

ARTICLES

THE UNITED NATIONS ACTION AGAINST
IRAQ: A PRECEDENT FOR ISRAEL'S ARAB
TERRITORIES?

JOHN QUIGLEY*

The action taken by the United Nations (U.N.) against Iraq for its occupation of Kuwait last year contrasts starkly with the U.N. action taken against Israel for its occupation of the Arab Territories¹ during and after the 1967 war.² The difference can partly be explained by the protection that the United States, as a permanent member of the Security Council, provides to Israel.³ Furthermore, there is a perception in the United States and in Europe that the two situations differed: Israel had acted in self-defense while Iraq had not.⁴ The fact that the U.N. Security Council found Iraq guilty of aggression in its occupation of Kuwait⁵ lent a sense of urgency to the situation which was lacking with respect to the Israeli occupation. If the Security Council had found Israel responsible for aggressive acts immediately following its invasion of the Arab Territories, it would likely have moved with greater dispatch to secure Israel's withdrawal. Even today, if the Security Council determined that

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

1. For the purposes of this article, the Arab Territories include the Gaza Strip, the Golan Heights, the Sinai Peninsula, and the West Bank.

2. With Israel's invasion, the U.N. made no finding of aggression. The Security Council and the General Assembly did call on Israel to withdraw from the Arab Territories occupied in the 1967 six day war. S.C. Res. 476, U.N. SCOR, 35th Sess. at 13, U.N. Doc. S/INF/36 (1980); G.A. Res. 3414, U.N. GAOR, 30th Sess., Supp. No. 34, at 6, U.N. Doc. A/10034 (1975); S.C. Res. 242, U.N. SCOR, 22d Sess. at 8, U.N. Doc. S/INF/22/Rev.2 (1968). In demanding an Israeli withdrawal, the U.N. did not find it necessary to decide whether Israel had acted aggressively. Even when acting defensively, a state taking territory gains no sovereign rights, because it is limited to force that is necessary to repel the aggression. Therefore, regardless of whether either Iraq or Israel committed aggression in taking, respectively, Kuwait and the Arab Territories, they had no right to remain. R.Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 55-56 (1963); W. THOMAS MALLISON & SALLY V. MALLISON, *THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* 259 (1986).

3. See, e.g., *Israeli and Palestinian Affairs in Brief; PLO's Fariq Qaddumi on U.S. Veto of Security Council Resolutions on Israeli Actions in Territories*, BBC SUMMARY OF WORLD BROADCASTS, Nov. 10, 1989, available in LEXIS, Nexis library, Archiv. file (quoting PLO representative that United States' veto of Security Council Resolutions condemning Israeli policy in the Occupied Territories proves that the United States does not wish to deal with the Middle East crisis).

4. See *infra* notes 56, 65 and accompanying text.

5. S.C. Res. 660, U.N. SCOR, 45th Sess. at 1, U.N. Doc. S/RES/660 (1990).

Israel committed aggression in taking the Arab Territories, the case for strong action in the U.N. would be more compelling.

The Iraqi occupation of Kuwait on August 2, 1990, brought the question of the Arab-Israeli dispute to the fore of international attention when Iraq raised the issue of linkage: after it occupied Kuwait, Iraq asserted that it would discuss withdrawing from Kuwait only in the context of negotiations for Israel's withdrawal from the Arab Territories.⁶ Linking the two events was appealing because it focused attention on the Arab-Israeli dispute which has long been on the U.N. agenda.⁷ More importantly, it presented an opportunity to remove Iraq from Kuwait without the use of military force,⁸ and to end the Israeli occupation of the Gaza Strip, West Bank, and the Golan Heights. The General Assembly, therefore, resolved to ask the Security Council "to convene the International Peace Conference on the Middle East."⁹ While most members of the Security Council agreed,¹⁰ the United States refused to link the two issues and threatened to veto any Security Council resolution that set a date for such a conference.¹¹ As a result, Resolution 681, addressing the Palestinian-Israeli conflict, was silent on the topic of a Middle East peace conference.¹² Thus, the United States precluded consideration of the Palestinian-Israeli issue in the context of the Kuwaiti crisis.

After the Security Council adopted Resolution 678, which authorized "all necessary means" to get Iraq out of Kuwait,¹³ President George Bush announced that although Secretary of State James Baker would hold talks with Iraq, he "[would] not be negotiating the Palestinian question."¹⁴ The Bush administration reasoned that any linkage would

6. Nick B. Williams, Jr., *Baghdad Seeks to Tie Any Dialogue to 'Outstanding Issues in the Arab Region,' Including Palestine. The U.S. Has Rejected Such a Linkage*, L.A. TIMES, Dec. 2, 1990, at A1.

7. S.C. Res. 242, *supra* note 2 (illustrating that the Security Council had debated the issue as early as 1968).

8. Nora Boustany, *Iraq Puts Conditions on Summit: Official Says Talks Must Deal with Arab-Israeli Issue*, WASH. POST, Nov. 13, 1990, at A1 (saying diplomats think Iraq would withdraw from Kuwait if it could gain progress towards an Israeli withdrawal).

9. G.A. Res. 68, U.N. GAOR, 45th Sess., 59th plen. mtg., Agenda Item 23, U.N. Doc. A/45/L.27 & Add.1.

10. President Gorbachev favored a conference on both Iraq's occupation of Kuwait and Israel's occupation of the Arab Territories. Jessica Lee, *Soviets Balk at Use of Force; Bush at a Loss*, USA TODAY, Nov. 21, 1990, at A6 (Yemen, Cuba, Malaysia, and Colombia pushing for linking the two occupations).

11. Question and Answer Session with Reporters in Santiago, Chile, 26 WEEKLY COMP. PRES. DOC. 1989, 1992 (Dec. 6, 1990); *Excerpts from President's News Conference on Crisis in Gulf*, N.Y. TIMES, Dec. 1, 1990, at A6. *See also Standoff in the Gulf; U.N. Postpones Vote on Resolution*, N.Y. TIMES, Dec. 13, 1990, at A20 (vote on Gulf postponed while the Foreign Minister of the former Soviet Union, Shevardnadze, discussed the U.S. veto threat with the chairman of the Palestine Liberation Organization, Arafat).

12. S.C. Res. 681, U.N. SCOR, 45th Sess. at 1, U.N. Doc. S/RES/681 (1990).

13. S.C. Res. 678, U.N. SCOR, 45th Sess. at 1, U.N. Doc. S/RES/678 (1990).

14. *U.S. Policy in the Persian Gulf: Hearings Before the Senate Comm. on Foreign Relations*,

reward Iraq for its occupation of Kuwait, and that Iraq did not invade Kuwait to settle the Palestinian question.¹⁵

The Iraqi government characterized the United States' stance as a propaganda ploy to excuse Israel's aggression against neighboring Arab peoples and represented an effort to distract world attention from Israel's occupation.¹⁶ The former Soviet Union also disagreed with the United States. Then Soviet Foreign Minister Eduard Shevardnadze pointed out that the Security Council had been working on the Palestinian-Israeli conflict for many years:

Why should we stop all this now? Are we in some strange way intimidated by the word "linkage"? We believe that we should continue what we have been doing and what we ought to be doing now: seeking a path towards a comprehensive settlement of the whole complex of Middle East problems that existed prior to 2 August. That is not rewarding anyone; it is just sound policy and common sense.¹⁷

In an immediate sense, the military action taken against Iraq in 1991 rendered the linkage dispute moot. Since the end of the Gulf war, efforts have been underway toward a Palestinian-Israeli settlement.¹⁸ Still, the linkage issue retains its importance for two reasons. First, the asserted differences between the two occupations are still raised as objections to an Israeli withdrawal from the Arab Territories that it occupied in 1967. Second, it appears that the U.N. has applied a double standard by treating Iraq severely while issuing only verbal injunctions to Israel.

This article argues that Israel, like Iraq, committed aggression, and that the U.N. should have acted against Israel as severely and expeditiously as it did against Iraq. The fact that Israel has been able to maintain control of the Occupied Territories since 1967 does not diminish the U.N. obligation to take necessary action. If Israel cannot be convinced through negotiation to withdraw from the Gaza Strip and the West Bank, the U.N. is obliged by the U.N. Charter to take economic and

101st Cong., 2d Sess. 107 (1990) (statement of Secretary Baker) [hereinafter *U.S. Policy in the Persian Gulf*].

15. *Secretary Baker's Statement Before the Senate Foreign Relations Committee, October 17, 1990, and House Foreign Affairs Committee, October 18, 1990*, FOREIGN POL'Y BULL., Nov.-Dec. 1990, at 43-44 ("He is not raping Kuwait to advance the Palestinian cause.").

16. *'Baghdad Observer' Says Middle East Conference Would Be 'Embarrassment' for USA*, BBC, Dec. 10, 1990, available in LEXIS, Nexis Library, Omni file).

17. *Provisional Verbatim Record*, U.N. SCOR, 45th Sess., 2963d mtg. at 93, U.N. Doc. S/PV.2963 (1990).

18. *See, e.g.*, Thomas Friedman, *After the War: Diplomacy; 8 Arab Countries Back Bush's Plan on Mideast Peace*, N.Y. TIMES, Mar. 11, 1991, at A1 (reporting that eight Arab countries agreed to the broad outline of President Bush's peace plan for the Middle East).

diplomatic sanctions to force Israel out.¹⁹ If such sanctions fail, then the U.N. should apply military sanctions.²⁰

I. THE IRAQI RATIONALE FOR OCCUPYING KUWAIT

The Iraqi rationale for invading Kuwait originated from economic and territorial claims. In the months preceding its 1990 invasion, Iraq raised a number of commercial complaints against Kuwait.²¹ Kuwait had loaned money to Iraq to support Iraq in its war with Iran and upon which Iraq sought a waiver of repayment. Iraq argued that Kuwait had profited at Iraq's expense by picking up Iraqi oil sales that had been reduced by wartime destruction.²² Furthermore, when the fighting between Iran and Iraq finally ended, Kuwait, instead of cutting production to let Iraq recoup some of its losses, pumped more oil than the quota agreed upon in the Organization of Petroleum Exporting Countries (OPEC), helping to further drive down oil prices.²³ Iraq suspected that by increasing production, Kuwait was seeking concessions on outstanding territorial issues.²⁴ Furthermore, during the Iran-Iraq war Kuwait set up oil rigs in the buffer zone between Iraq and Kuwait, a move that Iraq considered provocative.²⁵

Iraq also sought improved access to the Gulf. As a result of the borders drawn in the 1920s between Iraq and Kuwait, Iraqi territory is connected to the Gulf only by a narrow stretch of water and thirty miles of coastal marshland.²⁶ In order to provide improved access to the Gulf and to allow it to better protect its short shoreline and port facilities, Iraq claimed two uninhabited marshland islands that belonged to Kuwait — Warbah and Bubiyan.²⁷ During the spring of 1990, Kuwait refused to make concessions on these territorial issues,²⁸ telling King Hussein of

19. U.N. CHARTER arts. 39-41 (authorizing the Security Council to determine threats to the peace and to take appropriate action).

20. *Id.* art. 42.

21. Liesl Graz, *Iraqi Sabres Rattle in the Gulf*, MIDDLE EAST INT'L, Aug. 3, 1990, at 3.

22. *Id.*

23. G. Henry M. Schuler, *Congress Must Take a Hard Look at Iraq's Charges Against Kuwait*, L.A. TIMES, Dec. 2, 1990, at M4. In addition, Iraq claimed that Kuwait had taken oil that belonged to Iraq from a pool which lay under the disputed Iraq-Kuwait border. Thomas C. Hayes, *The Oilfield Lying Below the Iraq-Kuwait Dispute*, N.Y. TIMES, Sept. 3, 1990, at A7.

24. Schuler, *supra* note 23, at M4.

25. Hayes, *supra* note 23, at A7.

26. Shaw J. Dallal, *Has the United States Overreacted?*, MIDDLE EAST INT'L, Oct. 12, 1990, at 20, 20; Majid Khadduri, *Iraq's Claim to the Sovereignty of Kuwait*, 23 N.Y.U. J. INT'L L. & POL. 5, 26-28 (1990).

27. Khadduri, *supra* note 26, at 33.

28. Youssef M. Ibrahim, *Iraq Seeks Bigger Role in OPEC*, N.Y. TIMES, June 27, 1990, at D1; Schuler, *supra* note 23, at M4 (noting Iraqi release of allegedly secret Kuwaiti report on U.S.-Kuwaiti meetings in which the two agreed that Kuwait should pressure Iraq on the oil pricing issue to get a good border settlement).

