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ARMS EXPORT CONTROL ACT: ISRAELI BREACHES & U.S. INDULGENCE RESULT IN PALESTINIAN & LEBANESE CIVILIAN CASUALTIES

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The Palestine Center
Washington, D.C.
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Introduction

Often regarded as meriting only third-tier status, closed off and difficult to reach, Palestinians in Gaza have nevertheless borne the brunt of Israel's employment of high-tech American weaponry during the second *intifada*. Used by Israel in suspected violation of American law, American weaponry has also harmed civilians in recent years in Lebanon and the West Bank. Cluster munitions, a fearsome killer both in the moment and years later to the unsuspecting child or farmer, have not, however, been used in Gaza or the West Bank but rather in Lebanon a quarter century ago and, more recently, in 2006 (flechettes, however, are an ancestor of cluster munitions and have been used in Gaza).¹

Only rarely does the employment of these weapons cause a murmur of concern on Capitol Hill or at the State Department. Yet, some instances dating back to the 1970s have generated official American response. Notably, such cases usually do not result in consequences for Israel. Indeed, Israel has never been found to be in substantial violation of the Arms Export Control Act (AECA), though several times a determination has been reached that Israel "may" be in violation.

U.S. law is not yet meaningless when it comes to Israel, though it has now been 26 years since the U.S. suspended cluster munitions to Israel. The lack of action since then suggests that Israel is being provided with an increasingly free hand to employ American weaponry at great risk to Palestinian and Lebanese civilians.² This interpretation of events was repeatedly confirmed during the course of this research by the almost total failure on the part of Congressional staffers and State Department employees to speak forthrightly on possible Israeli legal violations and abuses.

Such neglect has critical implications for American law, principles and standing in the region. These are all jeopardized when common sense application of American law is avoided in favor of an expansive interpretation of Israel's "legitimate self-defense"—the key escape clause by which Israel has frequently avoided the AECA being brought to bear. One likely consequence of American indulgence of Israeli actions during the second *intifada* was the Israeli military's brutal resort in Lebanon to cluster munitions. The images of American weaponry employed against Palestinian and Lebanese civilians certainly harms American standing with these two peoples but also damages the U.S. government across the region.

The American public's obliviousness to Israel's misuse of American weaponry became most apparent in the course of developing this article when an acquaintance in Gaza emailed his personal account of an incident early in the second *intifada* that went widely unreported. There is a power in Nasser Hamdan's slightly edited words that Americans too seldom hear. The "flechettes" he refers to are an American-made weapon exported to the Israeli military. BBC News has described them as "finned inch-long darts, thousands of which are packed into tank shells and released at high speed with devastating results."³ Hamdan states:

One day at the beginning of the Al-Aqsa *intifada*, during summer time, I was sitting in our flat in Al-Zahra city, which is not far away from Netzarim settlement in the Gaza Strip. Suddenly at an unexpected moment, there were three huge explosions that shook the building and flashes like thunder and lightning. A few seconds later there was a sound like rain. For me, it was unbelievable to have rain at this time of year. Then, after a few seconds the rain stopped, and I heard the sounds of ambulances from the Zahra clinic and people's screams. I went downstairs to check what happened.

I found that all of this was Israeli shelling. Later, the news reported that flechettes had been used. The rain that I thought I heard was the sound of the arrow-shaped steel nails and pieces of metal that landed everywhere. I saw the evidence in people's hands after they collected the flechettes from the streets and from inside houses. People also talked about nails that hit walls and were embedded there.

If anyone looked at the wall, bunches of nails were readily visible spread throughout the walls of buildings close to the scene of the incident. People talked about nine individuals getting injured. One of those injured was an old woman, Um Ahmad, who was sitting in her ground-floor flat. One of the nails or pieces of metal hit her eye while she was at home. She lost her eye. The shopkeeper, Abu Ala, was hit in both legs along with another man who happened to come to buy something from the shop. The rest of those injured were from the people who had finished their prayers and were on their way home.

Everyone was asking what had happened and why. This was especially the case because Zahra is a quiet city. This was a very dangerous incident that affected all of Zahra for a long time. Even kids stopped playing outside as parents kept them inside instead. In fact, all of the city was thanking God that the incident took place at night after Isha prayer, the last prayer, when there were not too many people in the street.⁴

Israel's use of American weaponry is certainly no secret in the region. Americans, however, frequently do not know the details of how American weaponry is put to use by the Israeli military.

Relevant American law, which in the late 1970s and early 1980s was occasionally still applied, no longer appears to hold sway. The vagaries of "legitimate self-defense" and the interweaving of Israeli and American interests time and again enable Israel, with American complicity, to escape the intent of the law. Deep Israeli-American ties trump professed human rights concerns.

Several case studies of possible AECA violations are readily accessible and are explored below: Israel's initial invasion of Lebanon, the Hezbollah-Israeli fighting of 2006, the resort to flechettes in Gaza, the F-16 bombing incident in Gaza in July 2002 and the Caterpillar bulldozing that resulted in the death of Rachel Corrie in March 2003.

Background on the AECA

American law is clear regarding the "Purposes for Which Military Sales by the United States Are Authorized." The Congressional Research Service asserts that Section 4 of the Arms Export Control Act notes sales can be made to allies "solely for":

- * "internal security"
- * "legitimate self-defense"
- * "enabling the recipient to participate in 'regional or collective arrangements or measures consistent with the Charter of the United Nations'"
- * "enabling the recipient to participate in 'collective measures requested by the United Nations for the purpose of maintaining or restoring international peace and security'"
- * "enabling the foreign military forces 'in less developed countries to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries.'"⁵

Section 3 (c)(1)(A), cited at length, notes penalties for substantial violations and the required reporting process of possible violations:

No credits (including participations in credits) may be issued and no guaranties may be extended for any foreign country under this chapter as hereinafter provided, if such country uses defense articles or defense services furnished under this chapter, or any predecessor Act, in substantial violation (either in terms of quantities or in terms of the gravity of the consequences regardless of the quantities involved) of any agreement entered into pursuant to any such Act (i) by using such articles or services for a purpose not authorized under section 2754 of this title or, if such agreement provides that such articles or services may only be used for purposes more limited than those authorized under section 2754 of this title for a purpose not authorized under such agreement; (ii) by transferring such articles or services to, or permitting any use of such articles or services by, anyone not an officer, employee, or agent of the recipient country without the consent of the President; or (iii) by failing to maintain the security of such articles or services.

