1 (Jewish Agency agreed to pay $362 million over three years to absorb new immigrants). Garry Abrams, Homeward Bound; Operation Exodus Lends Support to Soviet Jews in Their Return to Israel, L.A. TIMES, June 11, 1990, at E1, col. 2 (Mendel Kaplan, Chairman, Jewish Agency Board of Governors, quoted as saying that the Agency provides Soviet immigrants to Israel all transportation cost to Israel plus total living expenses for their first six months).

\textsuperscript{47} Herb Keinon, Finland Gives Go-Ahead to Fly Jews to Israel, JERUSALEM POST, (int’l ed.), week ending July 14, 1990, at 3, col. 2.


\textsuperscript{49} Paul Lewis, Arabs to Assail Israel on Soviet Jews, N.Y. TIMES, Feb. 8, 1990, at A3, col. 1.

\textsuperscript{50} Id. (Shamir statement of Jan. 30).

\textsuperscript{51} Judea and Samaria are two sectors making up the West Bank. The terms are the ancient designations of the areas and are used in official Israeli parlance instead
The U.S.S.R. threatened that if Soviet Jews were settled in the West Bank or Gaza Strip, it might suspend their emigration. In an apparent response, Housing Minister Ariel Sharon announced that "immigrants will not be settled beyond the Green Line," meaning the line dividing Israel from the West Bank and the Gaza Strip.

Sharon said that "Israel has a policy of settling immigrants in the Galilee, the Negev, Wadi Ara and the centre of the country [these are all areas in Israel itself], but not in Jewish settlements in Judea and Samaria [the West Bank], despite their strategic importance." Sharon said that the government would not build housing for immigrants in the West Bank. However, the government was building new housing in the West Bank, and incoming Soviet Jews were free to apply for it.

The legality of the Israeli government's actions regarding Soviet Jewish immigration into the West Bank must be assessed against the international law of belligerent occupation. Israel holds the West Bank in belligerent occupation, because it came into control of it through armed hostilities, namely the June 1967 war. Belligerent occupation is regulated by a body of customary international law.
as well as by the 1949 Geneva Convention Relative to the Treatment of Civilian Persons in Time of War. The law of belligerent occupation presumes that the occupied territory will be returned to its legitimate sovereign and requires an occupying power to preserve the existing order pending that return.

An occupying power must leave the territory to the population it finds there and may not bring in its own people as new inhabitants. Article 49 of the Geneva Convention states: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." The government of Israel took the land for settlements, and in some instances initiated the construction and gave financial subsidies to settlers. Even before the Soviet influx of 1990, the government of Israel directed new immigrants to the settlements. In 1987 the United Nations Human Rights Commission 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."

While Article 49 prohibits settlement in occupied territory, Israel's government contends that the Geneva Convention does not apply to its administration of the West Bank. It argues that Article 2 of the Convention refers to "the territory of a High Contracting Party," and that this means territory lawfully held by a contracting party. It points out that Jordan, which occupied the West Bank 1948, did not have clear title there, and it viewed clear title as a prerequisite for the application of the Geneva Convention.

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The Jordanian parliament incorporated the West Bank into Jordan in 1950
The Israeli government states that it applies *de facto* those provisions of the Geneva Convention it deems "humanitarian," and the Supreme Court of Israel followed that approach, applying certain provisions of the Convention but not others. However, neither the government nor the Court found Article 49, which prohibits settlement, to be "humanitarian."

Many states have rejected Israel's view that the Geneva Convention does not apply to its occupation of the West Bank. These states stress that, according to Article 1, the Convention applies "in all circumstances," and, according to Article 2, to "all cases of declared war or of any other armed conflict." This argument is persuasive. The Geneva Convention was intended to protect an occupied population, and there is no indication that protection was to depend on whether the ousted state had good title. The Geneva Convention applies to Israel's occupation of the West Bank, and Article 49 prohibits settlement. Thus, as stated by the U.N. Commission on Human Rights, Israel's settlement of Soviet Jewish immigrants in the West Bank violates the law of belligerent occupation.

but with the proviso that the action was taken "without prejudicing the final settlement of Palestine's just case within the sphere of national aspirations, inter-Arab cooperation and international justice." Albion Ross, *Amman Parliament Vote Unites Arab Palestine and Transjordan*, N.Y. TIMES, Apr. 25, 1950, at A1, col. 2. Thus, Jordan did not claim absolute title to the West Bank.