Jordan that it was assured of United States intervention if Kuwait experienced trouble with Iraq.²⁹

A. The Historical Dispute

Iraq's territorial claim is also a part of a larger historical dispute with Kuwait. Until World War I, the region was part of the Ottoman Empire and the people of present day Iraq had ready access to Gulf ports.³⁰ However, in a 1915 secret pact (Sykes-Picot), France and Britain agreed to create the states of Iraq, Palestine, and Transjordan under British rule and the states of Lebanon and Syria under French rule.³¹ After occupation by Britain and France, they became part of the League of Nations mandate system.³² Early in World War I, Britain promised Kuwait its independence.³³

Following the war, Britain did recognize Kuwaiti independence, albeit under British protection.³⁴ From Iraq's perspective, the creation of Kuwait as a state was disturbing because its effect was to deny Iraq ready access to the Gulf. Britain divided the Gulf between Iran and Kuwait; Iran received the eastern side of the Gulf, and Kuwait received the western, leaving Iraq sandwiched in between the two. In addition, if Iraq were to control Kuwait City — the only deep water port in the Gulf — it would be preeminent in the region.³⁵ Therefore, Iraq initially refused to recognize Kuwaiti independence.³⁶ Iraq suspected that

29. Milton Viorst, *The House of Hashem*, NEW YORKER, Jan. 7, 1991, at 32, 43-44.

30. *Current Documents: Gulf War Legal and Diplomatic Documents*, 13 HOUS. J. INT'L L. 281, 287 (1991) (document from the Iraqi Department of Information, Ministry of Information and Culture entitled *Kuwait and Its Historical and Legal Relations with Iraq*) [hereinafter *Current Documents*]; Khadduri, *supra* note 26, at 26.

31. See *Correspondence Embodying Sykes-Picot Agreement, Apr. 26-Oct. 23, 1916*, 4 DOCUMENTS ON BRITISH FOREIGN POLICY 1919-1939, at 241-51 (1st ser. 1940). Britain had staked a claim to Kuwait even before World War I. In the late nineteenth century, Kuwait was administered from the Ottoman provincial center at Basra, which after World War I became part of Iraq. In 1899, Britain was concerned that Germany might build a railway to Baghdad, or that Russia might build one to Kuwait, threatening Britain's hold on India. To ensure its control of the port of Kuwait, Britain concluded a secret agreement with Kuwait that bound Kuwait not to receive the representative of any foreign power, or to cede or lease any of its territory, without Britain's consent. Khadduri, *supra* note 26, at 11.

32. LEAGUE OF NATIONS COVENANT art. 22. Under the Mandate system, states taking Ottoman territory were to administer their territory with accountability to the League.

33. Khadduri, *supra* note 26, at 23.

34. *Id.*

35. YAACOV SHIMONI, POLITICAL DICTIONARY OF THE ARAB WORLD 281 (1987).

36. Iraq finally recognized Kuwaiti independence in 1963. Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters, Oct. 4, 1963, 485 U.N.T.S. 326 ("[T]he Republic of Iraq recognized the independence and complete sovereignty of the State of Kuwait . . ."); Khadduri, *supra* note 26, at 30-31.

Britain wanted to prevent any single state from becoming too strong.³⁷ Britain could thereby be assured of better access to the region's oil by playing the states off against each other.³⁸

Britain further restricted Iraq's access to the Gulf in 1923, when the British High Commissioner of Iraq recognized Kuwaiti sovereignty over the islands of Warbah and Bubiyan despite the fact that they had never before belonged to Kuwait.³⁹ The two islands lie on the Iraq-Kuwait border and command the entrance to Um Qasr, an Iraqi port.⁴⁰ The action of the High Commissioner was never ratified formally by Iraq and thus is not legally binding on Iraq.⁴¹ Even after Iraq became independent in 1932, the two countries were unable to come to an agreement on this mutual border. Kuwait continues to control the two islands despite a British proposal that Kuwait lease Warbah, the smaller of the two islands, to Iraq.⁴²

B. The Invasion of Kuwait

In the summer of 1990, Iraqi President Saddam Hussein discussed the border issue with the United States ambassador to Iraq, who indicated that the United States did not have a position on Iraq's border dispute with Kuwait.⁴³ Kuwait showed little willingness to discuss the border issue or Iraq's financial claims. It is possible that, had Kuwait

37. *Current Documents*, *supra* note 30, at 287.

38. *Id.*

39. Khadduri, *supra* note 26, at 27.

40. *Id.* Apart from the Gulf port of Um Qasr, the only other Iraqi city connected to the Gulf is Basra, which is thirty miles inland from the Gulf up the Shatt al-Arab river. The river has been a matter of constant dispute with Iran. Edmund Ghareeb, *The Roots of Crisis: Iraq and Iran*, in *THE PERSIAN GULF WAR: LESSONS FOR STRATEGY, LAW, AND DIPLOMACY* 21, 27 (Christopher C. Joyner ed., 1990); Raymond Habiby, *Securing a Harbor: Iraqi-Iranian Relations* 15 (paper presented at Center of Iranian Research & Analysis, Ann Arbor, Mich., Apr. 5-7, 1991) (on file with author). In the Iran-Iraq war that began in 1980, one of Iraq's first military objectives was the capture of the eastern shore of the Shatt al-Arab. However, Iraq was never able to gain complete control over the Shatt al-Arab, preventing the use of the port of Basra throughout the entire decade of 1980s. Chaim Herzog, *A Military-Strategic Overview*, in *THE IRAN-IRAQ WAR: IMPACT AND IMPLICATIONS* 255, 259-60 (Efraim Karsh ed., 1987).

Once the Iran-Iraq war ended, the two nations sparred over who would pay the cost of dredging the Shatt al-Arab of the silt that had built up during the war and of clearing it of war debris. Habiby, *supra*, at 15. When this issue was not readily resolved, Iraq decided to construct a new waterway connecting Basra to the Gulf at Um Qasr, having concluded that this would be less expensive. *Id.* at 16. However, access to the Gulf at Um Qasr was blocked by the islands of Warbah and Bubiyan, leading Iraq to renew its claims to them and demand border rectification around Um Qasr. Khadduri, *supra* note 26, at 32; Habiby, *supra*, at 16.

41. Khadduri, *supra* note 26, at 28.

42. *Id.* at 29-30.

43. *Current Documents*, *supra* note 30, at 295 (excerpts from the Minutes of the Audience Given by His Excellency President Saddam Hussein to Miss April Glaspie, the U.S. Ambassador to Iraq, July 25, 1990, quoting Ambassador Glaspie telling President Hussein that the U.S. had "no opinion" on "inter-Arab disputes, such as your border disagreement with Kuwait").

agreed to formal or informal negotiations, the invasion might have been avoided.⁴⁴

However, on August 2, 1990, Iraq invaded Kuwait. At the time of the invasion, Iraq announced the formation of a new government in Kuwait that ceded to Iraq the two islands of Warbah and Bubiyan and some territory around the port of Um Qasr.⁴⁵ This action suggested that Iraq's initial goal may have been to get concessions on the two islands and on the area around Um Qasr (as well as on its financial claims) in exchange for a withdrawal from the rest of Kuwait.⁴⁶ It was not until the United States airlifted troops into Saudi Arabia a few days later that Iraq announced a "comprehensive and eternal merger" of Kuwait into Iraq.⁴⁷ Iraq declared that the two islands and the border area around Um Qasr would become a part of Basra province, while the rest of Kuwait would form a new province of Iraq.⁴⁸ Iraqi President Saddam Hussein said that "we are now one people, one state," and Iraq's Revolutionary Command Council said it had decided to return Kuwait to "the Iraq of its origins."⁴⁹ The U.N. Security Council condemned the annexation.⁵⁰

At this time, Iraq dropped its previous demand on Iran that the clearing of the Shatt al-Arab river⁵¹ should precede both an exchange of prisoners still held from the Iran-Iraq war,⁵² and Iraq's evacuation of small portions of Iranian territory still held from the war.⁵³ In a reversal of policy, Iraq also agreed to recognize the validity of the 1975 agreement with Iran that specified the *thalweg* of the Shatt al-Arab as the Iran-Iraq border.⁵⁴

44. *U.S. Policy in the Persian Gulf*, *supra* note 14, at 164 (post-invasion proposal of former National Security Adviser Zbigniew Brzezinski for binding arbitration of Kuwaiti and Iraqi differences, suggesting that even at that stage arbitration was worth trying).

45. Patrick E. Tyler, *U.S. Seeks Pressure on Iraq as Arab Talks Fail*, WASH. POST, Aug. 5, 1990, at A1; Habiby, *supra* note 40, at 16-17.

46. Saul Friedman, *For U.S., Options Aren't Inviting*, NEWSDAY, Aug. 3, 1990, at 5 (reporting view of Pentagon and other experts that Iraq might withdraw if it got lease rights to Gulf islands and a financial settlement from Kuwait).

47. S.C. Res. 662, U.N. SCOR, 45th Sess. at 1, U.N. Doc. S/RES/662 (1990).

48. *Current Documents*, *supra* note 30, at 282, 286.

49. John Kifner, *U.S. May Send Saudis a Force of 50,000; Iraq Proclaims Kuwait's Annexation; 'Merger' Declared*, N.Y. TIMES, Aug. 8, 1990, at A1 ("Responding to an airlift of United States forces to Saudi Arabia and the international embargo that has stilled the flow of his country's oil, President Saddam Hussein of Iraq today defiantly announced his outright annexation of Kuwait."). Iraq also claimed that Kuwait was historically part of Iraq. *Current Documents*, *supra* note 30, at 282, 286.

50. S.C. Res. 662, *supra* note 47, at 1.

51. *See generally supra* text accompanying note 40 (discussing the dispute between Iran and Iraq over the Shatt al-Arab river).

52. *See* 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. & POL'Y 73 (1989).

53. Habiby, *supra* note 40, at 17.

54. Williams, *supra* note 6, at A1. The *Thalweg* is defined as "the middle of the deepest

Iraq's position on its invasion of Kuwait is based on territorial claims that have, as a matter of history and international law, a certain plausibility.⁵⁵ Despite the plausibility of its claims, Iraq was not free to enforce them by force of arms. If Kuwaitis and Iraqis considered themselves to be one people, a merger should have resulted from some expression of sentiment by the governments or people, but Iraq had no right to bring about a merger on its own initiative. Its invasion and occupation of Kuwait constituted aggression, as the Security Council determined.⁵⁶

C. The International Response

However, the fact that real disputes underlay the Iraqi invasion was relevant to the international response. Under Article 39 of the U.N. Charter, the Security Council is obliged to recommend peaceful means to resolve conflicts between warring parties.⁵⁷ When, as with Kuwait and Iraq, territorial and financial disputes are at issue, the Council must promote negotiation.⁵⁸ The Security Council did this in its first resolution on the Iraq-Kuwait situation, calling on Iraq and Kuwait "to begin immediately intensive negotiations for the resolution of their differences."⁵⁹ However, the Security Council did not follow up on this suggestion in its subsequent actions and declarations, moving instead to impose economic sanctions against Iraq within a few days.⁶⁰

Some observers did suggest that Iraq and Kuwait engage in binding arbitration to resolve their differences,⁶¹ and the Arab League explored common ground for a negotiated settlement.⁶² However, the Security Council never pursued this route of negotiation between the parties. The exiled Kuwaiti government also did not show any willingness to negotiate, and the Security Council did not pressure it to do so. Thus, in dealing with Iraq's aggressive occupation of Kuwait, the U.N. virtually

or most navigable channel, as distinguished from the geographic center or a line midway between the banks." BLACK'S LAW DICTIONARY 1477 (6th ed. 1990).

55. See *supra* part IA. However, Iraq's recognition of Kuwait in 1963 seriously undercut its claim to sovereignty. Khadduri, *supra* note 26, at 25-26.

56. U.N. CHARTER art. 2, para. 4; S.C. Res. 660, *supra* note 5, at 1.

57. U.N. CHARTER art. 39. See also John Quigley, *The United States and the United Nations in the Persian Gulf War: A New Order or Disorder?*, 25 CORNELL INT'L L. J. 401, 434-35 (stating that Article 39 obliges the Security Council to make recommendations to the parties as an initial step and, if necessary, follow with sanctions under Articles 41 and 42).