(B) No cash sales or deliveries pursuant to previous sales may be made with respect to any foreign country under this chapter as hereinafter provided, if such country uses defense articles or defense services furnished under this chapter, or any predecessor Act, in substantial violation (either in terms of quantity or in terms of the gravity of the consequences regardless of the quantities involved) of any agreement entered into pursuant to any such Act by using such articles or services for a purpose not authorized under section 2754 of this title or, if such agreement provides that such articles or services may only be used for purposes more limited than those authorized under section 2754 of this title, for a purpose not authorized under such agreement.

(2) The President shall report to the Congress promptly upon the receipt of information that a violation described in paragraph (1) of this subsection may have occurred.

(3)(A) A country shall be deemed to be ineligible under subparagraph (A) of paragraph (1) of this subsection, or both subparagraphs (A) and (B) of such paragraph in the case of a violation described in both such paragraphs, if the President so determines and so reports in writing to the Congress, or if the Congress so determines by joint resolution.

(B) Notwithstanding a determination by the President of ineligibility under subparagraph (B) of paragraph (1) of this subsection, cash sales and deliveries pursuant to previous sales may be made if the President certifies in writing to the Congress that a termination thereof would have significant adverse impact on United States security, unless the Congress adopts or has adopted a joint resolution pursuant to subparagraph (A) of this paragraph with respect to such ineligibility.

(4) A country shall remain ineligible in accordance with paragraph (1) of this subsection until such time as -

(A) the President determines that the violation has ceased; and

(B) the country concerned has given assurances satisfactory to the President that such violation will not recur.⁶

Clearly, then, Congress is empowered to act if so interested. The responsibility is not solely that of the executive branch. Political calculation has presumably led some members of Congress to conclude that the risks far outweigh the benefits of actively engaging with possible Israeli wrongdoing. Indeed, one of the lead questioners in a 1982 transcript of Congressional testimony to be examined shortly was Rep. Paul Findley. Months later, he was defeated in his bid to be re-elected in large part because of the efforts of AIPAC (the American Israel Public Affairs Committee) and opponents of his outspoken concerns regarding Israeli policies.

Israeli Misuse of Cluster Munitions in Lebanon

In 1982, the Reagan administration suspended—for six years—the export of cluster munitions to Israel on account of their misuse during Israel's invasion of Lebanon. H.D.S. Greenway, writing in the *Washington Post*, described Israel's combat tactics. "Everything from the new American F-15 fighters, which were employed in combat for the first time anywhere, to the tried and true and highly efficient killer known as the cluster bomb were brought into play."⁷

One prominent journalist now based in Washington, DC recalled Robert Fisk at the time collecting evidence of the Israelis' use of cluster munitions. Indeed, Fisk confirms doing so in *Pity the Nation*. There, in a chapter painfully labeled "The Gravedigger's Diary" is the chilling account of American complicity in Israel's actions that Summer of 1982—actions which resulted in the belated effort of the Reagan administration to distance itself from Israel's use of cluster munitions, much as Thomas Friedman describes the IDF's belated and unconvincing effort to distance itself from the Sabra and Shatila carnage it oversaw just two months later.⁸

Fisk provides descriptions of the plastic bomb casings with the code and date of American manufacture that he and colleagues found in the Palestinian refugee camps of Beirut. He notes that some were labeled "U.S. Navy," that some appeared to be radar-guided and that one cluster bomb in Ouzai identified it as being the product of an American manufacturer. Fisk identifies two types of American cluster munitions in use there and describes his own efforts to reassemble the CBU-58 in his living room since the Israelis were (falsely) claiming that they had not used these weapons in the Palestinian refugee camps. His evidence alarmed Washington because with the use of these munitions came civilian casualties. Additionally, Fisk mentions the "Rockeye" tank cluster bomb, which "contained a number of small, heavy 'bomblets' crudely made in three parts, each about three inches in diameter."

Fisk recounts visiting Barbir hospital and finding children there who had been injured after unknowingly handling bomblets that eventually exploded as they played with them.⁹ Precisely the same thing would befall Lebanese children a generation later following the summer fighting of 2006.

The State Department notified Congress of possible Israeli violations in 1978, 1979 and 1981 when a shipment of F-16s and F-15s was suspended in the wake of Israel's 7 June 1981 attack on Iraq's nuclear facility.¹⁰ At that time, the administration was torn on how to respond and seemingly uncertain of its legal responsibilities as a declassified National Security Council (NSC) Memorandum of 11 June 1981 from NSC staff member Robert M. Kimmitt to National Security Advisor Richard V. Allen makes plain. Also copied on the memo was the seemingly ubiquitous Douglas J. Feith along with Raymond Tanter.¹¹

The memo makes plain that the President would have to cut off "military sales, credits, and deliveries if a country substantially violates any term of the agreement under which U.S. weapons are transferred to it." Kimmitt then adds, "We must now decide whether a substantial violation has occurred. If it has, the sanctions above would take effect after notification to Congress." Israel has never been so treated. Kimmitt, however, emphasizes, "The toughest question concerns the suspension of F-16 delivery. Such action is legally required only if it is determined that a substantial violation has occurred. Since that determination has not been reached, the decision was based on policy considerations."¹² Reagan, then, pursued Israel due to policy considerations and not on strictly legal grounds. More plainly, he hedged his bets and took a mild approach when he might have done far more.

Reached for an email interview about the wisdom of the temporary suspension of American warplanes to Israel, Tanter, a visiting professor at Georgetown University, stated:

To start with an analogy: in tennis, when you are unsure about whether to go down the line or go cross-court, you solve the riddle by going up the middle. Likewise, in diplomacy, when you are unsure of what action to take, sometimes it is best to take a middle course, rather than the extremes.

Temporarily suspending delivery to Israel, illustrates a policy of avoiding the two extremes—cancelling the F16s deliveries or doing nothing.

Suspending delivery allowed the Reagan administration to send a signal to the Arab states that Israel did not have the American green light to use American equipment without risking some kind of a cost.¹³

This was a less vigorous defense of Israel than might have been expected of Tanter who is on record as supporting regime change in Iran and the use of the People's Mujahedin Organization to accomplish it.¹⁴ Nonetheless, it speaks volumes that the nation's conservatives were more willing to bring modest pressure to bear on Israel two decades ago than are either conservatives or liberals today. This is not to say the Reagan administration was good on human rights, just stronger on enforcing the law than politicians today.

