Better than a Thousand Hollow Words Is One Word that Brings Peace: Enforcing Article 49(6) of the Fourth Geneva Convention Against Israeli Settlements in the Occupied Palestinian Territory

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Bianca Watts*

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I. INTRODUCTION

On September 7, 2009, Israeli Defense Minister Ehud Barak announced that
his office approved the construction of 455 new housing units in the West Bank.1
President Barack Obama responded by "insist[ing] Israel freeze all settlement
activity as a necessary step toward advancing negotiations with Palestinians."2
However, a halt on constructing the new Jewish housing units was unlikely to
occur, and the 2,500 housing units that were already in various stages of
construction continued despite the United States' objections.3

Unfortunately, this exchange involving Israel introducing construction plans
for new settlements, and the United States' disapproval, is not a new
phenomenon.4 Yet, this type of exchange is usually all that results: Israel
disregards the United States' wishes, continues to violate numerous bodies of
international law through continued settlement in the Occupied Palestinian
Territories ("OPT"), and suffers no legal consequences.

The illegality of Israeli settlement in the OPT is explained in the Fourth
Geneva Convention ("Geneva IV" or "Convention"), which is the principal
international treaty governing the law of belligerent occupation.5 Article 49,
paragraph 6 of the Geneva IV ("Article 49(6)") provides that "[t]he Occupying

2. Id. (emphasis added).
4. See Obama, Netanyahu Discuss U.S.-Israeli Disagreements, CNN (May 18, 2009, 8:00 PM),
5. Ardi Imseis, On the Fourth Geneva Convention and the Occupied Palestinian Territory, 44 HARV.
Power shall not deport or transfer parts of its own civilian population into the territory it occupies." High Contracting Parties ("HCPs") are obligated to both respect and ensure respect for the Convention in all circumstances under Article 1 of the Convention. Today, 194 states are party to the Convention, including the United States and Israel, and none have fulfilled their obligation under Article 1. In fact, the United States consistently uses its veto power in the United Nations ("U.N.") Security Council to block proposals to intervene and enforce the Geneva IV against Israel.

This Comment analyzes the legal obligations of "third states," particularly the United States under the Obama administration, to enforce Article 49(6) against Israel. Part II will provide a brief overview of circumstances surrounding the promulgation of Article 49(6) and Israeli settlement in the OPT. Part III will discuss treatment of the settlements in the OPT by Israel and the international community. Part IV briefly recognizes the international community's prior attempts to encourage, and condemn the lack of, Israel’s compliance with the Geneva IV, despite Israel's continued violations. Part V discusses the enforcement mechanisms available to the United States, as well as the various mechanisms available for enforcement within and outside the Convention. In addition, this section will offer recommendations of the most effective means of enforcement for the United States.

II. A BRIEF HISTORY OF THE GENEVA IV AND THE BEGINNINGS OF THE SETTLEMENT ENTERPRISE

A. Circumstances Surrounding the Creation of the Geneva IV

The decimation of civilian populations in occupied Europe during World War II led to the promulgation of the Geneva Conventions. Territories occupied by Nazi Germany saw the massacre of millions of Jews in slave labor camps as
well as mass deportations.\textsuperscript{12} Japanese and Russian occupation also resulted in gross human rights violations, though narrower in scope and scale than territories occupied by the Nazis.\textsuperscript{13} Millions of civilians were left without protection and remained at the mercy of the enemy power, and hundreds of thousands were put to death.\textsuperscript{14}

One of the primary aims of Geneva IV is "to ensure that claims of military exigency do not result in the violations of basic political and human rights of the civilians under military occupation."\textsuperscript{15} Similarly, Article 49 was intended to prevent a common practice occurring during World War II: occupying powers transferring portions of their own population into occupied territories for political and racial reasons, or to colonize the territories.\textsuperscript{16} These transfers "worsened the economic situation of the native population and endangered their separate existence as a race."\textsuperscript{17}

B. Israel's Acquisition of the OPT

The end of the Six Day War of 1967 brought Israel in control of the OPT.\textsuperscript{18} Israel captured the Golan Heights from Syria, Sinai, and the Gaza Strip from Egypt, and all of Jerusalem and the West Bank from Jordan.\textsuperscript{19} Shortly after the Six Day War, Israel began constructing settlements in the West Bank and Gaza Strip.\textsuperscript{20} From 1967 to 2009, Israel established 121 settlements in the West Bank, excluding East Jerusalem.\textsuperscript{21} As of 2007, the settlement population throughout the OPT was nearly 500,000.\textsuperscript{22} As of 2009, there are more than 300,000 Jewish settlers living in the West Bank settlements alone.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{12} Imseis, \textit{supra} note 5, at 66.
\item \textsuperscript{13} \textit{Id.} at 106.
\item \textsuperscript{14} ICRC, \textit{supra} note 11, at 5.
\item \textsuperscript{15} Imseis, \textit{supra} note 5, at 103.
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} ICRC, \textit{supra} note 11, at 334.
\item \textsuperscript{19} \textit{Id.}
\end{itemize}
The settler population in the occupied territories grew at a rate of 4.9%, a much faster growth rate than the general population, which grew by only 1.8%. Palestinians in the OPT also experienced settler violence. Since 1967, the Israeli military has provided weapons to settlers who receive “tacit consent” from Israeli authorities to terrorize Palestinians in the OPT. Settlers perpetrating violence in the OPT are rarely, if ever, punished by authorities.

III. TREATMENT OF SETTLEMENTS

A. By Israel

Israel first inquired about the legality of settling in the OPT, specifically the West Bank and the Golan Heights, in the fall of 1967. On September 18, 1967, Israeli Foreign Ministry Officials received a top-secret memo that settlement in the West Bank and Golan Heights would violate Article 49(6). Israeli officials were advised that the prohibition of settlements under Article 49(6) was categorical, unconditional, and aimed at preventing colonization of a conquered territory by the conquering state. This memo confirmed that Israeli officials knew that building settlements in the OPT violated international law prior to beginning settlement construction. Yet, despite the memo’s unequivocal warning that settlements violated the Geneva IV, Israel forged ahead with plans that resulted in the settlement enterprise we see today.

A key substantive principle of the international law of belligerent occupation, which finds influence in the Geneva IV, is that belligerent occupation is temporary. This principle is based on the fact that prolonged occupations negatively impact the occupied community. The risks of stagnation, impoverishment, and the “backwardness” of the occupied community all follow prolonged occupations. Scholars argue that “the longer an occupation continues, the more difficult it is to ensure effective compliance with the Geneva IV.”