58. U.N. CHARTER art. 39.

59. S.C. Res. 660, *supra* note 5, para. 3.

60. S.C. Res. 661, U.N. SCOR, 45th Sess. at 1, U.N. Doc. S/RES/661 (1990).

61. Marc Weller, *A Peace Plan for the Gulf*, N.Y. TIMES, Aug. 14, 1990, at A21.

62. John Kifner, *13 of 21 in Arab League Meet on Avoiding a War*, N.Y. TIMES, Aug. 31, 1990, at A12.

ignored outstanding issues between the two parties and proceeded quickly first to economic, and then to military sanctions.⁶³

II. ISRAEL'S RATIONALE FOR OCCUPYING NEIGHBORING ARAB TERRITORIES

The rationale asserted by Israel for its 1967 occupation of the West Bank, the Gaza Strip, the Sinai Peninsula, and the Golan Heights was quite different from Iraq's rationale for occupying Kuwait. Far from raising a territorial claim, Israel claimed that it was attacked by Egypt, and that it had responded defensively against Egypt and its allies, Jordan and Syria.⁶⁴ Israel's claim of self-defense was said to justify a weaker U.N. reaction to Israel in 1967 than that taken toward Iraq in 1990.⁶⁵ Furthermore, if Israel had acted defensively, it would legitimize Israel's initial use of force,⁶⁶ putting Israel in a more favorable light than Iraq. It might, in addition, color the terms of a settlement of the territorial issue; if Israel were deemed to be in a vulnerable position, it would have a stronger argument for expanding its borders at strategic points. Therefore, the claim that Israel acted defensively bears examination.

A. Historical Background of the 1967 War

The military action that began the 1967 war was ordered by the Israeli cabinet on June 4 of that year.⁶⁷ At dawn on June 5, the Israeli air force bombed Egyptian fighter aircraft, parked at their home bases. Taking the Egyptian air force by surprise,⁶⁸ Israel demolished almost 300 of Egypt's 340 combat aircraft.⁶⁹ By the end of the day on June 5, Israel had destroyed the air war capacity not only of Egypt, but also of

63. See S.C. Res. 678, *supra* note 13 (concerning military sanctions); S.C. Res. 661, *supra* note 60 (concerning economic sanctions); *infra* notes 73-75 and accompanying text.

64. See *infra* notes 73-75 and accompanying text.

65. Susan Crosland, *Playing Prison Reformer with a Poker Face*, SUNDAY TIMES, Oct. 14, 1990, at C7; *Real Linkage; Iraq-Kuwait Crisis's Effects on Arab-Israeli Conflict*, NATION, Dec. 31, 1990, at 827; Shlomo Slonim, *Withdrawal and the Origins of Aggression*, JERUSALEM POST, Oct. 14, 1990, at 4.

66. U.N. CHARTER art. 51.

67. DAVID KIMCHE & DAN BAWLY, *THE SANDSTORM: THE ARAB-ISRAELI WAR OF JUNE 1967: PRELUDE AND AFTERMATH* 134-56 (1968); Howard Koch, *June 1967: The Question of Aggression*, 15 ARAB WORLD 10-13 (1969). The account that follows is based on JOHN QUIGLEY, *PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE* 161-68 (1990).

68. EDGAR O'BALLANCE, *THE THIRD ARAB ISRAELI WAR* 49 (1972); EZER WEIZMAN, *ON EAGLES' WINGS: THE PERSONAL STORY OF THE LEADING COMMANDER OF THE ISRAELI AIR FORCE* 221-27 (1976) (describing the attack); Michael Akehurst, *The Arab-Israeli Conflict and International Law*, 5 N.Z. U. L. REV. 231, 241 (1973).

69. SYDNEY D. BAILEY, *THE MAKING OF RESOLUTION 242*, at 68 (1985); ROBERT STEPHENS, *NASSER: A POLITICAL BIOGRAPHY* 493 (1971).

Jordan, Syria, and Iraq.⁷⁰ Simultaneously, Israeli ground forces attacked Egypt, moving quickly through the Gaza Strip and into the Sinai Peninsula.⁷¹

In the U.N., Egypt charged Israel with aggression.⁷² Israel countered that Egypt had struck first;⁷³ Israeli Foreign Minister Abba Eban told the Security Council:

[O]n the morning of 5 June, when Egyptian forces engaged us by air and land, bombarding the villages of Kissufim, Nahal-Oz and Ein Hasheloshah we knew that our limit of safety had been reached, and perhaps passed. In accordance with its inherent right of self-defence as formulated in Article 51 of the U.N. Charter, Israel responded defensively in full strength.⁷⁴

Eban added that "approaching Egyptian aircraft appeared on our radar screens."⁷⁵

Egypt did not strike first.⁷⁶ The Security Council, however, did not inquire into the facts.⁷⁷ While the United States was aware that Israel struck first, it did not provide this information to the Security Council.⁷⁸

1. *Israel's Claim of Anticipatory Self-Defense.* After the war in 1967, Israeli Prime Minister Levi Eshkol implicitly admitted that Eban had lied to the Security Council about who struck first.⁷⁹ Eshkol said that Israel had initiated military action. He also claimed that Israel attacked Egypt

70. DONALD NEFF, *WARRIORS FOR JERUSALEM: THE SIX DAYS THAT CHANGED THE MIDDLE EAST* 203 (1984); STEPHENS, *supra* note 69, at 498.

71. TOM J. FARER, *3 LAW AND WAR, THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 15, 41 (Charles Black & Richard Falk eds., 1971); PIERRE-MARIE MARTIN, *LE CONFLIT ISRAËLO-ARABE: RECHERCHES SUR L'EMPLOI DE LA FORCE EN DROIT INTERNATIONAL PUBLIC POSITIF* 153-54 (1973)

72. U.N. SCOR, 22d Sess., 1347th mtg. at 1-2, U.N. Doc. S/PV.1347 (1967) (statement of Mr. El Kony, United Arab Republic). See also U.N. SCOR, 22d Sess., 1348th mtg. at 5, U.N. Doc. S/PV.1348 (1967) (report of June 5 statement by representative of former Soviet Union).

73. U.N. SCOR, 22d Sess., 1347th mtg., *supra* note 72, at 1 (communication of Permanent Representative of Israel to President of Security Council).

74. U.N. SCOR, 22d Sess., 1348th mtg., *supra* note 72, at 15.

75. *Id.* See also WEIZMAN, *supra* note 68, at 215 (explaining concern among Israeli commanders in the days preceding June 5 that the U.N. and the major powers would try to enforce a cease-fire shortly after Israel attacked Egypt).

76. *Admission on Attack*, *TIMES* (London), July 8, 1967, at 3 (stating that Eshkol "buried the often-repeated statement that Egyptian [air] and land forces attacked Israel before she launched her devastating lightning offensive on June 5").

77. U.N. SCOR, 22d Sess., 1348th mtg., *supra* note 74, *passim*; U.N. SCOR, 22d Sess., 1347th mtg., *supra* note 72, *passim*.

78. ANDREW & LESLIE COCKBURN, *DANGEROUS LIASON: THE INSIDE STORY OF THE U.S.-ISRAELI COVERT RELATIONSHIP 141-49* (1991). The United States had in fact tried, unsuccessfully, to dissuade Israel from invading Egypt. LYNDON JOHNSON, *THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY 1963-1969*, at 293 (1971).

79. *Admission on Attack*, *supra* note 76, at 3.

to in what he termed "legitimate defence" to forestall an imminent Egyptian invasion.⁸⁰

President Chaim Herzog stated Israel's claim that Egypt had been on the verge of attacking. Before the U.N., he said Israel was:

the victim of aggression when President Nasser with great fanfare moved his armies into Sinai and in an atmosphere of Arab frenzy and hysteria undertook publicly to annihilate Israel. He closed the Straits of Tiran, peremptorily ordered the United Nations forces out of Sinai and Gaza, and gathered around Israel an international Arab army bent on the destruction of our country—as he put it in Arabic, "*El-Kadaa a la Israel*"—the total annihilation of our people—men, women and children.⁸¹

Herzog also accused Jordan of aggression against Israel. Six hours after Israel began its invasion of Egypt, Jordan shelled Israel around Jerusalem.⁸² Herzog declared that Jordan had "launched a military attack on Jerusalem along the Israeli border, indiscriminately bombing, shelling and attacking Israeli towns and villages, including the Holy City of Jerusalem."⁸³ Jordan did initiate the attack on Israel before Israel fired at it, and Jordan's actions would constitute aggression unless Jordan had acted in lawful defense of Egypt.⁸⁴

Herzog characterized Israel's action as solely defensive.

As a result of this unprovoked Arab attack, which took place when we were sitting along the 1967 lines, . . . the territories under discussion [the Gaza Strip and West Bank] fell under Israeli control where they are today. We sought no war. We were promised annihilation. A new holocaust was our prospect. We fought back to defend ourselves, our wives, our children, our homes from a grim and unthinkable fate—a fate, I repeat, openly promised us over every Arab medium by every Arab leader in a wave of uncontrolled hysteria which is in itself frightening and horrifying to recall to this day.⁸⁵

80. *Id.*

81. U.N. GAOR, 32d Sess., 2 Plen. mtgs. at 867-68, U.N. Doc. A/32/PV.47 (1978) [hereinafter Statement of President Chaim Herzog].

82. Jordan, which had a defense treaty with Egypt, shelled Israel at half a dozen locations around the country. O'BALLANCE, *supra* note 68, at 181; William O'Brien, *International Law and the Outbreak of War in the Middle East, 1967*, 11 ORBIS 692, 703 (1969).

83. Statement of President Chaim Herzog, *supra* note 81, at 868.

84. U.N. CHARTER art. 51. *See also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 102-03, 120 (June 27) (finding that under Article 51 of the U.N. Charter, one state may act in the defense of another state that has been attacked, as "collective self-defense").

85. Statement of President Chaim Herzog, *supra* note 81, at 868.

One major obstacle, however, stands in the way of Israel's claim of self-defense. Article 51 of the U.N. Charter permits the use of force in self-defense only "if an armed attack occurs."⁸⁶ Most commentators read this clause to permit defensive force only in response to an armed attack that has already begun,⁸⁷ or at least is so imminent as to be obvious.⁸⁸ This was not the case when Israel opened hostilities with Egypt: Egypt did not initiate an attack, nor were its forces making obvious preparations for an imminent attack.⁸⁹

In fact, a number of Israeli officials contradicted Eshkol's claim that Israel acted on the morning of June 5, 1967 because it thought Egypt was about to attack.⁹⁰ The Israeli Chief of Staff, General Itzhak Rabin, stated that he did not believe that Egyptian President Gamel Abdul Nasser wanted war. He felt that the two divisions that Nasser sent into Sinai on May 14 would not have been enough to unleash an offensive against Israel. Rabin claimed that both Egypt and Israel knew that was the case.⁹¹ General Matitiahu Peled, a member of Israel's general staff in 1967, declared that the thesis according to which Israel struggled for its physical existence was only a bluff born and developed after the war.⁹² According to Peled, the General Staff never told the government that the Egyptian military threat represented any danger to Israel or that Israel was unable to crush Nasser's army, which, according to Peled, with unheard-of foolishness, had exposed itself to the devastating might of the Israeli army.⁹³ Menachem Begin, a former Israeli Prime Minister and

86. U.N. CHARTER art. 51.

87. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 141-43 (1979); John L. Hargrove, *Abating the Middle East Crisis Through the United Nations (and Vice Versa)*, 19 KAN. L. REV. 365, 367 (1971); Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. OF CHI. L. REV. 113, 133 (1986). At least one commentator reads Article 51 more expansively as incorporating a customary norm permitting an anticipatory use of force. DEREK W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 188-93 (1958). That view still requires evidence that an attack is so imminent so as not to enable the victim state to wait for the attack. 2 JOHN B. MOORE, *DIGEST OF INTERNATIONAL LAW* 412 (1906) (Secretary of State Daniel Webster articulating the standard that the "necessity of self-defense is instant, overwhelming and leaving no choice of means, and no moment of deliberation"). Even under this approach, which gives a state greater latitude to make an assessment that it is about to be attacked, Israel had no factual basis to substantiate that an imminent Egyptian attack was likely. See *infra* notes 90-95 and accompanying text. In particular, U.S. military intelligence, which was monitoring the situation, did not expect an Egyptian attack on Israel. Alfred J. Hotz, *Legal Dilemmas: The Arab-Israeli Conflict*, 19 S.D. L. REV. 242, 264 (1974).

88. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 366-68 (1963); HANS Kelsen, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 792 (1950).

89. See *infra* notes 90-95 and accompanying text.

90. HEINZ WAGNER, *DER ARABISCH-ISRAELISCHE KONFLIKT IM VÖLKERRECHT* 434 (1971).

91. *Le général Rabin ne pense pas que Nasser voulait la guerre*, LE MONDE, Feb. 29, 1968, at 1.

92. Amnon Kapeliouk, *Israël était-il réellement menacé d'extermination?*, LE MONDE, June 3, 1972, at 4.

93. *Id.*

a member of the cabinet which voted to attack Egypt, said that "[i]n June 1967, we again had a choice. 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."⁹⁴ As for why Israel attacked Egypt, Begin said that it was to "take the initiative and attack the enemy, drive him back, and thus assure the security of Israel and the future of the nation."⁹⁵

2. *Actions of Egypt Cited by Israel.* Prime Minister Eshkol's administration pointed to the recent conclusion of an Egyptian-Jordanian defensive alliance,⁹⁶ and to verbal threats by President Nasser against Israel⁹⁷ to demonstrate that Egypt was about to attack. In addition, Israel also relied upon three Egyptian actions: the partial closure of the Straits of Tiran to Israeli-flag vessels; the movement of Egyptian troops up to the Israeli-Egyptian border; and, Egypt's request that the U.N. withdraw peacekeeping forces stationed on the Egyptian side of the Egyptian-Israeli border.⁹⁸

However, the complaints raised by Israel can partly be explained by other evidence. Nasser did make belligerent statements toward Israel, but they were conditioned upon an Israeli invasion of Syria.⁹⁹ Israel's second complaint concerns Egypt's decision on May 22, 1967, not to permit passage of Israeli flag vessels, or any vessel carrying strategic material to Israel through the Straits of Tiran.¹⁰⁰ Israel argued that the closure gave it reason to expect an imminent attack by Egypt.¹⁰¹ However, Nasser cited Israel's threats against Syria and a presumed Israeli troop build-up facing Syria as his rationale for the closure.¹⁰²

94. CHERYL RUBENBERG, *ISRAEL AND THE AMERICAN NATIONAL INTEREST* 267, 276 (1986); *Excerpts from Begin Speech at National Defense College*, N.Y. TIMES, Aug. 21, 1982, at A6 [hereinafter *Excerpts from Begin Speech*]. See URI AVNERI, *MY FRIEND, THE ENEMY* 234 (1986) (discussing the lack of PLO attacks from Lebanon in the year preceding Israel's 1982 invasion and the lack of a basis for Israel to expect any attacks from Lebanon in the immediate future).

95. *Excerpts from Begin Speech*, *supra* note 94, at A6.

96. 1967 U.N.Y.B. 195-96, U.N. Sales No. E.68.I.1.

97. *Id.*; ALLAN GERSON, *ISRAEL, THE WEST BANK AND INTERNATIONAL LAW* 71 (1978); Amos Shapira, *The Six-Day War and the Right of Self-Defence*, 6 ISRAEL L. REV. 65, 76 (1971).

98. 1967 U.N.Y.B., *supra* note 96, at 195-96; GERSON, *supra* note 97, at 71; Shapira, *supra* note 97, at 76.

99. F. YAHIA, *THE PALESTINE QUESTION AND INTERNATIONAL LAW* 152-54 (1970). In a speech in which he stressed Israel's threats against Syria, President Nasser said, "[w]hen we said we were ready for battle, we meant that we would indeed fight if Syria or any other Arab State was subjected to aggression." *Text of Nasser's Speech on the Blockade of Aqaba*, N.Y. TIMES, May 26, 1967, at A16.

100. *Id.*

101. U.N. SCOR, 22d Sess., 1348th mtg., *supra* note 72, at 14 (statement of Mr. Eban, Israel).

102. 16 KEESING'S CONTEMPORARY ARCHIVES 22065 (1967).

Third, Israel cites the fact that Egypt moved troops to the Israel-Egypt 1949 armistice line in mid-May. However, Egypt announced that the troop movements were intended only to deter an Israeli attack on Syria as his rationale for closure.¹⁰³

Finally, Israel claims that Egypt's May 18 request to the U.N. to withdraw the U.N. forces from the Egyptian-Israeli border gave it reason to expect an attack.¹⁰⁴ These troops had been stationed on the Egyptian side of the 1949 armistice line following the 1956 Egypt-Israel war.¹⁰⁵ The U.N. commander reported that Egypt said it was preparing for "action against Israel, the moment it might carry out any aggressive action against any Arab country."¹⁰⁶ This again suggests that Egypt planned to attack Israel only if Israel invaded Syria. Following the Egyptian request, U.N. Secretary-General U Thant asked Israel to let him move the U.N. forces to the Israeli side of the armistice line, but Israel declined.¹⁰⁷ U Thant also proposed "that a U.N. representative go to Israel, Egypt, and Jordan to arrange a settlement . . .;" Egypt accepted the idea, but Israel rejected it.¹⁰⁸

3. *The Syrian Factor.* The Egyptian concern for an Israeli attack on Syria was not irrational.¹⁰⁹ In April 1967, the Israeli army had undertaken cultivation of land in a demilitarized zone between Israel and Syria in violation of the 1949 Israel-Syria armistice.¹¹⁰ Israel, over

103. Akehurst, *supra* note 68, at 240. Evidently, the Israeli Ministry of Defense accepted this explanation, because General Rabin reported to the Israeli cabinet that the Egyptian forces were in a "defensive posture." NEFF, *supra* note 70, at 93. See *supra* notes 90-94 and accompanying text.

104. U.N. SCOR, 22d Sess., 1348th mtg., *supra* note 72, at 14.

105. G.A. Res. 1125, U.N. GAOR, 11th Sess., Supp. No. 17, at 62, U.N. Doc. A/3572 (1957).

106. INDAR JIT RIKHYE, *THE SINAI BLUNDER: WITHDRAWAL OF THE UNITED NATIONS EMERGENCY FORCE LEADING TO THE SIX-DAY WAR OF JUNE 1967*, at 16 (1980).

107. *Report of the Secretary-General on the Withdrawal of the United Nations Emergency Force*, U.N. GAOR, 22d Sess., 5th Emerg. Spec. Sess. at 11, U.N. Doc. A/6730/Add.3 (1967). U Thant suggested that "if only Israel had agreed to permit UNEF to be stationed on its side of the border, even for a short duration, the course of history could have been different. Diplomatic efforts to avert the pending catastrophe might have prevailed and war might have been averted." U THANT, *VIEW FROM THE UN 223* (1977). If Israel had been concerned about an Egyptian attack, the logical response would have been to accept U Thant's offer. Quincy Wright, *The Middle Eastern Crisis*, 64 *PROC. AM. SOC'Y INT'L L.* 80 (1970). Israel's rejection suggested that it was not concerned about an Egyptian invasion. Akehurst, *supra* note 68, at 240. *But see* Ruth Lapidot, *The Security Council in the May 1967 Crisis: A Study in Frustration*, 4 *ISRAEL L. REV.* 534, 536 n.9 (1969) (justifying Israel's rejection of the offer on the grounds that the stationing of the U.N. forces in Israel at that time would not have prevented an Egyptian attack).

108. RITCHIE OVENDALE, *THE ORIGINS OF THE ARAB-ISRAELI WARS* 178 (1984).

109. Hisham Sharabi, *Prelude to War: The Crisis of May-June 1967, in THE ARAB-ISRAELI CONFRONTATION OF JUNE 1967: AN ARAB PERSPECTIVE* 49, 53-57 (Ibrahim Abu-Lughod ed., 1970).

110. General Armistice Agreement, July 20, 1949, Israel-Syria, art. V(4), 42 *U.N.T.S.* 327, 327 (1949); HENRY CATTAN, *PALESTINE AND INTERNATIONAL LAW: THE LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT* 169-70 (2d ed. 1976).

Security Council objections and Syrian protests, had consistently claimed sovereignty in the portion of the demilitarized zone that fell on the Israeli side of the 1949 armistice line.¹¹¹ On April 7, 1967, in order to stop the cultivation, Syria attacked the demilitarized zone and Israel retaliated.¹¹²

Israeli officials also levelled threats toward Syria. General Rabin stated that it was necessary to overthrow the Syrian government to protect Israel's national security,¹¹³ and on May 12, Israeli officials communicated to Syria a threat to occupy Damascus and overthrow the Syrian government.¹¹⁴ It seems clear that Israel "definitely contemplated some kind of action against Syria in the course of the month of May."¹¹⁵

In addition to the Israeli threats, other circumstances suggested to President Nasser that Israel might invade Syria. Armored units were absent from the May 15 Independence Day parade in Jerusalem,¹¹⁶ indicating to Nasser that the tanks were being massed for an attack.¹¹⁷ The Soviet government told Nasser that Israel had moved troops towards the Syrian border, and on May 24, the former Soviet government announced publicly that Israeli forces at the Syrian border were in a state of battle readiness.¹¹⁸ Nasser became convinced that an Israeli attack on Syria was imminent.¹¹⁹

The Israeli military leadership apparently concluded that Egypt intended either to intervene in the event of an Israeli attack on Syria, or to deter such an attack, but that Egypt did not intend to invade.¹²⁰

111. S.C. Res. 93, U.N. SCOR, 6th Sess. at 7, U.N. Doc. S/INF/6/Rev.1 (1951).

112. OVENDALE, *supra* note 108, at 178; *La genèse de la guerre*, LE MONDE, June 7, 1967, at 3.

113. OVENDALE, *supra* note 108, at 178.

114. MARTIN, *supra* note 71, at 155; Charles W. Yost, *The Arab-Israel War: How it Began*, 46 FOREIGN AFF. 304, 307 (1967) (public speech, Tel Aviv).

115. NADAV SAFRAN, *FROM WAR TO WAR: THE ARAB-ISRAELI CONFRONTATION, 1948-1967*, at 306 (1969). Israel claimed that it had the right to attack Syria to forestall cross-border terrorist attacks which it claimed were sponsored by Syria. On May 11 Eshkol, referring to cross-border attacks from Syria, said, "[t]he focal point of the terrorists is in Syria, but we have laid down the principle that we shall choose the time, the place and the means to counter the aggressor." Yost, *supra* note 114, at 307 (citing radio interview). See also *Weekly News Bulletin (Government of Israel)*, May 9-15, 1967, at 20, cited in Shapira, *supra* note 97, at 66.

116. James Feron, *Parade in Israel Omits Heavy Arms*, N.Y. TIMES, May 16, 1967, at A15.

117. OVENDALE, *supra* note 108, at 178.

118. *Zaiavlenie sovet'skogo pravitel'stva o polozhenii v Blizhnem Vostoke* [Statement of the Soviet Government on the Situation in the Near East], PRAVDA, May 24, 1967, at 1.

119. KIMCHE & BAWLY, *supra* note 67, at 91; ARTHUR LALL, *THE UN AND THE MIDDLE EAST CRISIS, 1967*, at 7-8 (1970); STEPHENS, *supra* note 69, at 467. There was, in fact, no unusual Israeli troop concentration near Syria, according to observers of the U.N. Truce Supervision Organization. Syrian military commanders were operating under the belief that such maneuvers were at hand. *Report of the Secretary-General on the Withdrawal of the United Nations Emergency Force*, *supra* note 107, at 11.

120. *Le général Rabin ne pense pas que Nasser voulait la guerre*, *supra* note 91, at 1 (stating

While they had previously thought they could attack Syria without incurring Egyptian intervention, "[t]he [Israeli] military now became convinced that Nasser meant to intervene in case of an Israeli attack against Syria" ¹²¹ Egypt's belief that Israel might invade Syria apparently motivated its dispatch of troops toward Israel, its partial closure of the Straits of Tiran, and its request for a withdrawal of U.N. troops. ¹²²

B. The Closure of the Straits of Tiran as a Cause of War

Israel also claims that Egypt's May 22 partial closure of the Straits of Tiran gave it a right to use military force against Egypt. ¹²³ Israel argued, first, that the closure was an "armed attack" against Israel, giving it a right of self-defense, and second, that the closure violated a customary right to passage through the Straits which would permit Israel to use force to secure passage. ¹²⁴ However, Israel was entitled to use force only if there actually existed aggression and if so, its response would have to have been in proportion to that aggression.