*Israeli Settlements in the Occupied Arab Territories*, Res. 1991/3, Feb. 15,
As indicated, most of the Soviet Jews who move into the West Bank settle in east Jerusalem or its immediate vicinity.\footnote{72} Israel’s control of east Jerusalem is governed by the law of belligerent occupation, because Israel took it during the 1967 hostilities along with the rest of the West Bank. The government of Israel, however, considers east Jerusalem to be in a legal status separate from the rest of the West Bank. In 1967 it made Israeli law applicable in east Jerusalem,\footnote{73} and in 1980 the Knesset declared Jerusalem (including east Jerusalem) to be Israel’s capital.\footnote{74} Thus, under Israeli law, east Jerusalem is tantamount to Israeli territory, although it has not formally annexed it. The government of Israel argued that its 1967 action regarding Jerusalem did not violate the law of belligerent occupation, which prohibits annexation.\footnote{75} Its foreign minister said at the time that Israel’s action fell short of annexation: “The measures adopted relate to the integration of Jerusalem in the administrative and municipal spheres, and furnish a legal basis for the protection of the Holy Places of Jerusalem.”\footnote{76}
Other states have rejected Israel’s attempted separation of east Jerusalem from the remainder of the West Bank. They consider Israel’s control of east Jerusalem to be governed by the law of belligerent occupation. The United Nations found the 1967 extension of Israeli law to east Jerusalem a violation of the law of belligerent occupation. This body of law specifically forbids the substitution of the occupier’s law in place of the law in force at the commencement of the occupation. For the same reason the United Nations declared invalid the 1980 law declaring Jerusalem to be Israel’s capital. Israel’s settlement of Soviet Jews in east Jerusalem, like its settlement of them elsewhere in the West Bank, violates the law of belligerent occupation.

III. THE ADMISSION OF SOVIET JEWS TO ISRAEL AS AN ABUSE OF RIGHT

Israel, like any other state, has a right to admit to citizenship whomever it chooses. However, it may not exercise this right in a way that violates the rights of existing segments of its population to which it owes a duty under international law. Domestic law, particularly in Continental countries, developed a doctrine of abuse of right (abus de droit), which does not permit the exercise of a right in a way that injures the rights of others. Abuse of right is found in international law as well. In specific instances it appears as a treaty

79 CONVENTION RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND, ANNEX, supra note 60, ART. 43; GENEVA CONVENTION, supra note 61, ART. 64.
81 SEE SUPRA NOTE 4, AT 20 (“IT IS FOR EVERY SOVEREIGN STATE, TO SETTLE BY ITS OWN LEGISLATION THE RULES RELATING TO THE ACQUISITION OF ITS NATIONALITY . . . ‘”).
norm, as in the United Nations Convention on the Law of the Sea, which requires signatory states to exercise the rights recognized in the convention "in a manner which would not constitute an abuse of right." But the doctrine is applicable more broadly, as a general principle of law under Article 38 of the Statute of the International Court of Justice.

Abuse of right occurs when a state exercises a right in a fashion that contradicts the purpose for which that right exists. When a state, by exercising a right, violates other internationally protected rights, it acts in a fashion that contradicts the purpose for which its own right exists. Judge Alvarez writes that "[T]he unlimited exercise of a right by a State . . . may sometimes cause disturbances or even conflicts which are a danger to peace." Bin Cheng, a leading student of the subject of general principles of law in international law, also writes that "every right is subject to such limitations as are necessary to render it compatible both with a party's contractual obligations and with his obligations under the general [customary] law." Abuse of right may occur even when the state exercising a right has no intention of, or awareness of, violating other internationally protected rights. Thus, although Israel has a right to determine whom to

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84 I.C.J. Statute, art. 38 ("the Court shall apply . . . the general principles of law recognized by civilized nations"); *see generally Ian Brownlie, Principles of Public International Law* 444 (1979) (stating abuse of right is general principle of law); *Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals* 121 (1953) (same); *Sir Hersch Lauterpacht, The Development of International Law by the International Court* 162-65 (1958) (same); *Oppenheim, supra* note 12, at 345 (same); Sir Humphrey Waldock, *General Course on Public International Law,* 106 Recueil des Cours, d'Académie de Droit International [R.C.A.D.I.] 5, 59 (1962) (same). *See also Alexandre Kiss, Droit International de L'Environnement* 72 (1989) (abuse of right as general principle of law also applicable to environmental law).