The extraordinary growth in clout of AIPAC in recent years has led many aspiring politicians to think that anything more than a cursory review of Israeli actions was dangerous to political health. (With the 2006 release of President Jimmy Carter's book, the Mearsheimer/Walt paper and book and invigorated efforts by various Jewish peace organizations, there are some indications, however, that the rest of the nation is becoming cognizant of the fact that the Jewish community is not monolithic, that AIPAC is overplaying its hand and that there is increasing political space for politicians to operate on Israel/Palestine and the wider Middle East should they choose to do so.)

It was not, however, until a Congressional investigation in 1982 found Israel had used American weaponry for purposes other than defense that the Reagan administration moved concretely against its Israeli ally for its actions in Lebanon.¹⁵ According to the Congressional Research Service, the Reagan administration concluded on 15 July 1982—just thirteen days after Fisk's major expose on cluster munitions in *The Times*¹⁶—that Israel “may” have violated the 1952 Mutual Defense Assistance Agreement¹⁷ by using cluster munitions against civilian targets in June and July of that year.

Just four days later, the administration declared on 19 July 1982 that it would prohibit the export of cluster munitions to Israel.¹⁸ As it turned out, despite the order of President Reagan, the explosive grenade central to the lethality of cluster bombs continued to be exported to Israel until late September 1982. The State Department maintained that the shipments were made by mistake but had stopped as of September 30.¹⁹

During this time period (first on July 15 and later on August 4), the House Committee on Foreign Affairs, Subcommittees on International Security and Scientific Affairs and on Europe and the Middle East, chaired by Rep. Clement J. Zablocki and Rep. Lee H. Hamilton, respectively, held intensive hearings on Israel's activities in relation to U.S. law. These hearings proved instrumental to President Reagan's suspension decision. Deputy Legal Adviser James H. Michel informed Zablocki and the other committee members that the Secretary of State was to “report to Congress whenever he receives information that a substantial violation of agreement governing the use of U.S. arms may have occurred.” Critically, Michel added that “the Executive can take what action it considers appropriate, can inform the Congress, the Congress can ask questions of the Executive, and if dissatisfied, urge additional actions or take action on its own.”²⁰

Research by William Espinosa and Les Janka makes abundantly clear the illegality of Israel's employment of cluster bomb munitions in Lebanon. They note that while the exact terms of U.S. export of cluster munitions to Israel are classified, media reports from 1982 indicated that previous agreements required they only be used against “clearly defined, military targets” and in the case of “an attack by two or more Arab nations.”²¹ Espinosa and Janka assert that if the media reports are accurate then Israel violated the American terms of export.

Practically anticipating the 2006 summer war, they note that the Palestine Liberation Organization (PLO) in 1982 was not a state actor,²² just as Hamas and Hezbollah were not in 2006—if the same classified language even remains the law of the land. Indeed, President Reagan may have insisted on even tougher terms when he re-instated the

export of cluster munitions to Israel in 1988. The language is strictly classified, however, and because of the required security clearances, Congressional employees had difficulty securing information for this analysis regarding the cluster munitions used in 2006. Others, it must be said, simply did not want to engage the issue. It is of significant concern that the Congressional oversight in 1982 so far exceeds the almost wholly absent oversight of the present day. Even so, the Congressional inquiry of 1982 failed to insist (at least publicly) that there had been a “substantial violation” of the AECA, which would have required the implementation of Section 3(c) penalties and quite possibly brought the “termination of military assistance.”²³

According to Espinosa and Janka, this was not the first time Israel violated American terms. Previously, however, violations were allowed to pass with promises of future good behavior. The Carter administration, for example, advised Congress on 5 April 1978 that Israel may have violated its agreement with the U.S. as a consequence of its resort to cluster bombs. Simcha Dinitz, Israel’s ambassador to Washington, penned a letter on 20 April 1978 that indicated Israeli culpability. Dinitz’s letter noted “additional secret assurances that were communicated by us to your Government on 16 December 1976, under which the use of the CBU was not permitted in an operation such as the one that took place in Lebanon.”²⁴

Rep. Paul N. McCloskey, Jr. put the letter in the *Congressional Record* of 1 May 1978 and then added his own concerns. He noted that Dinitz “clears up two previously uncertain facts,” the first of primary interest to the situation vis-à-vis Lebanon. “Israel,” McCloskey comments, “did violate an agreement with the United States that U.S.-supplied CBU’s would not be used in southern Lebanon.” McCloskey, a Korean war veteran and the first Republican to speak out against President Richard Nixon on Watergate, further stated, “These limitations are precise in prohibiting use of CBU’s against guerrilla forces operation out of a civilian-occupied area such as southern Lebanon where over 400,000 Lebanese resided in the area attacked by the Israeli forces.”²⁵ McCloskey also cited a 13 April 1978 letter received from Presidential Security Adviser Zbigniew Brzezinski confirming that Israel broke the law: “As you know, the Government of Israel has confirmed that CBU’s were in fact used in south Lebanon in contradiction to previous assurances given to us, and the State Department has communicated to the Israeli Government U.S. concern over this matter.”²⁶

Israeli Defense Minister Ezer Weizman pleaded ignorance. He insisted that he spent several hours combing through old documents until locating a 1976 letter specifying American restrictions on the use of cluster munitions. Weizman, who later became a dear friend of President Jimmy Carter’s from their days together at Camp David,²⁷ declared to *Yediot Aharonot*, “Had I known about the existence of the letter of commitment, I would have considered the matter differently.”²⁸ Ignorance of the law or terms of agreement, however, can be no excuse, particularly in the taking of innocent civilian life. Indeed, H.D.S. Greenway remarks on Weizman’s failure in a *Washington Post* news article with a candor unlikely to be repeated today. “That Defense Minister Weizman now says he was unaware of Israel’s promise not to use cluster bombs on offensive operations does not inspire confidence in either Weizman or the defense industry.”²⁹

Espinosa and Janka cite a letter from Douglas J. Bennet, Assistant Secretary of Congressional Relations, to Rep. McCloskey noting that Israel “used cluster bomb units during the military operation in southern Lebanon, a use contrary to previous assurances given to us.” Bennet told McCloskey that the U.S. government would not respond to the illegal Israeli action because it “requested and has received a reaffirmation of Israel’s acceptance of stipulations and conditions” regarding the use of cluster munitions.³⁰