1. *The Closure of the Straits as an Act of Aggression.* In justifying Israel's actions, Abba Eban told the U.N. General Assembly, "[b]lockades have traditionally been regarded, in the pre-Charter parlance, as acts of war. To blockade, after all, is to attempt strangulation." ¹²⁵ It is doubtful, however, that the Egyptian closure of the Straits of Tiran in 1967 constituted a blockade for the purposes of establishing acts of aggression because the Straits are within Egyptian territorial waters. ¹²⁶ No situation has arisen in international practice in which a state was considered to have committed aggression by establishing a blockade in its own territorial waters. ¹²⁷ But even if the action were deemed a violation of Israel's maritime rights, it would not be a blockade, but only a violation of a right of innocent passage. ¹²⁸ Thus, the portrayal of

that Nasser knew, and Israel's general staff knew, that the Egyptian troops on the border could not have successfully invaded Israel).

121. SAFRAN, *supra* note 115, at 307.

122. Quincy Wright, *Legal Aspects of the Middle East Situation*, 33 LAW & CONTEMP. PROBS. 5, 8 (1968).

123. Kenneth M. Lewan, *Justifications for the Opening of Hostilities in the Middle East*, 26 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 88 *passim* (1970).

124. See *infra* notes 125-59 and accompanying text.

125. U.N. SCOR, 22d Sess., 1348th mtg., *supra* note 72, at 17 (statement of Mr. Eban, Israel).

126. The navigable part of the channel is located only one mile from Egypt's shore. 16 KEESING'S CONTEMPORARY ARCHIVES, *supra* note 102, at 22064.

127. See generally C. JOHN COLOMBOS, INTERNATIONAL LAW OF THE SEA 714-52 (1967) (reporting no such case).

128. *Id.*

Egypt's closing of the Straits as constituting an act of aggression is not supportable under international legal principles.

Moreover, Egypt's action was defensive in nature.¹²⁹ Egypt was concerned that if Israel invaded Syria, Israel would, with the U.N. troops gone, use the Straits to bring in war materiel.¹³⁰ Egypt did not declare an intent to restrict non-Israeli flag vessels carrying non-strategic materials, nor did it declare an intent to restrict Israeli registered vessels chartered to a non-Israeli carrier.¹³¹ Rather, the partial closure was aimed at enhancing Egypt's ability to respond if Israel invaded Syria.

Nasser made his decision only after U.N. Secretary General U Thant removed the U.N. forces from Sharm el-Sheikh, which commands the entrance to the Straits of Tiran.¹³² Although Nasser had requested removal of U.N. forces from their border positions, he had not requested their withdrawal from Sharm el-Sheikh.¹³³ Nasser evidently had not planned to close the Straits until "the total evacuation of the UN forced his hand."¹³⁴

Even if the Egyptian action did constitute an aggressive blockade, Israel was entitled to act in self-defense only within the bounds of proportionality.¹³⁵ Here Israel undertook a full-scale invasion of Egypt, destroying its air force and sending troops deep into Egyptian territory.¹³⁶ However, Israel's government had determined that the closure did not constitute as much of a security threat to Israel as did the Egyptian troop concentrations in the Sinai.¹³⁷ Publicly, Israel claimed it faced "economic strangulation,"¹³⁸ yet Israel had barely used the Gulf of Aqaba, at the end of which sit the Straits of Tiran, for commercial transportation.¹³⁹ The most significant cargo for which Israel used Eilat was oil, carried on non-Israeli flag vessels, which is why Egypt was concerned about Israel's use of the Straits in the event of an Israeli invasion of Syria.¹⁴⁰

129. Roger Fisher, *Legality of Arab Position*, N.Y. TIMES, June 11, 1967, at E13 (Professor of International Law at Harvard Law School).

130. HENRY CATTAN, *PALESTINE AND INTERNATIONAL LAW* 174 (1976).

131. See *supra* note 99.

132. 16 KEESING'S CONTEMPORARY ARCHIVES, *supra* note 102, at 22064.

133. KIMCHE & BAWLY, *supra* note 67, at 92.

134. *Id.* at 95.

135. BROWNLIE, *supra* note 88, at 261-64; Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1637-38 (1984).

136. See *supra* notes 67-71 and accompanying text.

137. David Mandel, *The 1967 Arab-Israel War in Retrospect: A Case Against 'Anticipatory Self-Defense'* 32 (1988) (unpublished manuscript, on file with author).

138. FRED J. KHOURI, *THE ARAB-ISRAELI DILEMMA* 250 (3d ed. 1985).

139. During the two years preceding June 1967, no Israeli flag vessel had used the port of Eilat. NEFF, *supra* note 70, at 87. Cf. LALL, *supra* note 119, at 37 (stating that the last Israeli ship to enter the Straits of Tiran had done so eighteen months earlier). Most of Israel's exports and imports used Mediterranean ports. Mandel, *supra* note 137, at 31.

140. STEPHENS, *supra* note 69, at 488-89; Lewan, *supra* note 123, at 89. See also WEIZMAN,

2. *The Closure of the Straits of Tiran as a Violation of a Customary Right.* Israel also asserted that the partial closure of the Straits of Tiran violated Israel's right under customary law to use the Straits, and that this violation justified Israel's attack on Egypt.¹⁴¹ Egypt said, to the contrary, that it was under no duty to permit such use, and that even if it was, the breach of such a duty would not permit Israel to resort to force.¹⁴²

Egypt's position, that it was not required to permit Israeli-flag vessels through the Straits of Tiran, was based on two propositions.¹⁴³ First, Egypt argued that Egypt and Israel had been in a state of war since 1948; as a result, Egypt was not required to afford Israel (as a belligerent) rights to which it might have been entitled during peacetime.¹⁴⁴ Responding to this argument, Israel contended that the 1949 Egyptian-Israeli armistice¹⁴⁵ terminated the state of war between Egypt and Israel.¹⁴⁶ However, an armistice "does not terminate a state of war existing between the belligerents, either *de jure* or *de facto*. . . ."¹⁴⁷ The "Israeli-Arab Armistice General Agreements did not create even a *de facto* termination of the war between those states."¹⁴⁸

Israel also argued that a state of war no longer existed with Egypt because, under the U.N. Charter, a state of war between two U.N. member states is an impossibility. The Charter prohibits members from resorting to aggressive war: "our mutual obligations are still defined by the Charter of the U.N. which rules out any concept of a 'state of war.'"¹⁴⁹ Generally, however, most states reject that view, because it

supra note 68, at 248 (indicating that Sharm el-Sheikh was not an immediate objective of the IDF attack on Egypt but was attacked on June 7 to rationalize Israel's having made a *casus belli* of Egypt's partial closure of the Gulf of Aqaba).

141. Abdel Latif Zeidan, *The Emergence of the Gulf of Aqaba Problem*, 35 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 1, 16 (1979) (account of Egypt's arguments).

142. *Id.* at 53.

143. *Id.* at 54-56.

144. *The Aqaba Question and International Law*, 13 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 86, 91-93 (1957); Charles B. Selak, Jr., *A Consideration of the Legal Status of the Gulf of Aqaba*, 52 AM. J. INT'L L. 660, 667-68 (1958). A belligerent "may exploit a strait which it controls in order to cut off contraband from the enemy and to deny passage to enemy shipping in time of active hostilities." RICHARD R. BAXTER, *THE LAW OF INTERNAL WATERWAYS WITH PARTICULAR REGARD TO INTEROCEANIC CANALS* 215 (1964).

145. General Armistice Agreement, Feb. 24, 1949, Israel-Egypt, 42 U.N.T.S. 251.

146. Selak, *supra* note 144, at 670.

147. Howard Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT'L L. 880, 884 (1956). See 2 LASSA OPPENHEIM, *INTERNATIONAL LAW* 546-47 (Hersch Lauterpacht, ed., 7th ed. 1952).

148. Levie, *supra* note 147, at 886.

149. *Letter Dated 25 January 1957 from the Permanent Representative of Israel to the United Nations, Addressed to the Secretary-General*, 11 U.N. GAOR, Annex V, Agenda Item 66, at 61, U.N. Doc. A/3527 (1957); SHABTAI ROSENNE, *ISRAEL'S ARMISTICE AGREEMENTS WITH THE ARAB STATES: A JURIDICAL INTERPRETATION* 85 (1951).

would lead to the conclusion that no law governs the conduct of belligerents once war begins.¹⁵⁰

Second, Egypt argued that under customary law Israel did not have a right to use the Straits of Tiran. Although straits are open to all, only a passage between two areas of the high seas constitutes a strait.¹⁵¹ Under this definition, the Straits of Tiran is not actually a strait since it leads from the high seas into a bay.¹⁵² Taking a different approach, the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone defined "strait" to include a passage between the high seas and the territorial sea of a state, which would cover the Straits of Tiran.¹⁵³ However, Egypt did not ratify that convention precisely because it objected to that definition.¹⁵⁴

States have differed on whether there existed a customary international law right of passage through the Straits of Tiran.¹⁵⁵ United States Secretary of State John Foster Dulles maintained that there was such a right of passage, but conceded that there was "plausibility from the standpoint of international law" to Egypt's position.¹⁵⁶ At the Geneva Conference leading to the 1958 Convention, a substantial minority held that no such right of passage existed.¹⁵⁷ The head of the United States delegation to the Geneva Conference said that the Convention adopted a "new rule," one "which clearly applied to the Israeli-Arab controversy."¹⁵⁸ Thus, there was no consensus on a customary law right of passage through the Straits of Tiran. Even if Israel had a right to passage through the Straits of Tiran, it would not be entitled to attack Egypt to assert that right. An unlawful Egyptian refusal to permit passage would give rise to a dispute the resolution of which would need to be sought by peaceful means.¹⁵⁹

150. Richard R. Baxter, *The Definition of War*, 16 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 1, 8 (1960).

151. Corfu Channel Case (U.K. v. Albania), 1949 I.C.J. 4, 28 (April 9).

152. Momtaz Djamchid, *Du droit de passage dans le détroit de Tiran*, 30 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 27 (1974).

153. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 16(4), 15 U.S.T. 1606, 1611, 516 U.N.T.S. 205, 210 (1958).

154. ALI A. EL-HAKIM, *THE MIDDLE EASTERN STATES AND THE LAW OF THE SEA* 156 (1979). See also Leo Gross, *Passage through the Straits of Tiran and in the Gulf of Aqaba*, 33 LAW & CONTEMP. PROBS. 125, 144 (1968); Quincy Wright, *The Middle East Problem*, 64 AM. J. INT'L L. 270, 279 (1970) (both authors stating that international law obliged Egypt to permit Israeli ships through the Straits of Tiran).

155. See *infra* note 157 and accompanying text.

156. Dulles, *News Conference, July 16, 1957*, 37 DEP'T ST. BULL. 228, 232 (1957).

157. Gross, *supra* note 154, at 574-80.

158. Arthur H. Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L L. 607, 623 (1958).

159. U.N. CHARTER art. 33.

C. Israel's Retention of the Arab Territories

On June 9, 1967, Israel invaded Syria,¹⁶⁰ and rapidly advanced through the Golan Heights, a highland area of western Syria, before moving deeper into Syrian territory.¹⁶¹ Since the beginning of the Israeli occupation of the Arab Territories, a number of theories have been advanced to justify its continued presence. These theories all assume that Israel acted in self-defense during the 1967 war. One commentator argued that a state which takes territory in self-defense may lawfully annex it.¹⁶² But that view attracted little following, as it disregards Article 51, which allows only so much force as is necessary to repel the aggression.¹⁶³ Thus, even if Israel had acted in self-defense, its continued retention of those Occupied Territories would not be justified.¹⁶⁴ Under the U.N. Charter, there can be no lawful territorial gains from war, even by a state acting in self-defense.¹⁶⁵

Another theory suggested that Israel's taking of the Arab Territories was necessary and proportional in relation to its security needs, and that this necessity did not immediately subside.¹⁶⁶ One commentator said that, when a state has taken territory defensively

[a]s a condition of its withdrawal from such territory, that state may require the institution of security measures reasonably designed to ensure that that territory shall not again be used to mount a threat or use of force against it of such a nature as to justify exercise of self-defense.¹⁶⁷

160. BAILEY, *supra* note 69, at 84-85; STEPHENS, *supra* note 69, at 499 (noting several minor attacks by Syria against Israel on June 5 and 6).