87 Cheng, *supra* note 83, at 130.

88 Zoller, *supra* note 189, at 112-13 (a state that pollutes river with toxic substance within its borders abuses its right of sovereignty over the river when the substance harms another state, even if the first state had no aim of harming the other state).
admit to citizenship, if it exercises that right to the derogation of rights of its Palestine Arab population that are protected under treaty or customary law, it abuses its right to admit to citizenship.

Lauterpacht writes that while the doctrine of abuse of rights should be wielded with restraint, "[t]here is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused." The Permanent Court of International Justice referred to the abuse of right principle in Certain German Interests in Polish Upper Silesia, which involved the sale by Germany of certain state property in Upper Silesia prior to the transfer of the territory to Poland. The Court stated that Germany had a right to dispose of the property at issue, but that abuse of this right would constitute an international breach. "[O]nly a misuse of this right," it said, "could endow any act of alienation with the character of a breach." In Free Zones of Upper Savoy and District of Gex, the Court again addressed the abuse of right principle when it stated that France could not evade its obligation to maintain customs-free zones by imposing a tax that in effect was a customs duty, even though France in general had a right to impose taxes. Thus, France could not abuse its right to impose taxes if by so doing it violated an international obligation.

Although no international tribunal has applied the doctrine of abuse of right where a state admitted immigrants to the detriment of its existing population, states have applied the doctrine of abuse of right to the conferment of nationality and the movement of individuals across state boundaries. The Convention on Certain Questions Relating to the Conflict of Nationality Laws provides: "It is for each State to determine under its own law who are its nationals," but with the proviso: "This law shall be recognized by other States in so far as it is consistent with international conventions, international
custom, and the principles of law generally recognized with regard to nationality.\textsuperscript{94}

In the \textit{Nottebohm} case, the International Court of Justice stated that if a state oversteps its bounds in conferring nationality, an international court may find the conferment of nationality ineffective, if the rights of another state are affected. The Court also stated that Liechtenstein's conferment of nationality on Nottebohm was not effective against Guatemala, where the conferment allowed Liechtenstein to sue Guatemala on Nottebohm's behalf, and where there was not a substantial link between Nottebohm and Liechtenstein.\textsuperscript{95}

Another situation in which a state's action regarding citizenship may abuse the rights of others is expulsion of its citizens. A state may, on certain grounds, revoke citizenship,\textsuperscript{96} but if it expels large numbers of its citizens, the rights of other states may be infringed, because other states may be forced to admit them.\textsuperscript{97} The expulsion may also violate the rights of the expellees if, for example, it is racially based.\textsuperscript{98}

State practice on admission of immigrants reflects a concern for present citizens. The influx of a large group of immigrants may be perceived by existing population groups as adversely affecting their economic or national interests.\textsuperscript{99} States limit immigration out of con-
cern for its impact on the wellbeing of its current citizens.¹⁰⁰

Thus, although a state has broad discretion in the admission of immigrants, Israel may not admit large numbers of Jews without infringing the rights of the Palestine Arabs in the West Bank. Its admission of Soviet Jews in the early 1990s was an abuse of its right of admission because it infringed the rights of Palestine Arabs in the West Bank.

IV. THE SETTLEMENT OF SOVIET JEWS IN THE WEST BANK AND THE LIABILITY OF THE OTHER STATES

The settlement of Soviet Jews in Israel and the West Bank raises questions of the liability under international law of Israel and other states involved. Under international law, liability lies not only with a state that directly commits a wrong, but as well with a state that facilitates that wrong in a material fashion.¹⁰¹ This secondary liability is similar to complicity liability in municipal law.¹⁰²

Regarding the West Bank, the law of belligerent occupation imposes obligations on states peripherally involved in the treatment of an occupied population. Article 1 of the Geneva Convention requires state parties both to respect the Convention and to “ensure respect for the present Convention in all circumstances.”¹⁰³ They must endeavor to ensure that any occupying power that, like Israel, is a party to the Convention is complying with it.