25. Imseis, supra note 5, at 106.
26. Id.
27. Id.
28. GORENBERG, supra note 20, at 99-100.
29. Theodor Meron, Legal Council of Israel’s Foreign Ministry, advised the Prime Minister’s Political Secretary that “civilian settlement in the administered territories contravenes the explicit provisions of the Fourth Geneva Convention.” Id. at 99-100.
30. Id.
31. Id.
32. Imseis, supra note 5, at 91.
33. Id.
B. By the International Community

Since 1967, Israel continuously denies the applicability of Article 49(6) to the OPT. Close to the entirety of the international community disagrees. The discussion below lays out some of the responses from the international community to Israeli settlement in the OPT.

1. U.N. General Assembly

"The United Nations has issued scores of resolutions affirming the applicability of Geneva IV to the OPT and calling upon Israel to abide by its legal obligations as an Occupying Power." For instance, in Resolution 3240, the General Assembly criticized Israel's "continued and persistent" violation of the Geneva IV through the establishment of new settlements and expansion of existing settlements in the OPT. The General Assembly also demanded that Israel cease its settlement activity.

A/HRC/4/17 (Jan. 29, 2007) [hereinafter Dugard Report] (by John Dugard) (noting that Israeli occupation of the OPT has contributed to ninety percent of Palestinians populations in specific occupied territories living below the poverty line, devastating impacts on the economy and employment rates, and an inability of Palestinians to afford basic staples, like meats, vegetables, and fruits).

Imseis, supra note 5, at 92.

See id. at 92 (for a discussion of the various legal arguments Israel presents for why the Geneva IV does not apply to the OPT).

Id. at 97 ("The whole of the international community—except Israel—is of the opinion that the West Bank, including East Jerusalem, and the Gaza Strip are incontrovertibly subject to the provisions of the Geneva IV.").

G.A. Res. 3240(XXIX), ¶ 5(a), U.N. Doc. A/RES/3525 (Nov. 29, 1974). According to this Resolution, Israel committed nine violations:

(a) The annexation of parts of the occupied territories;
(b) The establishment of Israeli settlements therein and the transfer of an alien population thereto;
(c) The destruction and demolition of Arab houses, villages and towns;
(d) The confiscation and expropriation of Arab property in the occupied territories and all other transactions for the acquisition of land involving the Israeli authorities, institutions or nationals on the one hand, and the inhabitants or institutions of the occupied territories on the other;
(e) The evacuation, deportation, expulsion, displacement and transfer of Arab inhabitants of the occupied territories, and the denial of their right to return;
(f) Mass arrests, administrative detention and ill-treatment of the Arab population;
(g) The pillaging of archaeological and cultural property;
(h) The interference with religious freedom and practices, as well as family rights and customs; [and]
(i) The illegal exploitation of the natural wealth, resources and population of the occupied territories.

Id.
2. U.N. Security Council

Security Council Resolution 465 also confirmed the applicability of the Geneva IV to the OPT. In this resolution, the Council stated that all measures taken by Israel since 1967 to change the physical and demographic composition of the OPT had no legal validity. It further noted that Israel's policy of settling its population and new immigrants in the OPT constituted a "flagrant violation" of the Geneva IV, and asked that no state provide any assistance to Israel in connection with the settlements in the OPT.

This resolution is particularly significant because it marks the first Security Council resolution where the United States joined in criticizing Israel. But just two days later, the United States declared that it had intended to abstain, and that its vote in favor of Resolution 465 was the result of a miscommunication. The United States has assisted, and continues to assist, Israel in connection with the settlements by providing economic and military aid.

3. Third States

In 1978, the U.S. State Department's legal advisor wrote a letter concerning the legality of Israeli settlements in the OPT. The letter stated:

On the basis of the available information, the civilian settlements in the territories occupied by Israel do not appear to be consistent with [the] limits on Israel's authority as belligerent occupant in that they do not seem intended to be of limited duration or established to provide orderly government of the territories and, though some may serve incidental security purposes, they do not appear to be required to meet military needs during the occupation . . . . While Israel may undertake, in the

41. S.C. Res. 465, ¶ 5, U.N. Doc. S/RES/465 (Mar. 1, 1980). The Security Council is the organ responsible for maintaining international peace and security. It determines the existence of threats to international peace and security, and recommends what action should be taken in response to those threats. One of its key powers is that it can take military action against an aggressor state should it determine that that state proposes a threat to international peace and security. See generally U.N. Charter chs. V, VII (for a detailed discussion of the functions and powers of the Security Council).
43. Id.
44. Id.
46. Id. at 112.
occupied territories, actions necessary to meet its military needs and to provide for orderly government during the occupation, for the reasons indicated above the establishment of the civilian settlements in those territories is inconsistent with international law.49

Additionally, the President of the European Union ("E.U.") also warned Israel that "settlement building anywhere in the occupied Palestinians Territories, including East Jerusalem, is illegal under international law," as Article 49(6) explains. British officials noted that settlements "challenge the heart of . . . a Palestinian state."50

Despite this consensus that continued settlement in the OPT violates the Geneva IV, the international community consistently condemns Israeli settlement,51 while failing to take affirmative action to ensure that Israel respects the provisions of the Convention. Discussions among the international community regarding enforcement end in no viable plan of action.52 In the alternative, the United States, Israel's most powerful ally, uses its U.N. Security Council veto power to block any proposals to intervene and enforce the Convention against Israel.53

IV. PRIOR ATTEMPTS BY THE INTERNATIONAL COMMUNITY TO ENCOURAGE ISRAEL'S COMPLIANCE WITH THE GENEVA IV

For over four decades, Israel has consistently violated "nearly every provision of the Geneva IV" in its role as the occupying power of the OPT.54

49. Id.
52. Imseis, supra note 5, at 68.
53. Id. at 137.
54. ICRC, supra note 11.
55. Imseis, supra note 5, at 68; Geneva IV, supra note 6 (some of Israel's most egregious violations include:

(1) torture of Palestinians in the OPT in violation of Article 32: "The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents."

(2) deportation of Palestinians and annexation of Palestinian territories in violation of Article 49: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of
Because of the length of time over which these violations have occurred and the scope of the violations, the international community has "little reason to believe that [Israel’s] consistent violation[s] . . . [have] been the result of anything other than a premeditated and deliberate policy course, . . . protected externally by [Israel’s] special relationship with the United States."  

A. Efforts of the U.N. General Assembly

In 1974, the U.N. General Assembly passed Resolution 3240. Like many of its prior resolutions, the General Assembly noted Israel’s continued violation of the Geneva IV in the OPT and demanded that Israel cease annexation of East Jerusalem and colonization of the OPT. In the end, Israel ignored this demand, just as it ignored many other resolutions regarding settlement in the OPT.

B. States Party to the Geneva IV

In 1999, the United Nations held an international meeting ("Conference") on enforcing the Geneva IV in the OPT, including Jerusalem. The Conference was attended by 122 participants, including 114 states that are HCPs to the Convention. The United States and Israel declined to take part in the
Several individuals, including lawyers and human rights activists, pressed the attendees to formulate and implement a cohesive plan to effectuate Israel's compliance with the Convention. One representative recommended three levels of enforcement taken directly from Article 1 of Geneva IV: monitoring; demanding that the occupying power respect the Convention; and, finally, affirmative action on measures whereby enforcement would occur. However, the representative failed to clearly define these levels of enforcement, and did not give specific details as to how and why they failed. It was noted that the General Assembly already passed a series of resolutions demanding Israeli respect for the Convention. However, since Israel ignored these demands, this third level of enforcement was necessary.