161. WEIZMAN, *supra* note 68, at 257-58. Under pressure from the United States, Israel pulled back but continued to hold the Golan Heights, which it still occupies. Drew Middleton, *Cease-Fire in Syria Accepted; Israelis Hold Border Heights; Soviet Union Breaks Ties to Israel*, N.Y. TIMES, June 11, 1967, at A1.

162. MARTIN, *supra* note 71, at 261-65.

163. See *supra* note 135 and accompanying text.

164. J.R. GAINSBOROUGH, *THE ARAB ISRAELI CONFLICT: A POLITICO-LEGAL ANALYSIS* 149 (1986) (stating that Israel's retention of the Occupied Territories exceeded the limits of proportionality); *id.* at 158 ("[W]hen one considers the total geographic area of Arab lands still occupied by Israel since 1967 it seems that the area occupied far exceeds Israel's present security needs.").

165. Quincy Wright, *The Palestine Conflict in International Law*, in MAJOR MIDDLE EASTERN PROBLEMS IN INTERNATIONAL LAW 13, 27 (Majid Khadduri ed., 1972); Wright, *supra* note 154, at 270.

166. John Norton Moore, *The Arab-Israeli Conflict and the Obligation to Pursue Peaceful Settlement of International Disputes*, 19 KAN. L. REV. 403, 425 (1971).

167. Stephen Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344, 345-46 (1970).

Along this same line, one commentator said that Israel might lawfully retain the territories pending a peace agreement between itself and the Arab states.¹⁶⁸

The danger of these justifications is illustrated by Israel's occupation; a state that has taken territory defensively will always argue that there remains a danger of a repeat attack. After Israel took the Gaza Strip, the West Bank, and the Golan Heights, the armies of Jordan, Egypt, and Syria were in no condition to attack Israel. They were left with virtually no air power. Israel enjoyed such a commanding position militarily that its defensive right evaporated, and it was obligated to withdraw.¹⁶⁹

Other commentators have argued that Israel might permanently and lawfully retain these territories on the theory that Jordan and Egypt did not hold lawful title to the Gaza Strip and the West Bank. Without an original sovereign to whom the territories could revert,¹⁷⁰ it is argued that Israel had a better claim to title than anyone else by taking the territories defensively.¹⁷¹ One commentator stated that: "Where the prior holder of territory had 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."¹⁷²

However, uncertainty over sovereignty provides no ground to retain territory taken in hostilities. Even if Jordan only held the West Bank on a *de facto* basis, Israel could not acquire title if it were acting in self-defense.¹⁷³ To determine title to the territory, one must follow the accepted indicia of sovereignty.

D. Israel's Reasons for the Occupation

Despite President Herzog's statement that "[w]e sought no war,"¹⁷⁴ Israel had long coveted the Gaza Strip and West Bank, both part of Palestine.¹⁷⁵ The founders of Israel aimed to turn the whole of Palestine into a Jewish state and, therefore, sought ways to acquire the West Bank and Gaza Strip.¹⁷⁶ In late 1948 and early 1949, the Israeli

168. Akehurst, *supra* note 68, at 242.

169. Hargrove, *supra* note 87, at 367.

170. JULIUS STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS 52 (1981); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279, 294 (1968); Schwebel, *supra* note 167, at 346.

171. STONE, *supra* note 170, at 52; Blum, *supra* note 170, at 294.

172. Schwebel, *supra* note 167, at 346.

173. Antonio Cassese, *Legal Considerations on the International Status of Jerusalem*, 3 PALESTINE Y.B. INT'L L. 13, 24 (1986).

174. Statement of President Chaim Herzog, *supra* note 81, at 868.

175. QUIGLEY, *supra* note 67, at 87-89; Editorial, *Troubled Truce*, ECONOMIST, Aug. 21, 1948, at 289, 289-90.

176. LIVIA ROKACH, ISRAEL'S SACRED TERRORISM: A STUDY BASED ON MOSHE SHARETT'S PERSONAL DIARY AND OTHER DOCUMENTS 18 (1980) (entry in diary of Prime Minister Moshe

government planned to attack these territories, but backed off under pressure from Britain and the United States.¹⁷⁷ Again, in 1955, Prime Minister David Ben Gurion proposed the invasion and permanent occupation of the Gaza Strip. However, the Israeli cabinet refused to permit the invasion due to concern over the probable worldwide negative reaction.¹⁷⁸ In 1956, Israel did invade Egypt and occupied the Gaza Strip but withdrew a few months later under international pressure. Israel's army nonetheless continued to make contingency plans to invade Egypt, Syria, and Jordan.¹⁷⁹

Apparently, Israel's reason for attacking Egypt in 1967 was to take the segments of Palestine that had eluded it in 1948.¹⁸⁰ Israel spurned efforts by King Hussein of Jordan to negotiate a cease-fire until after it had captured the West Bank.¹⁸¹ Mordecai Bentov, a cabinet minister who attended the June 4 meeting and voted to invade Egypt, stated that "[t]his entire story about the danger of extermination was invented of whole cloth and exaggerated after the fact to justify the annexation of new Arab territories."¹⁸² General Ezer Weizman, chief of the General Staff Branch in 1967, said the war was "a direct continuation" of the 1948 hostilities, by which he meant that it was a war for territory.¹⁸³ The tension that had built up gave Israel an opportunity to attack under circumstances that it could publicly depict as threatening to its existence.¹⁸⁴

Since Israel had no right to attack Egypt in 1967, Jordan's use of force against Israel was a lawful and defensive action in support of Egypt. Therefore, Israel's counterattack against Jordan and its occupation of the West Bank was part of its illegal aggression against Egypt.

Israeli President Herzog characterized Israel's occupation of the Golan Heights as a defensive reaction to Syria's participation in Egypt's aggressive acts.¹⁸⁵ However, Egypt did not commit aggression against

Sharett).

177. TOM SEGEV, 1949: THE FIRST ISRAELIS 3 (1986). [1948] 5 FOREIGN RELATIONS OF THE UNITED STATES 1704 (message from acting secretary of state to U.S. representative (McDonald) in Israel, indicating that U.S. would block U.N. membership for Israel if it took the Gaza Strip); *id.* at 1705 (Britain to notify U.S. that Israeli failure to withdraw would trigger 1936 Anglo-Egyptian mutual defense treaty).

178. ROKACH, *supra* note 176, at 50.

179. KIMCHE & BAWLY, *supra* note 67, at 179; Hotz, *supra* note 87, at 254-55.

180. Wright, *supra* note 107, at 80.

181. NEFF, *supra* note 70, at 228 (Hussein efforts for cease-fire June 6); *id.* at 238 (Hussein still seeking cease-fire June 7).

182. Kapeliouk, *supra* note 92, at 4 (quoting Bentov).

183. Ezer Weizman, *Without Complications: A Formula to Minimize the Chances for a New War*, HA'ARETZ, Mar. 29, 1972, at 9, excerpted in JOHN K. COOLEY, GREEN MARCH, BLACK SEPTEMBER: THE STORY OF THE PALESTINIAN ARABS 162 (1973).

184. STEPHENS, *supra* note 69, at 491.

185. Statement of President Chaim Herzog, *supra* note 81, at 185 (stating that Egypt organized an "international Arab army" in which Herzog presumably meant to include Syria).

Israel, and Syria did not attack Israel prior to Israel's invasion of the Golan Heights.¹⁸⁶ Even if Syria had attacked following Israel's invasion of Egypt, the action would be similar in character to the Jordanian action and, thus, part of the collective self-defense of Egypt. It follows that Israel's invasion of Syria was also an act of aggression.

After the 1967 war, Prime Minister Eshkol said Israel would keep what he called "the new areas."¹⁸⁷ "Be under no illusion," Eshkol said, "that the State of Israel is prepared to return to the situation that reigned up to a week ago The position that existed until now shall never again return."¹⁸⁸ Eshkol ordered Israel's cartographers to delete the lines separating Israel from the Occupied Territories on new maps.¹⁸⁹ Foreign Minister Eban told the U.N. General Assembly that "the suggestion that everything goes back to where it was before 5 June is totally unacceptable."¹⁹⁰ Itzhak Shamir, who became prime minister of Israel in 1983, said that the 1967 war "put the stamp of permanency on the state's borders."¹⁹¹ Within three months of the war, Israel began settling its citizens in the West Bank.¹⁹² Its settlement agency declared, "no political victory, no proclamation, can convert these territories into Jewish territories if they are not settled by Jews."¹⁹³

The Israeli government was particularly clear in its intent not to return East Jerusalem, which it captured from Jordan as part of the West Bank. The Knesset passed a statute that applied Israeli law and administration to East Jerusalem, effectively annexing it.¹⁹⁴ Later it declared the entire city to be Israel's capital.¹⁹⁵ In 1981 the Knesset passed a similar law regarding Syria's Golan Heights, declaring the application of Israeli law and administration over the area and effectively annexing it.¹⁹⁶ Without asserting any historical claim to the Heights,

186. See *supra* notes 160-61 and accompanying text.

187. BAILEY, *supra* note 69, at 129.

188. *Eshkol Offers Arabs Peace with Us as We Are*, JERUSALEM POST, June 13, 1967, at 2; Sydney Gruson, *Eshkol Rejects Return of Israel to Old Frontiers*, N.Y. TIMES, June 13, 1967, at A1.

189. Misha Louvish, *The Spectre of the Green Line*, JERUSALEM POST (int'l ed.), Oct. 25, 1986, at 15.

190. U.N. GAOR, 22nd Sess., 5th Emerg. Spec. Sess., plen. mtgs. at 15, U.N. Doc. A/PV. 1526 (1967) (statement of Mr. Eban, Israel).

191. Joel Greenberg, *Shamir: Our Rule as Long as Jordan's*, JERUSALEM POST (int'l ed.), June 14, 1986, at 3 (quoting Shamir).

192. Hedrick Smith, *U.S. Chides Israelis on Settler Program*, N.Y. TIMES, Sept. 27, 1967, at A1.

193. Statement of the Zionist Executive, in *Reports Submitted to the Twenty-Seventh Zionist Congress in Jerusalem for the Period April, 1964 - December, 1967*, 53 (1968), cited in ABDEEN M. JABARA, ON BEHALF OF THE COMMITTEE TO CHALLENGE THE ABUSE OF THE CHARITABLE CONTRIBUTION EXEMPTION AND DEDUCTION, in *General Tax Reform: Public Hearings Before the House Committee on Ways and Means*, 93d Cong., 1st Sess. 1758, 1773 (1973).

194. Law and Administration Ordinance (Amendment No. 11), 21 LAWS OF THE STATE OF ISRAEL 75 (1967).

195. Basic Law: Jerusalem, Capital of Israel, 34 LAWS OF THE STATE OF ISRAEL 209 (1980).

196. Golan Heights Law, 36 LAWS OF THE STATE OF ISRAEL 7 (1981).

Israel's government said it would not return them because of their geo-strategic importance.¹⁹⁷ As for the West Bank, Prime Minister Shamir declared in 1991 that the "green line," meaning the eastern border of Israel, "does not exist."¹⁹⁸ His Health Minister, Ehud Olmert, said, "we believe our boundaries are at the Jordan River," which would include the West Bank.¹⁹⁹

III. THE IRAQI ACTION AS A PRECEDENT

In Resolution 242, the U.N. Security Council noted that "the inadmissibility of the acquisition of territory by war" required the "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict."²⁰⁰ In this Resolution, the Security Council also called for the "[t]ermination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force."²⁰¹ The Security Council appeared to be calling for an overall peace settlement between Israel and its Arab neighbors.

However, the Security Council left it unclear whether Israel was obliged to withdraw only after settlement with its neighbors or whether it was required to withdraw independently of such a settlement.²⁰² In 1980, the Security Council resolved that the forcible taking of territory was unacceptable and "reaffirm[ed] the overriding necessity to end the prolonged occupation of Arab Territories occupied by Israel since 1967, including Jerusalem."²⁰³ The Security Council viewed Israel's obligation to withdraw independently of other outstanding issues in the region.²⁰⁴

The U.N. General Assembly, refusing to take a position in 1967 on the initiation of the hostilities, has repeatedly and clearly called for an unconditional Israeli withdrawal. For example, a 1983 General Assembly resolution stated "that the acquisition of territory by force is inadmissible under the Charter of the United Nations," and that "Israel must

197. Terry Atlas, *U.S. Puts Stance in Writing for Syrians*, CHI. TRIB., Sept. 19, 1991, at A3.

198. Glenn Frankel, *Two Nations, One Land; Decades of Distrust Split Arabs, Israelis*, WASH. POST, Jan. 21, 1992, at A1; Daniel Williams, *Shamir Ok's Plan to Integrate Israel and West Bank*, L.A. TIMES, Sept. 25, 1991, at A1.