Explaining this obligation, the International Committee of the Red Cross states: “in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should

¹⁰⁰ See, e.g., Immigration and Nationality Act, 8 U.S.C. § 1324a (penalizing persons who employ unauthorized alien; purpose was to preserve employment of citizens).
¹⁰³ Geneva Convention, supra note 61, art. 1.
do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.\textsuperscript{104}

Thus, the U.S.S.R., which is also a party to the Geneva Convention, must try to ensure that Israel complies with it. The U.S.S.R. is potentially liable because it permits the departure of individuals, knowing that Israel encourages them to settle in the West Bank.\textsuperscript{105} If it supplies to Israel the persons that Israel then uses to violate the Convention, arguably the U.S.S.R. violates its Article 1 obligation. However, the U.S.S.R. is also under an international-legal obligation to permit the departure of citizens who wish to emigrate.\textsuperscript{106} Thus, it is caught between two obligations. It is required to allow its citizens to leave, but it is obliged not to facilitate their use by Israel in a way that violates the Geneva Convention.

The U.S.S.R. has shown concern for meeting its obligation to permit the departure of citizens who wish to emigrate. As indicated, it threatened to curtail Jewish emigration if Israel continued to settle Soviet immigrants in the West Bank.\textsuperscript{107} Israeli officials responded that they would not settle arriving Soviet Jews in the West Bank.\textsuperscript{108} The Soviet government found the response inadequate, since it did not ensure that Soviet Jews would not settle in the West Bank.\textsuperscript{109} The Soviet ambassador to the United Nations said that the response was "not real."\textsuperscript{110} The Israeli response left open the possibility that Soviet Jews who wished to settle in the West Bank would not be prevented from doing so.\textsuperscript{111} Although it rejected the Israeli response, the Soviet government gave new assurances that it would not block

\textsuperscript{104} \textsc{International Committee of the Red Cross}, Commentary (J. Pictet ed.) 16 (1958) (commentary on the Geneva Convention Relative to the Protection of Civilian Persons in the Time of War).

\textsuperscript{105} John Quigley, United States Complicity in Israel's Violations of Palestinian Rights, 1 Palestine Y.B. Int'l L. 95, 109-14 (1984).

\textsuperscript{106} There are certain exceptions to the obligation to permit emigration, such as where the individual is being criminally prosecuted, or has financial obligations (such as child support) that may not be discharged following emigration, or is in possession of national security information. \textit{See supra} note 1.

\textsuperscript{107} \textit{See supra} note 53.

\textsuperscript{108} \textit{See supra} notes 44-45.


\textsuperscript{111} Youssef M. Ibrahim, Shamir Rebuffs Gorbachev on Emigres, N.Y. Times, June 5, 1990, at A3, col. 4.
Soviet Jewish emigration to Israel. In 1991 it again said it might suspend Jewish emigration if Israel continued to settle Jews in the West Bank but again reiterated that the emigration would continue.

The U.S.S.R. may be able to secure Israel's compliance by negotiating with Israel an agreement to stop the settlement. President Gorbachev attempted this in 1990, but was only partially successful. The Israeli government assured the U.S.S.R. that it had no policy of settling Soviet immigrants in the West Bank. Israel did not, however, attempt to keep Soviet immigrants from settling there. It was clear that Israel would allow them, like any other Israeli citizens, to settle in the West Bank. The U.S.S.R. allowed the emigration to continue, aware that it had not gained an assurance that would keep its emigrants out of the West Bank.

The U.S.S.R. facilitated immigration to Israel by allowing Israel's consulate in Moscow to process applications for Israeli visas. For a time the Soviet government refused to permit direct air flights from Moscow to Israel, flights that might increase the numbers going to Israel as opposed to other destinations. Starting in January 1991, however, it permitted weekly El Al [Israeli airline] flights from Moscow to Tel Aviv, but announced that it would not allow emigrants to use them. Later in 1991, it agreed to let immigrants use them.

Once a Jew leaves the U.S.S.R., the Soviet government cannot control her or his movement. Thus, any emigrating Soviet Jew may go to Israel. An argument can be made that the U.S.S.R. is obliged to suspend the emigration of all Jews, so long as a great number of Jews go to Israel. As indicated, the U.S.S.R. has threatened to suspend the emigration if emigrants continued to settle in the West Bank.


For the U.S.S.R., such a suspension would probably not constitute a violation of its obligation to permit emigration.