The primary means of enforcement suggested at the Conference was withdrawal of economic cooperation with Israel. States that are parties to economic treaties with Israel have a legal right to condition the treaties upon Israel's compliance with international law. Trade agreements, thus, could be amended to state that Israel may not lawfully export goods that originate from settlements.

In reality, these recommendations were the only tangible, concrete enforcement measures proposed by the Conference participants. While other participants affirmed the applicability of the Geneva IV to Israeli settlements in the OPT, they failed to suggest specific measures the parties could take to enforce the Convention. Sadly, the Conference ended with no common plan, no specific course of action, and no real impact on the settlement issue.
C. The Wall Advisory Opinion

In the summer of 2002, the Israeli government unveiled its plans to erect a physical barrier ("wall") to separate Israel and the West Bank. The idea to construct the wall arose in response to the dramatic increase in Palestinian suicide-bombings in Israel since the start of the al-Aqsa intifada in 2000.

Although Israel defended the barrier as a temporary "security-fence" within its rights to self-defense from Palestinian terrorist attacks, this position was questioned and ultimately flat-out rejected by the General Assembly. One of the reasons for the barrier's international controversy was that it ran inside "the Green Line" and, consequently, would result in the annexation of occupied Palestinian land. The wall would also effectively cut off Palestinians from their farmlands, workplaces, schools, health clinics, and other social services. After Israel failed to heed the General Assembly's demand that it cease construction of the barrier, the General Assembly proposed the following question to the International Court of Justice ("ICJ"):

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Geneva IV of 1949, and relevant Security Council and General Assembly resolutions?


73. Whether the separation barrier is characterized as a "wall" or a "barrier" is politically influenced. For example, the British Broadcasting Corporation (BBC) notes on its website that its Board of Governors recommended that BBC journalists use "barrier" to avoid any political connotations that might detract from impartial reporting. Israel characterizes the barrier as a "security fence" while Palestinians refer to it as an "apartheid wall." Throughout this comment, I will refer to the barrier as a "wall" in line with the International Court of Justice's (hereinafter ICJ) characterization of the barrier in the Wall Opinion. See Israel and the Palestinians: Key terms, BBC NEWS (Nov. 23, 2009, 11:16 AM), http://news.bbc.co.uk/newswatch/ukfs/h/ newsid_8370000/newsid_8374000/8374013.stm.


76. Id. The “Green Line” refers to the official boundary separating Israel and the West Bank when the West Bank was part of Jordan before the Six Day War.

77. Bekker, supra note 75.

78. Dugard Report, supra note 34, ¶ 28-29.


80. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, HAGUE JUST. PORTAL (July 9, 2004), http://www.haguejusticeportal.net/eCache/DEF/0/378.html.

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The majority of the ICJ rejected Israel's contention that the wall was built legally as a defense barrier. The Court ruled that construction of the wall in the OPT and its associated regime of settlements, land confiscation, permit systems, and movement restrictions were in violation of international law, including the Geneva IV. The significance of the Wall Advisory Opinion was its unanimity on the issue of the illegality of Israeli settlements in the OPT. The opinion further demanded that Israel dismantle the wall, terminate its continued violations of the Geneva IV and other international law, and pay reparations for damage caused by the wall's construction. The General Assembly promptly adopted a resolution acknowledging the advisory opinion and demanded that Israel comply with the obligations laid out for it by the Court.

Of course, Israel's response to the Wall Advisory Opinion was unfavorable, calling it one-sided and claiming it was based solely on political considerations. However, the Israeli Attorney General warned that although the advisory opinion is not binding under international law, "the decision creates a political reality for Israel on the international level [which] may result in sanctions." But sanctions never came. Construction of the wall continued and, since then, no efforts have been made to enforce the obligations outlined in the ICJ opinion or the Geneva IV.

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82. Id.
83. Dugard Report, supra note 34, ¶ 33.
85. The resolution passed by an overwhelming majority with 150 votes in favor, six against, and ten abstentions. The United States and Israel were among the states voting against the resolution. Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory, U.N. Doc. A/RES/ES-10/15 (July 20, 2004).
87. ICJ advisory opinions are just that, advisory; they have no binding effect. The U.N. agency requesting the opinion is free to effectuate it or to ignore it. How the Court Works, INT'L CT. OF JUST., http://www.icj-cij.org/court/index.php?p1=1&p2=6#advisory (last visited July 13, 2011).
90. Lein, supra note 72.
V. Enforcement Mechanisms Available to the United States

A. Duty of the United States Under Article 1 of the Geneva IV

As noted above, HCPs of Geneva IV have a duty to respect and ensure respect for the Convention pursuant to Article 1.91 As the Commentary to the Geneva IV notes, use of the words "and to ensure respect for" was deliberate and "intended to emphasize the responsibility of the Contracting Parties."92 The 1999 U.N. international meeting on enforcing the Convention in the OPT articulated the duty of third states to enforce the Convention.93 The majority in the Wall Advisory Opinion also emphasized that third states are under an obligation to ensure that Israel comply with the Geneva IV.94 With a general consensus among the international community regarding the duty to enforce the Convention against Israel,95 and an argument that the United States is in the best position to do so, the pressing question remaining is how to enforce Article 49(6).

B. Mechanisms of Enforcement Available to the United States

There are a number of enforcement mechanisms available to the United States. Various articles in the Convention itself provide tools for third states to enforce the provisions of Geneva IV against other HCPs.96 As Israel's most powerful ally, the United States is in the best position diplomatically and financially to require Israeli compliance with Article 49(6). Further, the United States might seek enforcement through the various organs of the United Nations.97 This section, however, will address the enforcement mechanisms available that reflect Liberalism and Realism both within and outside of the Convention. In particular, the section below will discuss the critical role of the United States in clearly articulating the international norms Israel is obligated to follow.