199. Williams, *supra* note 198, at A1.

200. S.C. Res. 242, *supra* note 2.

201. *Id.*

202. The Latin American states tried to formulate the resolution to require Israel to withdraw unconditionally and independently of an overall Arab-Israeli settlement. The United States, however, blocked the move by the Latin American states. BAILEY, *supra* note 69, at 112-13; NEFF, *supra* note 70, at 345.

203. S.C. Res. 476, *supra* note 2.

204. *Id.*

withdraw unconditionally from all the Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem."²⁰⁵ The U.N. has also condemned Israel's annexation of East Jerusalem²⁰⁶ and its legislation designating Jerusalem as Israel's capital city.²⁰⁷ It has also declared Israel's legislation annexing the Golan Heights invalid.²⁰⁸ Perhaps the sternest resolution adopted by the U.N. regarding Israel's occupation is a General Assembly call for an end to economic and military aid to Israel because such aid helps Israel maintain the occupation.²⁰⁹

As illustrated by the U.N. action against Iraq, the U.N. Charter contemplates stronger action than verbal calls for withdrawal when territory is taken by force. Article 39 of the U.N. Charter states: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."²¹⁰

These provisions of Chapter VII of the U.N. Charter reflect the heart of the dream that inspired the creation of the U.N. The Security Council

205. G.A. Res. 123(F), U.N. GAOR, 37th Sess., at 39, ¶8, U.N. Doc. A/37/51 (1983).

206. S.C. Res. 267, U.N. SCOR at 3, U.N. Doc. S/INF/24/Rev.1 (1969); S.C. Res. 252, U.N. SCOR, 23d Sess. at 9, U.N. Doc. S/INF/23/Rev.1 (1968); G.A. Res. 2253, U.N. GAOR, 5th Emerg. Spec. Sess., Supp. No. 1, at 4, U.N. Doc. A/6798 (1967).

207. S.C. Res. 478, U.N. SCOR, 35th Sess. at 14, U.N. Doc. S/INF/36 (1981); G.A. Res. 35/169(E), U.N. GAOR, at 28, U.N. Doc. A/35/48 (1981).

208. S.C. Res. 497, U.N. SCOR, 36th Sess. at 6, U.N. Doc. S/INF/37 (1982) (the Council "decides that the Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is null and void and without international legal effect.").

209. G.A. Res. 180(D), U.N. GAOR, 38th Sess., Supp. No. 47, at 52, U.N. Doc. A/38/47 (1984); G.A. Res. 226, U.N. GAOR, 36th Sess., Supp. No. 51, at 48, U.N. Doc. A/36/51 (1982).

210. U.N. CHARTER art. 39. If a negotiated settlement cannot be achieved, Article 41 requires that the Security Council impose economic sanctions:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the U.N. to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Id. art. 41.

If these measures are insufficient to thwart the aggression, the U.N. Charter requires the Security Council to take military action under Article 42, which provides:

Should the Security Council decide that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the U.N.

Id. art. 42.

is charged to stop armed conflict wherever it might occur. While Articles 41 and 42 use the permissive "may," it was contemplated that the Council had an obligation to exercise its powers in the face of state aggression.²¹¹ The Charter gave the Security Council "primary responsibility for the maintenance of international peace and security . . ." ²¹² Article 39 imposes an absolute obligation on the Security Council, stating that it "shall" make a determination, where the peace has been broken and it "shall" take action under Article 41, and Article 42 if necessary, to restore the peace.²¹³

In the case of Iraq's invasion of Kuwait, the Security Council immediately made a finding of aggression and called on the parties to negotiate their differences in the hope that this might lead to an Iraqi withdrawal.²¹⁴ However, when Israel attacked its Arab neighbors, the Security Council made no such finding of aggression and waited five months to call on the parties to negotiate their differences.²¹⁵ The Security Council has moved beyond the call to negotiate by demanding that Israel withdraw,²¹⁶ but it has not yet moved to economic or military sanctions to ensure Israeli compliance with this demand.²¹⁷

In 1967, Israel's initial claim that Egypt attacked first gained sufficient world-wide acceptance that the Security Council, ignorant of the facts involving the Israeli attack, did not condemn Israel for its aggression. Furthermore, after Prime Minister Eshkol acknowledged that Israel struck first,²¹⁸ Israel was still able to maintain sufficient acceptance of the anticipatory self-defense claim to preclude a finding of aggression. Even though Israel committed aggression,²¹⁹ the Security Council has not returned to the issue. From 1967 to the present, the Council has not taken the Article 41 or Article 42 action that the Charter requires of it in the face of an act of aggression.

The Security Council's inaction relating to the Israeli occupations has given Israel time to establish itself in the Occupied Territories in a way that has made it increasingly difficult for the Security Council to secure an Israeli withdrawal. Israel installed over two hundred thousand of its civilians as residents of the Occupied Territories.²²⁰ It took direct

211. LELAND GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 293 (3d ed. 1969) (discussing Article 39); *id.* at 314 (discussing Article 42).

212. U.N. CHARTER art. 24(1).

213. U.N. CHARTER art. 39.

214. S.C. Res. 660, *supra* note 5.

215. S.C. Res. 242, *supra* note 2.

216. S.C. Res. 476, *supra* note 2; S.C. Res. 242, *supra* note 2.

217. The U.N. must be careful to follow Charter procedures in any action it takes. See Burns Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516 (1991).

218. See *supra* notes 79-80 and accompanying text.

219. See *supra* notes 91-95 and accompanying text.

220. See GEOFFREY ARONSON, CREATING FACTS: ISRAEL, PALESTINIANS AND THE WEST BANK

control over half of the land area and bars the local Arab inhabitants from its use.²²¹ It drained a substantial amount of the water supply from under the West Bank for use inside Israel.²²² It dynamited or sealed thousands of Arab homes as punishment for supporting the Palestinian uprising in the Occupied Territories.²²³ Further, by tightly controlling the commercial activities in these areas, Israel drove large numbers of young Arabs to emigrate in search of employment.²²⁴ Finally, by ruling through military edict, Israel deprives the inhabitants of a role in their own governance.²²⁵

A. Action by the General Assembly

Avoiding potential United States vetoes in the Security Council,²²⁶ the General Assembly took a number of steps to promote Israel's withdrawal from the Occupied Territories. In 1974, the General Assembly invited the Palestine Liberation Organization to participate in its work as an observer.²²⁷ The Assembly established three agencies to deal with the issue. In 1968 it set up the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, which reported on the treatment of the Arab populations in the Gaza Strip and West Bank.²²⁸ In 1975, it established the Committee on the Exercise of the Inalienable Rights of the Palestinian People, to seek a political solution.²²⁹ In 1977, the Assembly created an office within the U.N. Secretariat to assist the latter Committee — the Special Unit on Palestinian Rights,²³⁰ which was upgraded in 1979 to the status of a division of the Secretariat.²³¹ In 1983, the General Assembly called for an international conference at which Israel's withdrawal from the Occupied Territories would be negotiated.²³² However, Israel refused to participate, and the United

(1987); TREATMENT OF PALESTINIANS IN ISRAELI-OCCUPIED WEST BANK AND GAZA: REPORT OF THE NATIONAL LAWYERS GUILD 1977 MIDDLE EAST DELEGATION, *passim* (1978) [hereinafter REPORT OF THE NATIONAL LAWYERS GUILD]; Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L L. J. 129 (1991).

221. REPORT OF THE NATIONAL LAWYERS GUILD, *supra* note 220, *passim*.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *See infra* notes 242-45 and accompanying text.

227. G.A. Res. 3237, U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1975).

228. G.A. Res. 2443, U.N. GAOR, 23d Sess., Supp. No. 18, at 50, U.N. Doc. A/7218 (1969).

229. G.A. Res. 3376, U.N. GAOR, 30th Sess., Supp. No. 34, at 3, U.N. Doc. A/10034 (1976).

230. G.A. Res. 40(B), U.N. GAOR, 32d Sess., Supp. No. 45, at 25, U.N. Doc. A/32/45 (1978).

231. G.A. Res. 65D, U.N. GAOR, 34th Sess., Supp. No. 46, at 20, U.N. Doc. A/34/46 (1980).

232. G.A. Res. 58C, U.N. GAOR, 38th Sess., at 47, U.N. Doc. A/38/47 (1984); *United States and Israel Against Proposed Mideast Conference*, Reuters, Sept. 19, 1984, available in LEXIS, Nexis

States opposed such a conference.²³³ The considerable efforts of the General Assembly, therefore, have had little success in wresting Occupied Territories from Israel.

B. United States Influence

The United States reacted differently to Israel's 1967 invasion than it did to Iraq's 1990 invasion. In the case of the Iraqi invasion, President Bush called firmly for the protection of the sovereignty of Kuwait.²³⁴ Bush further warned that "we must keep all our options open to ensure that Iraq's unlawful occupation of Kuwait is ended and Kuwait's legitimate government is restored."²³⁵

In 1967, the United States administration took quite a different approach toward Israel. While Abba Eban told the Security Council that Israel had been invaded by Egypt, the United States delegate sat silent, even though the United States' administration was well aware that Israel had initiated military action.²³⁶ President Johnson was intimately involved in seeking a compromise between Egypt and Israel and followed the situation closely.²³⁷ Similarly, when Israel changed its version of the events of 1967 and sought to mitigate its responsibility with claims of self-defense, the United States did not challenge that analysis, even though the administration knew Israel's claims to be false.²³⁸

During the few days that fighting continued, the Johnson administration voted for the Security Council's call for a cease-fire,²³⁹ and pressured Israel to withdraw its troops from Syria.²⁴⁰ However, once Israel consolidated its hold on the Sinai Peninsula, the Gaza Strip, the West Bank, and the Golan Heights, the United States linked an Israeli withdrawal with an overall Arab-Israeli peace settlement.²⁴¹

The Soviet Union, on the contrary, sought an immediate Israeli withdrawal without consideration of other issues. The approach taken by the United States, which sought an overall settlement before withdrawal, would have required lengthy negotiations. This led Soviet

Library, Majpap. File.

233. *United States and Israel Against Proposed Mideast Conference*, *supra* note 232.

234. President Bush, meeting with the Amir of Kuwait, said, "Kuwait, free Kuwait, will endure." 26 WEEKLY COMP. PRES. DOC. 14376 (Sept. 28, 1990).

235. *Id.* at 14377.

236. JOHNSON, *supra* note 78, at 296.

237. *Id.*

238. *See supra* note 78 and accompanying text.

239. S.C. Res. 233, U.N. SCOR, 22d Sess. at 2, U.N. Doc. S/INF/22/Rev.2 (1968); S.C. Res. 234, U.N. SCOR, 22d Sess. at 3, U.N. Doc. S/INF/22/Rev.2 (1968); S.C. Res. 235, U.N. SCOR, 22d Sess. at 3, U.N. Doc. S/INF/22/Rev.2 (1968).

240. JOHNSON, *supra* note 78, at 296.

241. KIMCHE & BAWLY, *supra* note 67, at 271.

prime minister Alexei Kosygin to accuse the United States of helping Israel protect the fruits of its aggression by delay.²⁴² In calling for an Israeli withdrawal, Kosygin spoke in a fashion not unlike that of President Bush following Iraq's occupation of Kuwait:

[t]here are many regions in the world where there are likely to be those eager to seize foreign territories, where the principles of territorial integrity and respect for the sovereignty of States are far from being honoured. If Israel's claims are not rejected today, then tomorrow new aggressors, large or small, may attempt to overrun the lands of other peaceful countries.²⁴³

Kosygin claimed that "[t]erritorial conquests, if they were recognized by various states, would lead only to new and perhaps even larger conflicts and peace and security in the Middle East would remain illusory."²⁴⁴ Kosygin tabled a Soviet draft resolution that, in terms similar to those of the Security Council resolutions on Iraq, condemned Israel's action as aggression and demanded both withdrawal and reparation for damage caused by Israel.²⁴⁵

The United States opposed the Soviet draft resolution, maintaining its position that Israel should be asked to withdraw only in the context of an overall Middle East peace settlement.²⁴⁶ The United States explained its pro-linkage position on the grounds that achievement of an overall settlement would be the only way to guarantee long-term peace in the Middle East.²⁴⁷ In contrast, when the argument was made in 1990 that long-term peace could be assured only by resolving outstanding differences between Kuwait and Iraq, the United States insisted that Iraqi withdrawal was the only issue.²⁴⁸

In 1991, after military action was taken against Iraq, the United States initiated a process for Palestinian-Israeli negotiations to address the question of Israel's occupation of the Gaza Strip and the West Bank.²⁴⁹ If that process succeeds in securing an Israeli withdrawal, the Security Council will be relieved of its obligation to secure a withdrawal. It will,

242. U.N. GAOR, 5th Emerg. Spec. Sess., *supra* note 190, at 5 (statement of Prime Minister Kosygin, former Soviet Union); BAILEY, *supra* note 69, at 110.