The U.S.S.R. could argue that a temporary infringement of the right to emigrate is permissible to keep Israel from violating the rights of the Palestine Arabs in a potentially irreparable way. It could find a basis for this position in the International Covenant on Civil and Political Rights, which states that the right to emigrate may be restricted to protect the "freedoms of others." Thus, under the Covenant, the right of emigration gives way to the rights of others whose rights might be infringed by the emigration. A suspension of the emigration of Soviet Jews would be a justifiable countermeasure to protect the Palestine Arabs' against Israel's violations of their rights. However, violations of human rights are not generally permissible as countermeasures, even when the action to which they are a response itself a violation of human rights. That rule, though, was born to deal with such irreparable violations as torture. Moreover, as indicated, the Covenant itself contemplates that the right of emigration is not absolute.

A state's general obligation to permit free emigration may be negated by the purposes of those departing. If a group of citizens wanted to emigrate to form a commando group to murder civilians...

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118 International Covenant on Civil and Political Rights, supra note 1, art. 12 para. 3.
120 Draft Articles on State Responsibility, supra note 100, pt. 2, art. 11(1) ("The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that . . . (c) such obligations are stipulated for the protection of individual persons irrespective of their nationality"). See also John Quigley, Iran and Iraq and the Obligations to Release and Repatriate Prisoners of War After the Close of Hostilities, 5 AM. U. J. INT’L L. & POLICY 73, 80 (1989) (where two states hold each other’s prisoners after close of hostilities, neither is entitled to continue holding its prisoners on the ground that the other is refusing to release its prisoners).
at random, or to release nuclear radiation that would kill thousands of people, and if the government of their state was aware of such purposes, that government might be obliged to prevent their emigration, at least temporarily.\footnote{121}{Dinstein, supra note 1, at 268 (noting that there may be situations in which freedom of emigration could be denied because the emigrant's activities would be detrimental to human rights).}

In addition to the U.S.S.R., third states that facilitate the transfer of Soviet Jews to Israel may also be liable.\footnote{122}{Boyle, supra note 27, at 5 (suggesting the responsibility of states that play a role in the movement of Soviet Jews to Israel).} A number of eastern European states—Finland, Romania, Hungary, Poland, and Czechoslovakia—became “transit points” for the migrants, thereby facilitating their travel to Israel at the request of the Israeli government.\footnote{123}{Keinon, supra note 35, at 3, col. 1 (indicating that Romania and Hungary are already transit points). Finland Gives Go-Ahead to Fly Jews to Israel, supra note 46, at 3, col. 2 (Hungary, Romania, Poland already serving as transit points). Joshua Brilliant, Walter Ruby & Carl Schrag, Direct Moscow-Tel Aviv Flights to Start This Month, JERUSALEM POST (int'l ed.), week ending Oct. 6, 1990, at 1, col. 1 (Czechoslovakia serving as transit point).}

Unlike the U.S.S.R., these states were under no obligation with regard to the Soviet emigrants. They are, therefore, in a weaker legal position than the U.S.S.R. Bearing no countervailing obligation, they are facilitating an international-law violation by Israel.

The Palestine Liberation Organization protested Finland's decision to serve as a transit point, stating that “organized immigration waves” constituted aggression against the Palestinian people.\footnote{124}{Arab League May Seek Sanctions over Jewish Immigration - PLO, Reuters, PM cycle, July 5, 1990, available in LEXIS, Nexis Library, Reuters file.} The P.L.O. office in Helsinki suggested that the Arab League should consider political and economic sanctions against states like Finland that served as transit points.\footnote{125}{Keinon, supra note 46, at 3, col. 2; Finland Wants an Explanation, JERUSALEM, June 1990, at 14 (foreign minister said Finland had sought, but had not received, assurances from Israel that persons transiting through Finland would not be permitted to settle in occupied territories).} In justification, Finland's foreign minister said that he trusted that Israel would not settle the immigrants in the West Bank or Gaza Strip, and said that immigrants arriving in Finland should be given an opportunity to reconsider their destination.\footnote{126}{Keinon, supra note 46, at 3, col. 2; Finland Wants an Explanation, JERUSALEM, June 1990, at 14 (foreign minister said Finland had sought, but had not received, assurances from Israel that persons transiting through Finland would not be permitted to settle in occupied territories).} The transit states might condition their assistance on assurances that Jews transiting through their territory not be permitted to settle in the West Bank.
States that give financial assistance to Israel to facilitate the settlement of the Soviet emigrants in the West Bank may also be liable. The United States is the only current financial contributor to Israel, providing substantial economic and military aid unrestricted as to use.27 Israel provides financial subsidies both to new immigrants and to any of its citizens, whether immigrants or not, who settle in the West Bank. The United States is aware of these policies.128 It has said that it has a private agreement with Israel that Israel will not use aid money for West Bank settlements, but the unrestricted character of the aid renders this agreement, if it exists, meaningless.129