Regarding Israeli adherence to American concerns, a damning passage can be found in a 1983 Government Accountability Office (GAO) report on “U.S. Assistance To The State Of Israel.” The GAO report details that Secretary of State Cyrus Vance noted in a letter to Congress of 5 April 1978 that “a violation of the 1952 Agreement [the Mutual Defense Assistance Agreement] may have occurred by reason of the Israeli operations in Lebanon.” GAO then adds that Secretary Vance decided against recommending the President take further action on account of a statement from the Government of Israel that it intended to comply with United Nations Security Council Resolu-

tion 425.³¹ A scant 22 years later, Israel was good to its word when it withdrew from Lebanon (though not from Sheba'a farms). Kevin Danaher, however, asserts that the Carter administration simply accepted the Israeli argument that CBU's were dropped solely on military targets, despite "abundant, reliable information disproving this claim."³² Years later, President Carter told BBC's Tim Sebastian how he had used American law to rein in Prime Minister Menachem Begin:

There was a time when Israel was contemplating an invasion of Lebanon, and I went to Israel and confronted Prime Minister Begin about it, and I told him in effect that if US weapons were used in an invasion of Lebanon, that I would use my authority as President, which I had under the law, to declare that these weapons were being used improperly, and not for the defence of Israel, but for the attack of another country, and at that time Prime Minister Begin cancelled his decision to go into Lebanon.

When further queried by Sebastian as to whether this was a lever that could be used again, Carter responded:

I think so, and after I left office, as you know, and President Reagan was in office, Prime Minister Begin authorised Israel to go into Lebanon 40 kilometres, but the then Defence Minister Sharon, I think without the authority of the Prime Minister, decided to go all the way to Beirut.

But yes, I think that's an appropriate law to enforce if Israel uses its American-supplied weapons other than in the defence of Israel.³³

The historical record, however, makes clear it was Reagan and not Carter—although his threats did get the Israelis' attention—who took the longer lasting response to Israeli misuse of American weaponry with his six-year suspension of cluster munitions. Carter only became particularly outspoken about Israeli actions after he left office. Reagan, for his part, was quite outspoken in the Summer of 1982. At an August 1 press conference, he employed language about the Israeli prime minister that would simply be unimaginable today from President George W. Bush.

Q: Tomorrow, when you see Foreign Minister Shamir, is it time to get tough with Israel on breaking cease-fires?

The President: Let me say I'll be firm as I've just been here. Yes, this must be resolved, and the bloodshed must stop.

Q: Are you going to be tough with Shamir tomorrow? Is it time to get tough with Israel?

The President: If I answered it that way you'd say, "The President says he's going to get tough."

Q: I can say that?

The President: No. You can just say that we're going to have a very serious discussion, and I think they will understand exactly how we feel about this.

Q: Are you losing patience? Are you frustrated?

The President: I lost patience a long time ago.³⁴

This is as dramatic an indication as any of just how much American politics have changed in the past 25 years. President Bush failed to express impatience and dissatisfaction with Israeli military action at the height of the summer carnage in Lebanon and in fact was a cheerleader for the Israeli action—as was almost the entire U.S. Congress. The Bush administration has long failed the test of creative leadership and yet time and again Democrats in the Congress have enabled the administration, particularly in this instance when they thought, wrongly as it turned out, that belligerence would advance Israeli interests. In hindsight, neither party is positioned to re-examine the 2006 fighting

and offer an honest appraisal regarding the misuse of American weaponry. (Indeed, even the inadequate Winograd Commission Report—though clearly insufficient—came closer to grappling with war shortcomings and violations of human rights than a U.S. Congress content to avoid any substantive review of Israeli actions.)

Between 1982 and 2006, the resolve of the U.S. Congress to address Israeli weapons abuses in a serious and responsible manner deteriorated. The probing questions of Rep. Lee Hamilton to State Department official Wat Cluverius (Deputy Assistant Secretary, Bureau of Near Eastern and South Asian Affairs) in a public setting are almost unthinkable today despite the very similar circumstances in Lebanon and the clear need for intensive questioning of State Department officials. Hamilton directly queried him on cluster bombs possibly being used against a hospital and then followed up with a question about whether any use of them in Lebanon would be a “violation of any existing agreement that we have with Israel.” Cluverius asserted he would have to be in closed session to answer.³⁵

The political environment for such examinations of fact, however, has become exceedingly more hostile than during mid-1982. It was not until later that Fall, as previously noted, that Rep. Findley lost his run for re-election and the strength of AIPAC began to seep into the consciousness of political candidates as a force not to be crossed without possible damage to one’s political prospects. In 1982, however, Congressional inquiry was still quite vigorous as seen below.

Mr. Hamilton: Mr. Cluverius, did Israel use U.S. supplied cluster bombs in Lebanon? [...]

Mr. Cluverius [speaking for the Department of State]: Their use I don’t think is in dispute, but how they were used is relevant [...]

Mr. Hamilton: If they were used in whatever sense in Lebanon, is that a violation of any existing agreement that we have with Israel?

Mr. Cluverius: I believe we would have to go into closed session to give you a proper answer to that.

Mr. Hamilton: Is there an agreement between the United States and Israel relating to the use of cluster bombs?

Mr. Cluverius: I think I would have to go into closed session to answer that question and the preceding one.

Mr. Hamilton: I have a letter, Mr. Cluverius, that is from the Department of State, dated May 1978. It is an unclassified letter in which at that time Israeli Minister of Defense Weizman stated that he was not aware of Israel’s commitment to the United States regarding the use of CBU’s that had he known it he would have approached the matter differently; and that, and I quote, “arrangements have been made to prevent such incidents in the future.” Have such arrangements been made?

Mr. Cluverius: I believe we would have to go into closed session to discuss those arrangements.

Mr. Hamilton: So, you are not willing to say, in public at least, that there is even such an agreement; is that correct?

Mr. Cluverius: Yes, sir, that is correct.

Mr. Hamilton: You are not willing to say that there was a violation of the agreement. Let me quote further from this 1978 letter, if I may: “The United States requested and has received a reaffirmation of Israel’s acceptance of stipulations and conditions on the use of CBU’s. This reaffirmation is in the form of a classified agreement concluded by an exchange of notes dated April 10 and 11, 1978.”³⁶

You have already acknowledged publicly in a letter written to me 4 years ago that there is such an agreement. Why

would you refuse to admit the existence of the agreement today?

Mr. Cluverius: Mr. Congressman, I took your earlier questions to mean you wanted to discuss the content of those arrangements.

Mr. Hamilton: My question was very specific. I asked you. Was there an agreement? You said you could not answer that question. I am asking you why you cannot answer it, if it has already been answered publicly 4 years ago?