243. U.N. GAOR, 5th Emerg. Spec. Sess., *supra* note 190, at 5, (statement of Prime Minister Kosygin, former Soviet Union).

244. *Id.*

245. *Id.* at 6.

246. U.N. GAOR, 5th Emerg. Spec. Sess., 1527th plen. mtg. at 4, U.N. Doc. A/PV.1527 (1967) (statement of Amb. Goldberg, U.S.A.).

247. *Id.* (statement of Amb. Goldberg of the United States, that a reversion to pre-June lines would leave many underlying problems unresolved).

248. See *supra* notes 13-15 and accompanying text.

249. Thomas L. Friedman, *Arabs & Israelis Invited to Begin Peace Talks, Oct. 30 with Bush & Gorbachev*, N.Y. TIMES, Oct. 19, 1991, at A1.

of course, have been remiss for over two decades in carrying out its duties under Chapter VII, and that failure has caused untold hardship and loss of life and property.

However, if the United States-sponsored peace process does not secure an Israeli withdrawal from the Occupied Territories, the Security Council will remain obligated by Article 39 to move to economic sanctions first, and then, if necessary, to military sanctions under Article 42.²⁵⁰ International pressure is essential to secure an end to Israel's occupation.²⁵¹ Israel is a small country heavily dependent on foreign commerce for raw materials and foreign markets for its products and, therefore, is an ideal target for economic sanctions. That being the case, the likelihood of a need to move to Article 42 military sanctions is remote. Effective international economic sanctions against Israel should suffice to convince Israel to abandon the West Bank, the Gaza Strip, and the Golan Heights.

It was argued by one commentator, albeit prior to the U.N. action against Iraq, that economic or military sanctions against Israel were not feasible because they would not gain the necessary support from the United States or Europe.²⁵² To be sure, strong support from the United States and Europe would be essential, but to argue that these states, as a matter of practical politics,²⁵³ are not likely to participate is not an argument against the appropriateness of economic sanctions. Moreover, whatever the posture may have been prior to the U.N. action against Iraq, the use of sanctions in that situation puts pressure on states to do the same in other comparable situations.

When it initiated a peace process in 1991, the United States recognized the Security Council's role regarding the Occupied Territories.

250. See *supra* notes 210-12.

251. MALLISON & MALLISON, *supra* note 2, at 420 ("[T]here will be no solution of the Palestine problem until effective sanctions are applied to the Government of Israel."); Falk & Weston, *supra* note 220, at 157 ("[T]he moral clarity of the legal situation suggests the appropriateness of mobilizing as much international pressure as possible to end the circumstance of unlawful occupation and to encourage the proper fulfillment of Palestinian claims of self-determination.").

252. Christopher C. Joyner, *Book Review Essay*, 55 GEO. WASH. L. REV. 689, 708-09 (1987) (reviewing W. THOMAS MALLISON & SALLY V. MALLISON, *THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* (1986)).

253. It is increasingly difficult to argue that practically speaking the United States is unlikely to support economic sanctions. The United States administration has recently questioned Israeli actions in the Arab Territories. The Bush administration has sought to add a condition to its loan guarantees on behalf of Israel that such loans not be used in the construction of Jewish settlements in the Occupied Territories. See John M. Goshko, *U.S. Details Loan Plan for Israel; Offer Called 'Very Fair and Balanced'*, WASH. POST, Mar. 19, 1992, at A23 (reporting that the Bush administration unconditionally offered Israel \$300 million in loan guarantees, but would not approve a further \$10 billion request unless Israel agreed to freeze the building of Jewish settlements in the Occupied Territories).

In a letter of assurances that it sent to the Palestinian delegation, the United States Department of State wrote:

With regard to the role of the United Nations, the UN Secretary General will send a representative to the conference as an observer. The co-sponsors (the United States and the Soviet Union) will keep the Secretary General apprised of the progress of the negotiations. Agreements reached between the parties will be registered with the UN Secretariat and reported to the Security Council, and the parties will seek the Council's endorsement of such agreements. Since it is in the interest of all parties for this process to succeed, while this process is actively ongoing, the United States will not support a competing or parallel process in the United Nations Security Council.²⁵⁴

By suggesting that the parties seek the endorsement of the Security Council, the State Department acknowledged the Security Council's responsibility to settle the dispute. By stating that it would not support action in the Security Council while the peace process was on going, it further recognized that the Security Council does have the power to take measures aimed at securing an Israeli withdrawal. The thrust of the paragraph was that the United States wanted to forestall attempts by the Security Council to take an approach that was different from that to which the parties themselves might agree.²⁵⁵ Furthermore, the State Department's posture on this point was consistent with U.N. Charter Article 39, which requires attempts at negotiation between the parties as the first step in resolving a breach of the peace.²⁵⁶

This contrasts strongly, however, with the United States' posture following Iraq's invasion of Kuwait. Despite the Security Council's call for negotiation in its initial resolution,²⁵⁷ the United States ignored the possibility of negotiation between the parties, immediately moving to unilateral economic sanctions against Iraq.²⁵⁸

The Security Council could take as a starting point Resolution 242, which calls on Israel to withdraw from the Arab Territories as part of a package that includes ending the state of belligerency with neighboring Arab states.²⁵⁹ Such a package deal is politically feasible, as Arab states

254. United States Department of State, Letter of Assurances 2 (Oct. 18, 1991) (on file with author). See also Ghassan Bishara, *U.S. Letters of Assurance Were Very Difficult to Write*, AL-FAJR, Dec. 2, 1991, at 4 (reporting on the content of United States letters of assurance to the Palestine Liberation Organization, assuring the PLO that while the United States would "work for serious negotiations," the United States "took a stand against the U.N. dealing with the process while the American-Soviet sponsored conference continues").

255. Letter of Assurances, *supra* note 254, at 2.

256. See *supra* note 57 and accompanying text.

257. S.C. Res. 660, *supra* note 5.

258. U.S. State Department, Regular Briefing, Fed. Info. Systems Corp., Aug. 14, 1990, available in LEXIS, Nexis Library, Omni file.

259. See *supra* notes 200-04

appear willing to conclude peace agreements with Israel in the context of Israel's withdrawal from the Arab Territories.²⁶⁰

The major obstacle to international action aimed at an Israeli withdrawal is the United States, which, since 1967, has stood in the way of stronger action. If a draft resolution were proposed in the Security Council to invoke Article 41 economic sanctions against Israel, the United States, as a permanent member of the Security Council, would have the power to cast a veto to defeat the measure.²⁶¹ If that occurred, the General Assembly could act on the matter, on the basis of its power to "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions . . . setting forth the purposes and principles of the United Nations."²⁶² Refraining from the use of force against other states is a "principle" of the U.N.²⁶³

The General Assembly could act, more specifically, under the Uniting for Peace Resolution, adopted during the Korean war.²⁶⁴ That resolution authorizes the Assembly to recommend economic or military action when the Security Council fails to address a breach of the peace "because of lack of unanimity of the permanent members."²⁶⁵ Any action that the General Assembly might take under the Uniting for Peace Resolution would be non binding, since the Assembly has no power to require member states to follow its recommendations.²⁶⁶ However, concerted action by the world community to isolate Israel economically would constitute community pressure that would be difficult for Israel to ignore.

There is precedent for invoking the Uniting for Peace Resolution to deal with this dispute. In June 1967, after the Security Council failed to move beyond calls for a cease-fire, the former Soviet Union asked the Secretary-General to convene a special session to take action to secure Israel's withdrawal from the territories it had just seized.²⁶⁷ Of all the U.N. member states, only the United States, Israel, and Botswana

260. Anthony Goodman, *Mubarak Tells U.N. Time Ripe for Palestinian-Israeli Dialogue*, Reuters, Sept. 29, 1988, available in LEXIS, Nexis Library, Archiv File.

261. U.N. CHARTER art. 27, para. 3.

262. *Id.* art. 14.

263. *Id.* art. 2, para. 4.

264. *Uniting for Peace Resolution*, G.A. Res. 377A, U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950).

265. U.N. CHARTER art. 1.

266. *Id.* arts. 11, 13-14.

267. U.N. GAOR, 5th Emerg. Spec. Sess., Annex 1, Agenda Item 5 at 2, U.N. Doc. A/6717 (1967) (letter dated 13 June, 1967 from the representative of the former Soviet Union to the Secretary-General, requesting special session "to consider the question of liquidating the consequences of Israel's aggression against the Arab States and the immediate withdrawal of Israeli troops behind the armistice lines").

opposed the Soviet request for a special session.²⁶⁸ Again, as in the Security Council, the United States delegate sat silent. The General Assembly, after two weeks of debate, failed to take any significant action aimed at an Israeli withdrawal, perhaps in large part because most members did not view Israel as the aggressor.²⁶⁹ If a request for a meeting under the Uniting for Peace Resolution were to be made today, it would be difficult to maintain that the Security Council was dealing with the matter since the occupation has continued since 1967 without any solution.

IV. CONCLUSION

Both Israel and Iraq made legal arguments to justify their military actions in 1967 and 1990, respectively. Iraq at first asserted a claim only to small parcels of territory near its border, claims for which it had a legal basis. After seeing the reaction of the United States, Iraq broadened its claim to one of sovereignty over the whole of Kuwait. While Israel harbored a sovereignty claim to the Gaza Strip and the West Bank, it did not assert a sovereignty claim over these territories at the time of its invasion. Had Israel asserted its sovereignty over the Arab territories as its justification for the attack, it would have gained little support from the international community.²⁷⁰

However, Israel was successful in convincing the world of its self-defense claim. Even after Israel acknowledged that it had lied about Egypt attacking first, Israel still maintained general acceptance for its anticipatory self-defense claim.

From a sovereignty standpoint, Iraq has a stronger claim to the border area and the two islands than Israel does to the West Bank or to the Gaza Strip. Yet the U.N. challenged Iraq much more swiftly than it did Israel. The rapid action against Iraq reflected a double standard at the U.N.²⁷¹

The role of the United States in the two situations is the key. Regarding Israel, the United States stands against any stronger action by the world body to wrest the Arab Territories from Israel's control. The

268. 1967 U.N.Y.B. 191, U.N. Sales No. E.68.I.1.

269. NEFF, *supra* note 70, at 301-10.

270. In 1956, after it occupied the Gaza Strip, Israel asserted its intent to take over the Gaza Strip. Evoking a negative international response. Israel withdrew within a few months following United States threats to withdraw economic aid. *Aide-mémoire on the Israel Position on the Sharm el-Sheikh Area and the Gaza Strip*, 11 U.N. GAOR at 5, U.N. Doc. A/3511 (1957); *Report by the Secretary-General in Pursuance of the Resolution of the General Assembly of 19 January 1957 (A/RES/453)*, part 2, para. 5(a), U.N. Doc. A/3512 (1957); DONALD NEFF, WARRIORS AT SUEZ 431-35 (1981); *Aide-mémoire to Ambassador Abba Eban by Secretary John Foster Dulles*, Feb. 11, 1957, 36 DEP'T ST. BULL. 392 (1957); Benny Morris, *Creeping Withdrawal*, JERUSALEM POST (int'l ed.), Dec. 10, 1988, at 9.

271. *Provisional Verbatim Record*, *supra* note 17.

United States is an ally of Israel and its sole provider of financial aid. Aware that Israel's action was aggressive, the United States participated in the aggression by covering up for Israel in the Security Council.

However, given the action taken against Iraq, there is no principled reason for the U.N to continue the go-slow approach to Israel's occupation of Arab Territories. If the U.N. is to maintain credibility as a body committed to international peace, it cannot sit idly by while Israel's unlawful occupations continue.