The Arab states, at a summit meeting in Baghdad in May 1990, resolved to review their relations with countries that support the settling of Soviet Jews in Israel.130 "The Conference regards the United States of America as having prime responsibility for this situation as the State which provides Israel with the military capacity, the financial assistance and the political cloak without which it would be unable to persist in such policies in defiance of the will of the international community."131 In July 1990, the Arab League called for a boycott of private companies that facilitate Soviet Jewish immigration to Israel.132

The United States also has been involved in providing Israel with funding specifically for the new Soviet immigrants. In 1989, as the number of Soviet Jewish immigrants to Israel rose, Israel asked the United States to guarantee the repayment for $400 million worth of loans it would obtain from United States banks to finance housing for the immigrants, and Israeli officials indicated that some of this housing would be in the West Bank.133 The United States held the loan up, seeking an assurance that Israel would not use the money

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127 Quigley, supra note 104, at 99-100.
128 As indicated by its criticism of Israel for the settlements. See infra notes 132-133.
129 126 Cong. Rec. 15048, (daily ed. June 17, 1980) (statement of Sen. Adlai Stevenson that any such agreement is meaningless because the aid frees other money that Israeli government can use to finance West Bank settlements).
131 Id. at A10, col. 1. For text of resolution, see 13 U.N. Division for Palestinian Rights, Bulletin (no. 5), at 12, (May 1990), microformed on United Nations microfiche collection (Readex Microprint Corp.).
132 Chedli Khibi: Boycott Hardly an Arab Invention!, JERUSALEM (Palestine Committee for NGOs, Tunis), July 1990, at 4.
to build housing in the West Bank. Secretary of State James Baker called on Israel to stop new settlement activity in the West Bank, and President Bush said that Israel should create no "new settlements in the West Bank or in East Jerusalem." The reference to east Jerusalem was important, since most Soviet Jews settling in the West Bank settle in East Jerusalem or its immediate vicinity. The United States demanded that Israel disclose the spending data for Israeli ministries, so that it could determine what moneys were expended on West Bank settlements. Ultimately the United States guaranteed the loans even though Israel did not provide the information.

In 1990 the State Department reaffirmed the position it had held since 1967 that East Jerusalem is part of the occupied territories. When Housing Minister Sharon announced that the government would not settle Soviet Jews in the West Bank or Gaza Strip, the United States called Sharon's statements "a hopeful development, as they respond to international concerns, including our own." In October 1990, Israel again gave the Bush Administration assurances that it would not settle Soviet Jews in the West Bank or Gaza Strip, but backtracked later the same month in a letter to the administration by Foreign Minister David Levy. He wrote, "My government 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."

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137 Id.

138 Joel Brinkley, Labor Party Rejects Likud Terms for Palestinian Talks, N.Y. TIMES, Mar. 7, 1990, at A3, col. 3 (statement of Margaret Tutwiler, spokesperson, Dept. of State).

139 Cohler, supra note 39.

In 1991 Israel indicated it might need $10 billion in U.S. aid to settle Soviet immigrants, and Prime Minister Shamir has estimated that Israel might eventually need $40 billion for that purpose. The projected cost was so high because Israel's economy could not absorb large numbers of Soviet Jews, many of whom had advanced academic degrees and high technological skills. The request for $10 billion, like that for the $400 million loan guarantee, involved the settlement of immigrants generally, not specifically in the West Bank. However, it was clear that many would settle in the West Bank. Bush Administration officials informed Israel that the settlement issue would affect the U.S. reaction to the $10 billion request.

Despite its exhortations regarding settlements, the United States would seem to be liable for its actions. Aware of the settlement of Soviet Jews in the West Bank, it limits the entrance of Soviet Jews to the United States, thereby forcing them to go to Israel, and gives Israel military and economic aid that facilitates Israel's continued hold on the West Bank and its ability to build settlements there. The United Nations has previously called on states to refrain from aid to Israel, since Israel uses the aid to establish settlements and for other purposes that violate Palestinian rights. The General Assembly has asked states "to avoid actions, including those in the field of


142 Asfour, supra note 19, at 31.


aid, which might be used by Israel in its pursuit of the policies of annexation and colonization." The Security Council has asked states "not to provide Israel with any assistance to be used specifically in connexion [sic] with settlements in the occupied territories."