1. The Role of the Theory of Liberalism in Enforcing Article 49(6)

Liberal international relations ("liberalism") theorists argue that the domestic structure of a nation determines whether it will obey international law.98 Compliance with international law depends heavily on whether the nation can be

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92. ICRC Treaty, supra note 8, at 16.
94. Wall Advisory Opinion, supra note 10, ¶ 159.
95. Id.
96. See Geneva IV, supra note 6, at art. 9.
97. See generally U.N. Charter.
characterized as “liberal” in identity. \(^9^9\) Liberal nations have some form of representative government, guarantees of civil and political rights, and a judicial system dedicated to the rule of law. \(^1^0^0\) Liberals propose that “democracies don’t fight one another” and thus, liberal democracies are more likely to “do law” with one another rather than handle disputes through the use of force. \(^1^0^1\) Liberalism stresses that “liberal states will rely . . . on adjudication to resolve disputes, both intergovernmental and transnational.” \(^1^0^2\)

Rather than viewing states as unitary actors, liberals see states as plural actors, the primary actors being groups and individuals acting in a domestic and transnational civil society. \(^1^0^3\) Interdependence among liberal states permits primary actors to exert different pressures on national governments. \(^1^0^4\) Thus, the hesitation to use force against other liberal states is even stronger among liberal democracies that share a high level of transnational social and economic relations. \(^1^0^5\) Under a liberal view, the social, economic, and political interdependence of the United States and Israel, along with the sense of common identity among the two states, make it likely that disagreements between the states would be resolved through legal arenas, either domestic or transnational. \(^1^0^6\)

\(a. \) Dissemination of the Geneva IV Under Article 144

Article 144 governs the dissemination of the Geneva IV. \(^1^0^7\) It provides that the HCPs agree to disseminate the text of the Convention as widely as possible in their countries in times of peace as well as war. \(^1^0^8\) In this way, Article 144 reflects an accord with liberalism by looking at the domestic activities of the HCPs and obliging each of them to educate their populations on international laws. Article 144 also emphasizes that the text of the Geneva IV should be studied by military personnel and civilians so that the rules of the Convention “become known to the entire population.” \(^1^0^9\)

However, Article 144 also stresses that it is “particularly necessary” that the HCPs ensure that “any civilian, military, police or other authorities,” who in time of war assume responsibilities with respect to “protected persons,” have a

99. Id.
103. Slaughter, supra note 100, at 508.
104. Id.
105. Id. at 512.
106. See generally Slaughter, supra note 100.
108. ICRC TREATY, supra note 8, at 581.
thorough knowledge of the Geneva Conventions.\textsuperscript{110} Geneva IV defines “protected persons” as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”\textsuperscript{111} Palestinians in the OPT fit the definition of “protected persons” as envisioned in Geneva IV and should be entitled to protection from the HCPs.\textsuperscript{112}

The duty under Article 144 includes the duty to ensure that any person responsible for “protected persons” both possess and be specially instructed on the text of the Convention.\textsuperscript{113} The purpose of Article 144 is instructive:

> In signing the first Article of the Convention, the Powers undertook to respect and ensure respect for it in all circumstances. Now if legal provisions are to be properly applied, a thorough knowledge of them is necessary... The Convention must be known by those who will have to apply it, who may have to render an account of their shortcomings before the courts and who, in some cases, are likely to become beneficiaries.\textsuperscript{114}

The Commentary to Article 144 states that the text of the Convention “\textit{must} also be widely disseminated among the [general] population so that its [laws] are known to all those who may benefit from it.”\textsuperscript{115} Article 144’s direct reference to Article 1 makes it clear that Israel, as a HCP and the Occupying Power of the OPT, has a duty to educate its military personnel, civilian authorities, nationals, and Palestinians on the text of the Convention.\textsuperscript{116} However, Article 144 may also implicate a duty on behalf of third states to ensure that Israel fulfill its duty to educate all persons located in the OPT, particularly its military personnel, on the laws of the Convention.\textsuperscript{117}

Israeli soldiers and commanders are instructed on international law while attending the Israel Defense Forces (“IDF”) Military School.\textsuperscript{118} According to the Former Commander of the IDF Military School, Lieutenant Colonel Amos

\begin{itemize}
  \item[110.] ICRC TREATY, supra note 8, at 581
  \item[111.] Geneva IV, supra note 6, at art. 4, ¶ 1.
  \item[112.] \textit{See id.}
  \item[113.] \textit{Id. at art. 144(2); ICRC TREATY, supra note 8, at 580.}
  \item[114.] ICRC TREATY, supra note 8, at 580-81.
  \item[115.] \textit{Id.}
  \item[116.] Geneva IV, supra note 6, at 144.
  \item[117.] Article 144’s Commentary notes that the HCPs agree to disseminate the text of the Convention as widely as possible in \textit{their respective countries}. The Commentary does not expressly state that HCPs possess a duty to ensure that \textit{other} HCPs uphold the duty of dissemination under Article 144. But because the Commentary to Article 144 ties dissemination into the HCPs’ duty to respect and ensure respect for the Convention by educating their populations on the text, a fair inference can be made that Article 1 creates a duty to ensure that other HCPs disseminate in their own countries, particularly during times of war. See ICRC TREATY, supra note 8, at 580-81.
\end{itemize}
Guiora, IDF soldiers regularly received lectures about international law and the law of war while under his command.\textsuperscript{119} Guiora acknowledged Article 144's dissemination requirement and noted that the IDF had developed a code of conduct that reflected a combination of international law, Israeli law, and the IDF's traditional ethics code, ruach tzaal ("the spirit of the IDF").\textsuperscript{120} Reserve and regular IDF units are taught eleven rules of conduct, including the need to accord dignity and respect to Palestinian populations and those who are arrested.\textsuperscript{121}

Thus, it is evident that Israel has attempted to fulfill its dissemination obligations under Article 144. However, the effectiveness of the dissemination is hardly clear. For one, the Israeli government denies that Article 49(6) applies to the OPT,\textsuperscript{122} so its military and civilian personnel training on international law is incomplete because they are not taught the full text of the Geneva Conventions.\textsuperscript{123} In addition, IDF soldiers in particular are given instruction on the ground that is wholly at odds with the soldiers' obligations under international law and the IDF's rules of conduct.\textsuperscript{124} Dissemination of the Geneva IV cannot serve its high purpose if soldiers are taught to respect only parts of international law; if military personnel are trained to accord dignity and respect to Palestinians in Military School but given license to shoot first and ask questions later on the ground;\textsuperscript{125} and if the Israeli government itself refuses to acknowledge the applicability of the entirety of Geneva IV to the OPT, including Article 49(6).\textsuperscript{126}

The Obama Administration can play a critical role in increasing effectiveness of dissemination in Israel and the OPT through articulating the international legal

\textsuperscript{119} Id.


\textsuperscript{121} The Rules of Conduct are as follows: Military action can only be taken against military targets; the use of force must be proportional; soldiers may only use weaponry they were issued by the IDF; anyone who surrenders cannot be attacked; only those who are properly trained can interrogate prisoners; soldiers must accord dignity and respect to the Palestinian population and those arrested; soldiers must give appropriate medical care, when conditions allow, to oneself and one's enemy; pillaging is absolutely and totally illegal; soldiers must show proper respect for religious and cultural sites and artifacts; soldiers must protect international aid workers, including their property and vehicles; soldiers must report all violations of this code. Guiora, supra note 120.

\textsuperscript{122} See Imseis, supra note 5, at 93 (discussing the various legal arguments Israel presents for why the Geneva IV does not apply to the OPT).