Mr. Cluverius: Mr. Chairman I was not aware of that unclassified letter. I was under the impression, until you read it, that all of those arrangements, including the correspondence, were classified. Yes: there are such arrangements.

Mr. Hamilton: It took a lot of work to get that, Mr. Cluverius.³⁷

Amb. Cluverius, offered the opportunity in March and April 2007 to add further remarks declined to do so, though he did urge to “keep pressing” on AECA matters.³⁸

Lebanon in 2006

Secretary Vance’s willing acceptance of future Israeli goodwill and law-abiding behavior did not head off the 1982 use of cluster munitions, which led to Reagan’s six-year suspension of their export. Indeed, even the six-year suspension of cluster munitions was followed some 18 years later by further concerns of illegal Israeli action with such munitions. While normally one would expect the U.S. Congress to be cautious regarding the track record of such a nation, this is not at all the case with Israel and certainly did not limit effusive support for Israel’s summer campaign. The reckless undertaking suggests a belief among high-ranking Israeli officials that they can act with impunity.

Disturbing news and images from Lebanon seemed to reach everywhere save the U.S. Congress. Oblivious or uncaring, the U.S. House of Representatives voted 410-8 in July 2006 for a resolution including recognition of “Israel’s longstanding commitment to minimizing civilian loss” and welcoming “Israel’s continued efforts to prevent civilian casualties” in Lebanon and elsewhere. This language profoundly contradicted already available evidence to the contrary and was positively Orwellian in its effort not just to subvert truth but to attempt to alter it. There were, after all, already hundreds of killed and maimed Lebanese civilians at the time of the Congressional vote that should have highlighted the absurdity of the legislation’s language.

Had Congress taken a more responsible stance, it may have been able to head off or limit the Israeli military’s cluster-munition rampage over the course of the last three days of fighting. Instead, the United Nations’ Undersecretary-General for Humanitarian Affairs, Jan Egeland, was reduced to commenting in dismay: “What’s shocking and, I would say to me, completely immoral, is that 90% of the cluster-bomb strikes occurred in the last 72 hours of the conflict, when we knew there would be a resolution, when we really knew there would be an end of this.”³⁹

Even earlier, in the midst of the 2006 war between Israel and Hezbollah, Michael Ratner, President of the Center for Constitutional Rights (CCR) and Bill Goodman, CCR’s legal director, wrote President Bush and Secretary of State Condoleezza Rice to express concern that the U.S. government was supplying weapons to Israel “in violation of the Arms Export Control Act (AECA).”⁴⁰ This is just the most recent example of serious concerns voiced by credible human rights organizations regarding American disregard for its own laws in relation to Israel’s use of American weaponry. Disdain for the views of such reputable organizations ran from the White House to the U.S. Congress and helps explain how the United States has managed to place itself and the region in such dire circumstances. Furthermore, significant portions of both major political parties share a reckless infatuation with violence as a problem-solving mechanism and support for an Israel that they believe can do no wrong—or are unprepared to criticize. The combination of militarism and blind support for Israel creates a perfect storm for these politicians that proves irresistible even as it pulls the region in a demonstrably damaging direction.

Amnesty International USA Executive Director Larry Cox widened the scope of concern over American and Israeli actions with his own letter of 14 August 2006:

The UN Guidelines on International Arms Transfers, for example, commits governments to bear in mind respect for human rights when transferring arms internationally, among other items. According to Article 16 of the UN International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which comments on international law, 'a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so.'⁴¹

In the post-9/11 world, this proved to be no deterrent to President Bush with his ardent support for Israeli military action and indeed his open support for military action as the preferred means of transforming the Middle East.

George Monbiot raised his own concerns in an opinion piece for the *Guardian*. His analysis only found an occasional echo in American public opinion expressed that summer and then generally from dissenters outside of official Washington circles:

Many of these weapons have been used to kill Palestinian civilians and are being used in Lebanon today. The US arms export control act states that 'no defence article or defence service shall be sold or leased by the United States government' unless its provision 'will strengthen the security of the United States and promote world peace.' Weapons may be sold 'to friendly countries solely for internal security, for legitimate self-defence (or for) maintaining or restoring international peace and security.'

Monbiot further points out, quite accurately, that by "giving these weapons to Israel, the US government is, in effect, stating that all its [Israel's] military actions are being pursued in the cause of legitimate self-defence, American interests and world peace. The US also becomes morally complicit in Israel's murder of civilians. The diplomatic cover this provides [to Israel] is indispensable."⁴²

Israel has, in fact, done very little to demonstrate that American weapons were used in accordance with American law or even in accordance with the commands of the Israeli military hierarchy. Little responsible forethought appears to have been given prior to the firing of American cluster munitions at approximately 250 sites south of the Litani River (and 770 sites identified throughout the country by October 2006).⁴³ Already by late August 2006, the United Nations Mine Action Coordination Center asserted it had found 559 M-42s, 663 M-77s and five BLU-63s, which are the bomblets accompanying the CBU-26 cluster bomb. The State Department's Office of Defense Trade Controls began an investigation the same month, though *The New York Times* asserted that unnamed officials thought it unlikely any violation of the AECA would be found.⁴⁴

Steve Goose, director of the arms division at Human Rights Watch asserted:

We've investigated cluster munitions in Kosovo, Afghanistan, and Iraq, but we've never seen use of cluster munitions that was so extensive and dangerous to civilians. The issue is not whether Israel used the American cluster munitions lawfully, but what the US is going to do about it.⁴⁵

It appears the answer is nothing. Israel's then-Chief-of-Staff Dan Halutz stated to *Ha'aretz* that the Israeli military did not use the cluster munitions in keeping with his orders. "I don't know if this is surprising," said Halutz, "it is more disappointing."⁴⁶ This is an understatement.⁴⁷ More accurately, it is criminal and would constitute a violation of American law were it not for the fact that the legislative and executive branches want very much to avoid such a determination.

Indeed, the lack of IDF compliance with orders could be interpreted as a sign of rogue units in operation. If so, consideration ought to be given to application of the Leahy Law, though within the current political climate the idea

is a nonstarter. The amendment states:

None of the funds made available by this Act may be provided to any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such unit has committed gross violations of human rights, unless the Secretary determines and reports to the Committees on Appropriations that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice.⁴⁸

An inquiry to the office of Sen. Patrick Leahy in early 2007 elicited no response. Leahy, one of the most progressive senators in Washington, knows as well as any that at the moment such an inquiry is a political loser. By early 2008, however, there were slight indications that Leahy's office was more open to considering Israeli violations.