The United Nations Human Rights Commission has said that, given Israel's violations of the Geneva Convention, states that provide Israel with aid fail to "ensure respect" for the Convention, as Article 1 requires them to do, and has asked "all states, in particular the state 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 policies of annexation and colonization." In 1990 the Organization of African Unity called upon both the U.S.S.R. and the United States "to do everything possible to prevent the settlement of migrant Jews in the occupied Palestinian and Arab territories."

The United States may also bear liability for its refusal to accept more Soviet immigrants. Aware that most emigrating Soviet Jews desire to settle in the United States, it imposed a 50,000 per year ceiling on Soviet immigrants in late 1989, a measure that predictably led to increased Soviet Jewish immigration to Israel. Although the United States under international law has the right to choose whom to admit as migrants, in this situation its refusal entails its international liability because of its awareness of the consequences, and because by its financial aid it facilitates Israel's settlement of the new arrivals in the West Bank.

146 S.C. Res. 465, supra note 68.
151 See, e.g., Declaration and Plan of Action Adopted by the North American Regional NGO Symposium on the Question of Palestine, in 13 U.N. Division for Palestinian Rights, Bulletin (no. 6), at 15, para. 13 (June 1990), microformed on
In sum, under international law the U.S.S.R., the transit states, and the United States would all seem to be acting unlawfully by facilitating an immigration that results in violations of the law of belligerent occupation.

V. Remedies Available to the Palestine Arabs

Israel is likely to continue to encourage Soviet Jewish immigration. An Israeli journalist, discussing that immigration, said that Israel viewed it as its "most important national interest."152 Prime Minister Shamir, upon forming a new government in June 1990, declared, "The government’s main effort will be on the most important matter in our lives today—the mass immigration flowing into the country and the absorption (of immigrants)."153

If the various states connected to the immigration of Soviet Jews to Israel and the West Bank continue their actions, the Palestine Arabs, as the injured party, are in need of a remedy. At the May 1990 Arab summit, a number of states called for an oil embargo of the United States or other economic action directed at the United States to pressure it to stop facilitating the migration of Soviet Jews to Israel.154 At that meeting Palestine President Yassir Arafat called for economic sanctions against states "aiding the passage of Soviet Jewish migrants to Israel."155 The Arab states did not, however, take steps to act against the United States or other states involved, and the situation resulting from Iraq's invasion of Kuwait in August 1990 made it unlikely that the Arab states would do so.

The Arab states also urged the United Nations to establish "an international instrument of control" to prevent settlement by Jews in the West Bank and Gaza Strip.156 The Security Council has the

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152 Shapiro, supra note 15, at 8, col. 1.
153 Shamir Forms Far-Right Coalition to Rule Israel, supra note 57, at A1, col. 2.
power to act in this regard under Chapter 7 of the United Nations Charter. By declaring the settlement of Soviet Jews in the West Bank a threat to the peace, it could organize enforcement action of a military or non-military nature to secure compliance by the states in question.\textsuperscript{157} However, since the United States is one of the states with veto power in the Security Council, and since it is one of the states at fault, there is little chance that a Security Council resolution would escape its veto. Alternatively, the General Assembly could ask states voluntarily to take military or non-military action to the same end under its Uniting for Peace resolution.\textsuperscript{158}

Apart from these United Nations remedies, states should open their doors more widely to the Soviet Jews who desire to emigrate. If more alternative destinations were available, fewer Soviet Jews would immigrate to Israel. Since states that are party to the Geneva Convention (which includes most states) have, as indicated, an obligation to ensure respect for the Convention, one way in which they could fulfill that obligation would be to admit Soviet Jews. If a number of states admitted only a few thousand each, the numbers immigrating to Israel would drop sharply. The world community has recognized that immigration infringes the rights of the Palestine Arab people in the West Bank, although it has not taken measures to protect them.

The immigration of Soviet Jews to Israel presents a number of legal problems that have not previously arisen in international practice. There has been little attention in international law doctrine to the impact of immigration on existing populations. When the recipient state does not protect these existing populations, however, an international wrong is committed, and international remedies are needed.

\textsuperscript{157} U.N. CHARTER, arts. 41-42.