\textsuperscript{123} Id.

\textsuperscript{124} Rep. of the U.N. Fact Finding Mission on the Gaza Conflict, ¶ 801, 803, U.N. Doc. A/HRC/12/48; 12th Sess. Agenda Item 7 (Sept. 15, 2009) [hereinafter Goldstone Report]. In the Report of the United Nations Fact Finding Mission on the Gaza Conflict, Justice Richard Goldstone described two "policies" conveyed by IDF soldiers with regards to protecting unarmed civilians as follows: "if we see something suspect and shoot, better to hit an innocent than hesitate to target an enemy." The second "policy" articulated by IDF soldiers was the setting of "red lines." Red lines are an outpost procedure, which was allegedly applied in areas held by the Israeli armed forces after the Gaza ground invasion. "It means that whoever crosses this limit is shot, no questions asked . . . Shoot to kill." Id.

\textsuperscript{125} Id.

\textsuperscript{126} See Imseis, supra note 5, at 93.
norms regarding settlement. The United States cannot tout that its role in the
Israeli-Palestinian conflict is that of a "mediator," while at the same time using
its "tremendous international influence" and Security Council veto to block any
efforts to "impose terms (or some form of censure)" on Israel for failing to fulfill
its obligations under international law. The United States must make a
concerted effort to clearly articulate the applicability of existing norms,
particularly Article 49(6), to Israeli settlement in the OPT.

The only way Israel will accept and fulfill its obligations under Geneva IV is
if the international community, led by the United States, clearly articulates and
accepts legal rules governing Israeli settlements in the OPT. Once the
applicability of 49(6) is acknowledged by the United States—as it is already
acknowledged by the international community in general—the legitimacy of
Geneva IV will be bolstered by elevating it to its intended status of a mandatory
determinative body of international law.

However, President Obama has refused to explicitly state that Israeli
settlements in the OPT are illegal. Instead, he uses variations of the following
phrase: "the United States does not accept the legitimacy of continued Israeli
settlements." By calling Israeli settlements illegitimate rather than illegal,
Obama not only downplays settlement as "merely as violating previous
agreements"—he also implicitly grants validity to Israel’s ongoing argument
that Article 49(6) does not apply to the OPT. In fact, the last four U.S.
presidential administrations have abandoned characterizing Israeli settlement as
illegal, while the European Union and most of the rest of the international
community has consistently characterized it as such.

If the United States simply acknowledged, as the rest of the world seemingly
has, that the Article is indeed applicable to the OPT and that settlement is
illegal, any ambiguity about the applicability of 49(6) to the OPT would be
removed. As a result, the Israeli government would be more likely to concede to

127. Clearly, calling the United States a "mediator" mischaracterizes its role in the Israeli-Palestinian
conflict, and its ability to pressure Israeli compliance with Article 49(6): "[It] is our intimacy with the Israelis
that gives America—and only America—the capacity to be an honest and effective broker [in the resolution of
the Israeli-Palestinian conflict]." See Omar M. Dajani, Shadow or Shade? The Roles of International Law
128. See id. at 115-16, n.286.
129. See id. at 118.
130. See id.
131. See Imseis, supra note 5, at 97.
132. See Dajani, supra note 127, at 118.
133. Flynt Leverett & Hilary Mann Leverett, A Road Map to Nowhere: Obama’s Refusal to Dub Israeli
Settlements Illegal is Undermining Any Hope of Middle East Peace, FOREIGN POL’Y (July 1, 2009),
134. Id.
135. Id.
136. Id.
137. See Imseis, supra note 5, at 97.
Article 49(6)'s applicability, especially in light of the "unshakable bond" between the two nations. Articulating clear norms is crucial to serving as a check on the conduct of state actors, by defining the parameters of legal actions and warning how other states would react to particular illegal courses of action. President Obama's characterization of settlements in the OPT as illegal and in violation of Article 49(6) would remove the last remaining shield Israel has in denying 49(6)'s applicability to the OPT.

Clear norms also provide an avenue for non-governmental organizations ("NGOs") and other domestic actors in both Israel and the OPT to press for compliance through the legal arena. Because liberalism emphasizes the importance of domestic actors on the behavior of state governments, a clear statement by the Obama administration that Israeli settlements are illegal in violation of Article 49(6) could provide "political cover" to Palestinians in the OPT. The United States has shown its willingness to "push back" when it comes to Palestinian non-compliance with U.S. demands. For example, at the Camp David summit in 2000, President Clinton warned Yasser Arafat that failure to offer further concessions in the peace negotiations was dangerous: "You won't have a state, and relations between America and the Palestinians will be over. Congress will vote to stop the aid you've been allocated, and you'll be treated as a terrorist organization."

As a result of perceived pro-Israel bias in the facilitation of agreements between the parties, Palestinians naturally fear that their interests are not considered legitimate or taken seriously by the United States. Clear expression by the United States of the illegality of settlements under Article 49(6) could bolster both parties' perceptions of the rule's function, as well as undermine claims that the United States is biased in favor of Israel.
b. Dugard’s Suggestion for a Second ICJ Opinion on the Illegality of Settlements

An additional avenue available to the Obama administration comes from the Dugard Report.147 The Dugard Report suggested that the General Assembly request a further advisory opinion on the legal consequences for Palestinians, Israel, and third states of prolonged occupation.148 The ICJ’s 2004 Wall Advisory Opinion, while an effort to clarify the legal standards governing Israeli settlement in the OPT, had little direct influence on the Israeli government because the United States failed to support the ICJ’s conclusions.149

The Dugard Report claimed that “the nature of Israel’s occupation which has given rise to the argument that Israel’s occupation has over the years become tainted with illegality.”150 Dugard recommended that the General Assembly frame the issue to the ICJ as follows:

The Court might be asked to consider the legal consequences of a prolonged occupation that has acquired some of the characteristics of apartheid and colonialism and has violated many of the basic obligations imposed on an occupying Power. Has it ceased to be a lawful regime, particularly in respect of “measures aimed at the ‘occupant’s own interests?’” And, if this is the position, what are the legal consequences for the occupied people, the occupying Power and third States?151

Such an opinion might not only produce legal clarity on the consequences of Israel’s occupation and settlements in the OPT but may also put further pressure on the international community to compel Israel to comply with its obligations as an occupying power.152 However, it is imperative that the United States either lead the efforts in the General Assembly to seek an advisory opinion on this issue, or at the very least, participate in the efforts.153 The request and subsequent opinion are unlikely to have any impact on the settlement issue otherwise.154 Once the Obama administration calls settlements illegal, Israel can no longer argue that Article 49(6) does not apply to the OPT.155