In late January 2007, the State Department sent a report to Senator Joseph Biden, Chairman of the Senate's Foreign Relations Committee, and to Rep. Nancy Pelosi, Speaker of the U.S. House of Representatives, asserting that Israel may have used cluster munitions in violation of agreements with the United States. According to *The New York Times*, there were battles in both the Pentagon and the State Department as to whether the use of cluster munitions in populated areas violated American law or was in compliance because Israel's action was regarded as an acceptable act of self-defense. Several officials told *The Times* that they did not anticipate further action.⁴⁹

Congressional staffers have certainly given no indication that they are seized of the matter. Indeed, in the course of research, it became clear that neither the State Department nor the Senate's Committee on Foreign Relations has a good handle on how to proceed regarding Israel's use of cluster bombs in 2006. A State Department employee requested that she not be cited and confided that it was not clear to her that State was obligated to make a determination of whether there was a violation one way or the other. Later, she asserted that State had fully met its obligations with its January report.⁵⁰

A Congressional source spelled out and answered three technical questions about how the current AECA concern would proceed. The source referred to State's report as a letter:

1) What happens now to State's letter looking into a possible Arms Export Control Act violation that has recently been submitted to Congress?

State continues its investigation, and we watch.

2) How long before a decision is reached?

They can take as long as they need.

3) Which committee makes the determination of whether a violation did or didn't occur? Is it ours or Armed Services?

We [SFRC] get the report. But the determination is up to the executive branch, not to Congress. If Congress doesn't like the results, or if it accepts the results and doesn't like their implications, then Congress can change the law.⁵¹

Multiple contacts with Congressional staffers went unanswered, suggesting that many of them hope the whole inquiry will simply go away. Sen. Biden's office ignored multiple queries regarding whether he was vigorously looking into the possible AECA violation. Speaker Pelosi's office clearly sought to avoid the issue. Both are critical to the process as they received copies of State's January report (Sen. Biden as chairman of the Senate Foreign Relations Committee and Rep. Pelosi as Speaker of the House). Relevant staffers also seemed entirely unaware (or uninterest-

ed) that Congress is provided the right under the AECA to play a far larger role should it so desire. As shown earlier, Congressional involvement in 1982 played an enormous part in getting the Reagan administration to take action after considerable delay. Less politicized State Department employees remain the best hope that American law will still be applied even in this highly politicized environment. High-level Bush administration officials, however, are certain to contain and severely limit any negative finding, though that certainly seems a distant prospect.

The near-total support for Israel suggests that high-ranking administration officials were not the least concerned with the AECA or the likelihood that Israel violated it. Simple political calculation indicates that the parties likely to be interested in confirming a violation have little political muscle. Bush's base of Christian Zionists, on the other hand, would not stand for a finding of a substantial violation nor, to be sure, would AIPAC.

Resistance to AECA claims in Lebanon was not the exception but rather consistent with a pattern made clear by the experiences of Palestinians, particularly those in Gaza.

Israeli Misuse of Flechettes in Gaza

Jane's Defence Weekly correspondent Steve Rodan first reported on 22 May 2001 that the Israel Defense Force (IDF) was employing "tank-fired flechette anti-personnel rounds in its conflict with Palestinian militants in the West Bank and Gaza Strip."⁵² Already at that time, there was a clear example of a Palestinian civilian having been killed by flechettes and more cases would follow.

Rodan reported that the IDF was employing "a modified version of the M494 105 mm APERS-T round provided by the USA in the 1970s." When used by the IDF, Rodan added, "the M494 is fitted with the Reshef Technologies OMEGA M127 electronic fuze which is set before the round is fired. At the set range the forward section of the M494 round ruptures releasing approximately 5,000 small flechette darts and a dye marker. The flechettes are dispersed in a cone-shaped pattern which is 300m long and about 94m wide."

It is almost inconceivable that flechettes could be deployed in densely populated Gaza without causing significant civilian harm. Rodan notes that according to the U.S. Army manual, the round is "designed for close-in assault against massed infantry assaults and for offensive fire against exposed enemy personnel."⁵³ These circumstances in Gaza are unlikely. The Israeli military leadership nevertheless disregarded the realities on the ground in using flechettes against Palestinians. Strikingly, the reports of flechettes originated from the isolated Gaza Strip and not from the more closely monitored West Bank.

Palestinians first reported a civilian death by flechettes in March 2001 when a Palestinian farmer was "riddled with metal darts that Palestinians said were anti-personnel ammunition known as 'flechettes' not previously seen in the conflict." CBS News went on to report that "X-rays of Ziad Ayad's body showed a nail-like projectile in his left eye, two in his pelvis and one in his left lung."⁵⁴ Remarkably, CBS News quoted the army as stating it "uses means best suited to the overall security conditions and specific threats in the area."

Just three months later, Human Rights Watch announced it welcomed Israel's announcement of an investigation into an incident on June 9 in which two Bedouin women and a girl were killed and three other people injured. Hanny Megally, then-executive director of the Middle East and North Africa division of Human Rights Watch asserted, "While flechette ammunition is not banned under international law, its use in such circumstances is highly questionable since it raises risk of civilian casualties to a threshold that is intolerable under international law."⁵⁵ Killed in the incident were Selmiya al-Malalha, Nasra al-Malalha and teenage girl Hekmat al-Malalha.

Ghada Ageel, a Palestinian doctoral candidate from the Gaza Strip at Exeter University, wrote in the *Los Angeles Times* that any investigation would "not bring back the dead" from the al-Malalha family and two other families killed in distinct incidents, "but a sincere inquest might help to protect innocent civilians in the future. And yet

investigations do not get to the heart of the matter...”⁵⁶

The Palestinian Centre for Human Rights then reported on 30 January 2002 that three Palestinian children—Ahmed Mohammed Banat, 15, Mohammed ‘Abdel-Rahman El-Madhoun, 16, and Mohammed Ahmed Lubbad, 17—were killed by flechettes north of Beit Lahia in an incident that occurred one month earlier. In September 2005, IDF Major General Doron Almog managed to avoid arrest in London for related war crimes. Apparently, he was to be questioned regarding the flechette incident (and the bombing in July 2002 of a Gaza neighborhood house in which fifteen Palestinians were killed). The UK police operating at London’s Heathrow Airport reportedly feared a shootout could result if they executed the arrest warrant.⁵⁷