147. Dugard Report, supra note 34.
148. Id. ¶ 57.
149. See Dajani, supra note 127, at 118-19.
150. Dugard Report, supra note 34, ¶ 8.
151. Id.
152. Id.
153. See Dajani, supra note 127, at 115-16.
154. Id.
155. Israel has also argued that even if Article 49(6) applies, transfer of Israeli settlers in the OPT is not illegal under Article 49(6) because it merely “induce[s]” migration and Article 49(6) only prohibits “forcible” transfer. However, the text of Article 49(6) discusses the term “transfer” broadly and does not qualify transfer with any limiting terms, including “forcible transfer.” HUMAN SCI. RESEARCH COUNCIL, OCCUPATION,
Along with removing any remnants of legitimacy from the above arguments, U.S. articulation of the illegality of settlements under Article 49(6) may exert pressure on the Israeli High Court of Justice ("High Court") to entertain suits brought by Palestinians, rather than the High Court continuing its current course in declaring the issue of the legality of settlements as a political, non-justiciable issue. As a result, Palestinians' perception of the United States, Article 49(6), and their ability to use legal avenues to protect their rights may change for the better. Once it is known that the domestic and international courts of law are available and able to hear Palestinians' claims regarding settlement, a resort to violence may be less necessary.

c. Political Costs: The U.N. Security Council and Censure

The United States can also utilize its influence on the Security Council, which can provide another enforcement mechanism. The Security Council has only used the term "censure" in a fairly small number of its resolutions condemning the conduct of particular state parties. Israel was the censured state in at least five of them. The word the Security Council uses to indicate its strongest displeasure is the word "censure." It has been suggested that a prerequisite to censure is failure of the censured state to comply with previous Security Council resolutions on the subject at issue. That prerequisite has clearly been satisfied in the case of Israeli settlements many times over.

Because clear legal rules play an important role in helping to clarify the content and implications of international law, the United States can link censure of Israeli settlements to Israel's continuous violation of Article 49(6) via a Security Council resolution. After the Obama administration expressly characterizes settlements as illegal, Article 49(6) would then be elevated to its
intended statute as customary international law, which the High Court and Israeli
government would be forced to acknowledge. A Security Council resolution for
censure, led or supported by the United States, will apprise Israel of the
seriousness of its conduct and promote serious consideration within the Israeli
government of re-assessing its current and future settlement plans.

\(d\) Economic Costs: Sanctions

Liberals posit that the central determinative factor in a nation’s compliance
with international law is the existence of pressure from their domestic
constituencies. Legal rules exert a pull to compliance because of their
perceived fairness, and can influence bargaining because of the reputational costs
of non-compliance. These costs may hinder future access or threaten current
access to beneficial international regimes. As Professor Omar M. Dajani notes,
third states: “can extend the shadow of international law by taking steps that
impose costs on the parties for non-compliance. As others have observed, such
steps may include withholding or constraining trade privileges, [and] suspending
economic assistance.”

“Many European countries, notably France, Belgium, and the Scandinavian
states, have become increasingly hostile to Israel.” But the United States’
economic, military, and political power puts it in the best position to employ
“coercive power” against Israel in the chance that “reward power” is
ineffective. The United States is also in the best position among possible
authoritative states to pressure Israeli compliance with Article 49(6). Palestinians recognize, as does the rest of the international community, that no
other state has influence over Israel’s activities comparable to that of the United
States, and thus appeals to other nations to impose terms on Israel are unlikely to
be nearly as influential.

165. APARTHEID STUDY, supra note 155, at 91.
166. See Dajani, supra note 127, at 79-81.
167. Id.
168. Id.
169. Id. at 122.
170. Korobkin & Zasloff, supra note 146, at 63.
171. See id. at 56-61; see also Jason C. Nelson, The United Nations and the Employment of Sanctions as
a Tool of International Statecraft: Social Power Theory as a Predicator of Threat Theory Utility, 29 LAW &
PSYCHOL. REV. 105, 130-31 (2005) (noting that “coercive power” is based on one party’s perception that the
other party has the ability to mediate punishments, while “reward power” is based on one party’s understanding
that the other party has the ability to mediate rewards).
172. See Korobkin & Zasloff, supra note 146, at 56-61.
For Obama, an actual threat of sanctions "is far easier in regard to Israel" because of the sheer number of U.S. dollars flowing into Israel from the United States each year. Israel received more U.S. foreign aid than any other country in the world: $2.8 billion in 2002 and $2.5 billion in 2007, which subsidized the Israeli economy and military. The threat of losing $2 billion dollars in U.S. economic and military aid may very well encourage Israel to comply with international law, including Article 49(6).

President Obama could make such a threat, but the threat's credibility would immediately be questioned. As one commentator suggested:

Congress controls the purse strings, and the power of the pro-Israeli political lobby would make it difficult, and perhaps impossible, for the President to follow through if the threat fails to satisfy its objective. To make the threat credible, the President should seek a Congressional resolution at the time [an Israeli-Palestinian] peace proposal is unveiled that makes U.S. aid to Israel contingent on its acceptance of the peace proposal, thus tying Congress' hands.

Dealing with backlash from the Israel lobby for threatening economic sanctions is a legitimate risk that the Obama administration must consider. However, U.S. international legitimacy will continue to be undermined if the pattern of lopsided imposition of costs for non-compliance between Israelis and Palestinians continues. The United States has threatened and carried out economic sanctions on the Palestinian Authority in the form of discontinuation of aid and banking restrictions. Even the European Union and other western states joined in the effort to sanction the Palestinian Authority. Israel has not received a similar threat from the United States, and the United States has not imposed economic sanctions on Israel. Once the illegality of settlements is made clear

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174. See Korobkin & Zasloff, supra note 146, at 60.
175. U.S. Census Bureau, supra note 47.
176. Id.; Korobkin & Zasloff, supra note 146, at 61.
179. Id.
181. See Dajani, supra note 127, at 115.
182. See id.
183. Dugard Report, supra note 34, ¶ 40.
184. Id.
by the United States and it has taken the steps laid out above, attempts to impose
sanctions for Israeli non-compliance would only be fair.186

2. **Realist Enforcement Mechanisms: Pressing for Compliance Through
   Imposition of Economic, Political and Judicial Costs**

Realists contend that states are rational, unitary actors and that state
preferences are fixed and originate externally.187 These state preferences “range
from survival to aggrandizement,” and the “anarchic structure of the international
system,” creates uncertainty such that states “must constantly assume and prepare
for the possibility of war.”188 One commentator notes, “for Realists, power is the
currency of the international system.”189 The threat of enforcement or sanction if
international rules are violated determines the effectiveness of those rules.190

If enforcement is dependent on the acts of individual states, the effectiveness
of international legal rules is a function of “states’ relative power to sanction one
another and their respective interests in doing so.”191 Absent threats of
enforcement, law has no influence.192 Thus, international norms serve only
instrumental purposes and are only likely to be enforced or be enforceable by a
hegemon possessing the resources and influence necessary to impose costs on
violators of the legal rules and an interest in doing so.193

If clear articulation of the illegality of Israeli settlements is ineffective, the
Obama administration will nonetheless have laid the groundwork for taking more
aggressive action to press Israeli compliance with Article 49(6).194 Imposing
conditions on Israel’s receipt of U.S. funds would probably be effective because
the loss of billions of dollars in U.S. aid and trade relations would be devastating
to the Israeli economy.195 The risks associated with a halt in economic relations
with the United States could shake up the Israeli government and force officials
to finally heed U.S. demands and stop settlement in the OPT.

186. See Dugard Report, supra note 34, ¶ 24-40.
187. Slaughter, supra note 100, at 507.
188. Id.
189. Id.
190. Dajani, supra note 127, at 78.
191. See id.
192. See id.
193. Slaughter, supra note 100, at 507.
194. See Dajani, supra note 127, at 122.
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a. Judicial Costs: Internal and External Prosecution of Israeli’s Settlement Administrators

As a last resort, President Obama might consider prosecuting Israel for breaches of Article 49(6) by facilitating criminal prosecution in domestic and international forums of officials accused of war crimes and related offenses. There are a number of avenues within and outside the Geneva IV. The discussion below will outline those avenues, as well as the pros and cons involved in using them.

i. Within the Geneva IV: Domestic Prosecution?

Article 146 obligates all HCPs to implement legislation penalizing grave breaches of the Geneva IV. It imposes a duty to pursue, capture, and try those suspected of grave breaches of the Convention. Although settlement is not expressly listed as one of the acts constituting a grave breach under Article 147, settlement might constitute a grave breach as it may result in the “extensive appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” The commentary to Article 147 notes that HCPs are obligated to search for persons accused of committing grave breaches. As soon as an HCP discovers that a person on its soil has committed a grave breach, the HCP is obligated to ensure the arrest and prosecution of that person “with all speed;” “[n]ationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts.”

While settlement may not be explicitly labeled a grave breach, conduct associated with settlement may very well be. Settlement has been linked to the unlawful and wanton appropriation and destruction of property not justified by military exigency. The Goldstone Report discusses the Israeli conduct during

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196. Dajani, supra note 127, at 122 (citation omitted).
197. Imseis, supra note 5, at 127.
198. Geneva IV, supra note 6, at art. 146.
199. The Convention lists only the following acts as grave breaches: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, [and] taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. Geneva IV, supra note 6, at art. 147.
201. ICRC, supra note 8, at 597.
202. Id. at 593.
203. Id.
204. See Goldstone Report, supra note 124, ¶ 1569-74.
“Operation Case Lead” in Gaza from 2008 to 2009. For example, settlement activity in Jerusalem involved the demolition and appropriation of Palestinian land with intent to “secure a Jewish minority in Jerusalem and push Palestinians outside the city’s borders.” Clearly, intent to create a Jewish majority in Jerusalem cannot constitute any military exigency; thus, as the report notes, the settlement plans are unlawful (under Article 49(6)) and wantonly carried out. Many other examples of expropriation and destruction of Palestinian lands in the OPT are noted in the Goldstone Report and linked to Israeli settlement planning, not military necessity. The Goldstone Report made this legal finding:

Settlements . . . may constitute direct discrimination against Palestinians, besides causing restriction of movement, hindering economic and social development, and access to health, education and social services. In addition, the extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, amount to a “grave breach” of article 147 of the Geneva Convention.

Article 148 discusses the HCPs responsibilities under the Geneva IV. It provides that “[no] HCP shall be allowed to absolve itself or any other HCP of any liability incurred by itself or by another HCP in respect of breaches referred to in [Article 147].” The Goldstone Report notes that while Israeli settlements are not “grave breaches” under Article 147, the conduct associated with settlement does indeed constitute a grave breach. Israel has made it clear that it does not intend to prosecute any of its nationals, including government officials, for the alleged grave breaches of the Geneva IV occurring during Operation Case Lead. However, Israel’s rejection of the report does nothing to diminish the United States’ responsibility to seriously consider the Goldstone Report’s

205. See id.
206. Id. ¶ 1569.
207. Id. ¶ 1579.
208. Id. ¶¶ 1570-73 (noting that in March and April of 2009, 60,000 Palestinians in East Jerusalem were at risk of having their homes demolished by Israeli authorities; the Israel High Court rejected a petition brought by the Association for Civil Rights in Israel and Rabbis for Human Rights on behalf of Palestinian residents of Khirbet Tana, effectively allowing the state to destroy all of the village’s homes; new infrastructure for settlements, including roads, tunnels, and waste dumps are being built to service the planned settlements, requiring confiscation of Palestinians’ land and demolition of houses and businesses. All of these plans are intended to promote Israeli settlement in the OPT, and have nothing at all to do with military necessity.).
209. Id. ¶ 1579.
211. Id.
212. Goldstone Report, supra note 124, ¶ 1579.
findings, and at the very least press Israel to undergo a serious investigation of the Report’s allegations.\(^{214}\)

U.N. Security Council action under Chapter VII\(^{215}\) is an option should Israel fail to acknowledge the illegality of settlements and the consequences of settlement rising to the level of grave breaches of Geneva IV.\(^{216}\) The United States, via the Security Council, could pass a resolution under Chapter VII articulating the illegality of continued settlement in the OPT, and that the settlement and occupation of the OPT has resulted in grave breaches of the Geneva Conventions,\(^{217}\) which constitute a threat to international peace and security.\(^{218}\) The United States could demand that Israel fulfill its obligations under international law by freezing all current and future settlement activity. If Israeli-U.S. relations reach this point, U.S. action through the Security Council would have a strong perception of legitimacy since it would have already clearly articulated the norm and threatened to impose costs for non-compliance. If Israeli officials failed to act in efforts to comply, it would be difficult for Israel to argue that this act was unfair.

\textit{ii. Outside the Geneva IV: Referring Israeli Government Officials to the International Criminal Court}

\textit{a. Settlements and the Customary Norm Against Apartheid}

Without a doubt, prosecution of Israeli officials inside the United States would be politically problematic for the Obama Administration in light of the tremendous power and influence of the Israel Lobby.\(^{219}\) Even if one assumes that the realist approaches recommended in this section are only used after the United States has exhausted all attempts to press for Israeli compliance through liberal means, the Israel Lobby will stand as a formidable barrier for Obama to penetrate.\(^{220}\) The International Criminal Court ("ICC") presents another tool available to the United States to enforce Article 49(6) against Israel on an international, rather than domestic, level.