The fourth well-documented incident—and this is not intended as a comprehensive list of all flechette-related incidents in Gaza—occurred in late August 2002 when, according to BBC News, four Palestinian civilians were killed by “tank shells which are said to have sprayed thousands of metal darts at a target in Gaza.”⁵⁸ Ageel, in her *Los Angeles Times* opinion piece, noted considerable shooting noise that night but had been unaware of the killing of civilians. “When the shootings stopped,” she noted, “we went to sleep without realizing that a brutal killing had taken place. Artillery shells spitting nail-like ‘flechettes’—courtesy of the United States, according to *Jane’s Defence Weekly*—killed four members of the Al Hajeen family. A woman, her two sons and a cousin sleeping in front of their house in the middle of their fields were slain when an Israeli tank launched its death shell at them. Two hours passed before the ambulance reached them.”⁵⁹

A fifth incident received a major write-up in *The New York Times*. Five Palestinian cousins desperate to find work in Israel were killed by flechettes in a failed effort to clamber over a ladder at the fence separating Israel and Gaza.⁶⁰ While a definitive link cannot be made between *The New York Times* article and an absolute cessation of fatal flechettes targeting civilians, it seems possible that the outcry over the tragic consequences for civilians played a part in pushing the IDF away from its regular employment of the devastating darts. The State Department had also insisted as early as 30 August 2002 that concerns raised by American officials with their Israeli counterparts were playing a part in reining in the use of flechettes.⁶¹ Nevertheless, a *Washington Post* article in 2003 indicates that flechettes had not been entirely removed from the IDF’s Gaza arsenal and, indeed, were still being employed with devastating consequences.⁶²

If the raising of American concerns is accurate, it sets the precedent that official American pressure—in conjunction with full and embarrassing American media revelations—can play a part in altering, though perhaps not fully stopping, the more extreme examples of Israeli military behavior. This has enormous implications for efforts to apply the AECA to Israel with greater frequency and to greater effect. Certainly, such steps have not recently been vigorously applied by U.S. politicians and at most have only resulted in suspensions in shipments of weapons systems. A case can be made, however, that Israel is susceptible to public castigation from the United States.

This case, of course, is weakened on account of the near universal failure of American politicians to press for a full investigation into Israel’s misuse of American weaponry. American political cowardice plays a significant part in the militarization of Israel’s conflicts in the Occupied Palestinian Territories and Lebanon. This has particularly been the case during the Bush administration as both the United States and Israel have looked ever-more quickly to military solutions as a means to resolve complex political problems. Indeed, Marwan Bishara remarked at the Tenth Anniversary Conference of The Center for Policy Analysis on Palestine (renamed the Palestine Center) in 2002 that it would be “the most dangerous thing that could ever happen to this world, if America becomes Israelized.” He feared the “kind of unilateral conservatism that has been augmented in the United States over the last two decades by policies that adopt Israeli ways of thinking; where we are on our own. Or as Thomas Friedman put it, we have to fight it all on our own.” Bishara concluded his remarks by noting that “using more violence can only lead to yet more violence.”⁶³

Indeed, the Bush administration’s own belligerent stance toward Iraq has likely contributed to its hands-off attitude

regarding Israeli policy toward the Palestinians and Lebanese. Rather than recognize the limitations of violence, both Israel and the United States appear increasingly enamored of it, even as its shortcomings become increasingly evident. The U.S. pushed Israel into further fighting in Lebanon (not that much encouragement was needed) while for months Israel has pressed the U.S. toward a more confrontational approach with Iran. They are pushing one another into further adventurism—with sophisticated American weaponry—instead of stepping back to cool rising tensions. Restraint is seen as weakness rather than a sign of wisdom and maturity.

Early Concerns in Second Intifada Regarding Possible AECA Violations

Already in the Fall of 2000, at the outset of the second *intifada*, Israel was employing legally suspect approaches in carrying out “targeted assassinations.” Frequently, such assassinations brought the deaths of civilian onlookers. This was the case ever since the first instance when two Palestinian women were killed in an American-made helicopter attack that also killed the target, Fatah official Hussein Mohamed Salim Ubayyat, in November 2000.⁶⁴

Baltimore Sun correspondent Mark Matthews spoke to Edward S. Walker about such assassinations shortly after Walker retired as assistant secretary of state for the Near East. “It was a clear administration position,” Walker noted, “that this was an excessive use of force.” He maintained that Israel even briefly stopped employing the helicopters in such assassinations.⁶⁵ The respite, however, was brief, and the threat to civilians remained very high. In fact, the annual State Department human rights report noted in 2004 that, during the course of the year 2003, there were more civilian bystanders killed (47) in Israeli “targeted assassinations” than actual targets (44).⁶⁶

Rep. John Conyers wrote the State Department on 7 June 2001 to inquire as to whether Israel was using American military equipment in violation of the AECA. He received an answer from Powell on 17 August 2001 that was released by the State Department on September 9. “Under the AECA, we are required before supplying defense articles to obtain the recipient’s agreement that those defense articles will be used only for specified purposes, including internal security and legitimate self defense. Under section 3c, a report must be submitted to Congress if a substantial violation of such an agreement may have occurred. Based on our assessment of the totality of the underlying facts and circumstances, we believe that a report under section 3c of the AECA is not required.”⁶⁷

According to State Department officials provided anonymity by the *Washington Post’s* Glenn Kessler, “lower-level officials had determined that Israel had violated its agreements with the United States, but, the officials said, the finding was quashed at a more senior level.”⁶⁸ Such results almost certainly gave Israeli officials a sense that they had *carte-blanche* so long as Bush and his colleagues were in office.

Israeli Use of American-made F-16 Kills Civilians in Gaza

The most notorious Israeli misuse of American weaponry in the course of the second *intifada* came when Israel used an American-made F-16 on 22 July 2002 to drop a one-ton, laser-guided bomb on a Palestinian neighborhood in order to kill one man: Sheikh Salah Shehada, accused by Israel of being the leader behind several suicide bombings targeting Israelis. The Israeli military got its man—and a good part of the neighborhood. Another fourteen Palestinians were killed, including eight children.⁶⁹ One of those fourteen killed was Shehada’s bodyguard, the rest were quite clearly civilians. In total disdain of international and American opinion, Prime Minister Ariel Sharon referred to the attack as “one of our greatest successes.”⁷⁰ Mark Regev, spokesman for the Israeli embassy in Washington, was also brazen in his remarks when he termed it “a justifiable act of self-defense.” He added, “The government of Israel, too, regrets the innocent loss of life. We are, of course, talking about operations against one of the most dangerous terrorists, a man responsible for the murders of dozens.”⁷¹

Yet surely, Israel knew that there would be such innocent loss of life. Claims that the Israeli military was unaware other families were present cannot be taken seriously in regard to the densely populated Gaza Strip and when Israel is known to have superb intelligence regarding Palestinian neighborhoods.