International organizations have also suggested that Israel’s continued settlement in the OPT has taken on characteristics of apartheid.\(^{221}\) The Human Sciences Research Council ("HSRC") published a study on whether Israeli occupation of the OPT evolved into an illegal regime characterized by apartheid.

\begin{itemize}
  \item \textit{214.} See Geneva IV, \textit{supra} note 6, at art. 147; see Goldstone Report, \textit{supra} note 124.
  \item \textit{215.} U.N. Charter ch. VII.
  \item \textit{216.} See Goldstone Report, \textit{supra} note 124.
  \item \textit{217.} See id. ¶ 1579.
  \item \textit{218.} See U.N. Charter art. 39.
  \item \textit{219.} See MEARSHEIMER & WALT, \textit{supra} note 180.
  \item \textit{220.} Id. at 113-20.
  \item \textit{221.} APARTHEID STUDY, \textit{supra} note 155, at 13.
\end{itemize}
and racial discrimination. The Apartheid Study set out to examine the issue presented by John Dugard in the Dugard Report, namely, the legal consequences for Israel, Palestinians and third states if the prolonged occupation of the OPT has ceased to be a legitimate regime. The International Convention on the Suppression and Prevention of Apartheid ("Apartheid Convention") and the International Convention for the Elimination of All Forms of Racial Discrimination ("ICERD") impose a duty on states parties to make apartheid an international crime which is subject to universal jurisdiction. Similarly, the Rome Statute of the ICC classifies apartheid as a crime against humanity, subject to prosecution by the Court. Further, settlement itself constitutes a "war crime" under the Rome Statute. Both Israel and the United States have ratified the ICERD; however, even if neither state were a party to the ICERD, the prohibition of apartheid is a customary jus cogens norm creating obligations erga omnes.

"To assess whether the State of Israel is practicing apartheid in the occupied Palestinian Territory," the HSRC looked at the definition of apartheid as defined in the Apartheid Convention. The Apartheid Study found that Israel attempted to consolidate the presence of settlers in various parts of the OPT, which is not "simply the pursuit of an improper purpose, it is the pursuit of an illegal purpose [in violation of Article 49(6)], and . . . one pursued knowingly from the start of the settlement process." Further, the Apartheid Study rejects the Israeli argument that discriminatory treatment of the Palestinians is not racially motivated but based purely on citizenship. Under Israeli law, "Palestinian refugees from within the Green Line and living in the OPT would not be..."
prevented from returning to Israel and obtaining Israeli citizenship if they were Jews." Long-term residents are allegedly denied citizenship on the grounds of their race, ethnicity, or descent group.

These findings are just a few of the many included in the Apartheid Study indicating that Israeli occupation in the OPT is no longer legitimate, and occupation and settlement has acquired features of apartheid that must be addressed by Israel and the international community. This study culminated with recommendations that the General Assembly request an advisory opinion on the legal consequences of the prolonged occupation as advised by the Dugard Report, and that third states "not . . . recognize as lawful the illegal situation created by Israel's practices of . . . apartheid in the OPT" and "cooperate with a view to bringing the illegal situation to an end."

Because neither the United States nor Israel ratified the Rome Statute, the United States would have to refer Israeli government officials to the Prosecutor of the ICC via a Chapter VII Security Council resolution pursuant to Article 13(b) of the Rome Statute. Since the United States is probably the only member of the Security Council today who would veto a Security Council referral of Israeli officials to the ICC, having the United States initiate and back the referral should ensure that it reaches the ICC without a veto from any other member of the permanent five. Referral by the United States via the Security Council would provide an incentive to Israel to comply with Article 49(6). Failure to comply would not only risk Israel losing its strongest ally and primary source of international aid, but also expose its government officials to penal sanctions.

Aside from the political backlash stemming from the Israel Lobby, another impediment to the United States seeking enforcement of Article 49(6) against Israel through the ICC is the United States' own self-interest. The ICC's central purpose, to end impunity for those who commit mass atrocities, reflects U.S. values. Yet, the United States is in opposition to the ICC. The primary concern the U.S. Government expressed about the ICC is its jurisdictional

234. Id.
235. Id.
236. See id.
237. Id. at 294.
239. See Rome Statute, supra note 227, at art. 13(b).
240. See id.
241. Id.
243. Id. at 2.
244. Id. at 1-4.
elements. The bulk of the ICC's substantive statutes laying out the elements of particular war crimes were overwhelmingly influenced by the United States.

However, U.S. officials refuse to become a signatory to the ICC until the ICC's jurisdiction is reformed. The U.S. Government feared that states party to the Rome Statute would use the ICC as a means of challenging U.S. foreign policy, or worse, as an avenue for hostile states to target the United States through prosecution of American citizens. As a result, the United States made it clear that it would not become a party to the Rome Statute unless an exemption was made for prosecution of Americans. Naturally, this was not politically feasible since no other state party would have the same exemption made available for its nationals, and otherwise the whole foundation of the ICC would crumble and leave no incentive for any state to become a signatory.

Finally, there is the issue of how to choose which Israeli officials to prosecute. President Obama would need to select Israeli officials that develop and administer Israel's settlement policy in the OPT, and refer those specific individuals to the ICC for prosecution. Thus, while referral to the ICC is a tool available to the United States to enforce Article 49(6) against Israel, it does not seem to offer the best solution, particularly since neither Israel nor the United States is a party to the Rome Statute.

VI. CONCLUSION

After over forty years of occupation and settlement in the OPT, Israel was bound to engage in activity that would produce negative effects on Palestinians and subject the state to overwhelming criticism from its nationals and third states. However, Israeli settlements have gone beyond a mere breach of Article 49(6) by acquiring features of apartheid, and possibly rendering its entire occupation regime illegal. The United States, as Israel's closest and most powerful ally, must change its approach. It cannot continue to shield Israel from both international and domestic calls for the government to comply with its obligation under Article 49(6) to cease settlement in the OPT and yet expect finality to the Israeli-Palestinian conflict.
It is well established that the United States is the key authoritative power in the conflict.\textsuperscript{254} Intergovernmental organizations like the United Nations primarily cite the legal norms with respect to Israel but cannot move beyond this type of citation without the backing of the United States.\textsuperscript{255} Moreover, if the Obama administration cannot even declare settlements illegal,\textsuperscript{256} then it is impossible to conclude that the United States is living up to its legal duty to press Israeli compliance with Article 49(6). The United States faces more criticism today than it has in prior years from international actors for its unwillingness to articulate the legal rules governing Israeli settlements.\textsuperscript{257} U.S. legitimacy is being questioned and undermined and will continue to be if the United States does not act on its duty under Article 1. If liberal approaches are ineffective, realist mechanisms are available to the Obama administration and should be employed, if for no other reason than to protect the United States' position relative to the rest of the world. Israel must be subjected to costs, the same costs imposed on the Palestinian Authority and Hamas, before Israel will act. If the imposition of costs is not led by, or at least joined in by, the United States, then the world may not see an end to the Israeli-Palestinian conflict for another forty years.

\textsuperscript{254} See Dajani, \textit{supra} note 127, at 110-18.
\textsuperscript{255} See \textit{id.} at 122.
\textsuperscript{256} Leverett & Leverett, \textit{supra} note 133.
\textsuperscript{257} See Dajani, \textit{supra} note 127, at 119.