The outcry was larger and more animated than usual, including in the United States. The range of voices bears examination in some detail, as it is unusual, though at the same time eventually resulting in the typical result—no action. James Zogby, President of the Arab American Institute (AAI), asserted:

This is not what US arms are intended for, and Israel's continued violation of US statutes regarding the use of American arms is a shame on their government, and a shame on the Bush Administration whose words are not followed by actions. If President Bush seriously believes that this attack by an F-16 is 'heavy-handed,' then the U.S. should act to restrain such Israeli behavior.⁷²

AAI also cited a letter from Congressmen John Dingell and Nick Rahall to President Bush about the bombing: "It is important that violent acts that target innocent civilians, regardless of who perpetrates them, must be condemned. There is no justification for the killing of innocent civilians."⁷³ Yet, most members of Congress were not particularly exercised over the misapplication of American weaponry in distant Gaza. In fact, the general Congressional sentiment is to make dramatic allowances for Israel's perceptions of its own security situation. Still, some did speak out on this occasion.

Rep. William Delahunt of the International Relations Committee declared, "These weapons are to be used within certain guidelines. If those guidelines have been violated, the American people have a right to know."⁷⁴ Rep. Delahunt's comments were something of a surprise as he rarely speaks up on the Israeli-Palestinian conflict and, indeed, his office failed to respond to an inquiry for further information.⁷⁵

State Department spokesman Richard Boucher declared within hours of the strike:

First, we very deeply regret the loss of life of innocent civilians, including the children who were hurt and killed in last night's Israeli action. As the White House said earlier today, President Bush believes that the heavy-handed action in Gaza last night, carried out in a residential area and resulting in civilian casualties, does not contribute to peace. We have conveyed this view to the Israeli Government through our Embassy, through our Ambassador in Israel. And I think it's been stated quite clearly, both here and at the White House.⁷⁶

Boucher quickly followed up his comment with one playing down the prospect of this being a violation of the AECA. So far-fetched was this possibility in the Washington political climate of the time that when Boucher was asked if a report would be issued regarding a possible violation, he responded with a "maybe," eliciting a round of laughs from his journalistic "colleagues." He did, however, later note:

The Arms Export Control Act requires that US Government-origin weaponry only be used for certain agreed purposes, primarily legitimate self-defense and/or internal security. The act requires that the Department of State submit a report to Congress if a substantial violation of the terms of an agreement governing the use of US origin defense articles may have occurred. We have not made such a report regarding Israel's actions since the current violence began.⁷⁷

White House spokesman Ari Fleischer, for his part, was remarkably outspoken on behalf of an administration viewed as very much supportive of Israeli actions against the Palestinians. Though he and Boucher may have been reading from the same talking points in referring to the incident as "heavy-handed," there was an uncommon vigor in the White House condemnation of the Israeli action. Initially, Fleischer stated:

The President has said repeatedly that Israel needs to be mindful of the consequences of its actions in order to preserve the path to peace in the Middle East. The President views this as a heavy-handed action that is not consistent with dedication to peace in the Middle East. This message has been conveyed to Israel this morning through the embassy in Israel, and that is what the President thinks about this.⁷⁸

Fleischer became more animated when a question was put to him challenging him to distinguish between Israel's action in Gaza and American actions in Afghanistan. He vehemently fended off the accusation and made plain the administration's viewpoint that the Israeli military clearly must have known that civilian lives were being put at enormous risk.

It is inaccurate to compare the two (Israel in Gaza and the United States in Afghanistan). And the crucial difference here being that in this instance, in Gaza, this was a deliberate attack against a building in which civilians were known to be located. And that does separate it from the activities taken.

There are going to [be] losses of innocents in times of war. And I think that that's recognized around the world. What's always important is in pursuit of the military objectives, as the United States does in Afghanistan, to always exercise every restraint to minimize those losses of life. But in this case, what happened in Gaza was a knowing attack against a building in which innocents were found.⁷⁹

Fleischer's assertion that this was a "deliberate attack" on a target where civilians were known to be located is one of the strongest criticisms the Bush administration has ever leveled at the Israeli government. AAI built on Fleischer's comment and asserted that enforcement of the AECA would promote several vital objectives:

*act as a restraint against Israel's future misuse of U.S. supplied weapons;

*generate a much needed debate within Israel on the wisdom and legality of extra judicial killings and the use of disproportionate force;

*repair our nation's standing in the broader region which has come to view this conflict as an "Israeli-U.S. war against the Palestinians" because of the role U.S. weapons play.⁸⁰

Perhaps most remarkable was the unexpected engagement of Sen. John Warner, the long-time Republican senator from Virginia, with the bombing. His critical remarks highlight that American political leaders can still be deeply troubled by the loss of Palestinian life. It is precisely this sort of humane response (albeit in the context of seeking to rally international support in the aftermath of 9/11 and shortly before the U.S. invasion of Iraq) that engenders some slim hope that American leaders can be moved to action on Israeli-Palestinian peacemaking and to enforce relevant U.S. laws intended to protect against the abusive use of American weaponry. Sen. Warner took to the Senate floor on July 24 to express his reservations:

Madam President, I and other Members of the Senate from time to time have taken the floor to address the tragedies which daily, weekly, monthly, and yearly come forth in the Middle East. Today, we were greeted by a headline in the Washington Post: U.S. Decries Israeli Missile Strike, Ponders The Effect On The Peace Bid.

I ask unanimous consent that it be printed in the RECORD following my remarks...

Madam President, again, I have taken the floor several times to give just one Senator's viewpoint. I am almost at a loss for words to describe the tragic situation that has unfolded in the past 24 hours, or 36 hours – whatever the case may be – where a plane that was manufactured here in the United States delivered a missile into a residential area controlled by the Palestinians and brought about the deaths of many innocent people.⁸¹

The significant level of discussion at such an early stage in the aftermath of the 2002 F-16 incident becomes more remarkable because of serious allegations voiced later that Undersecretary of State for Arms Control and International Security John Bolton killed a memo to Secretary of State Colin Powell maintaining that Israel's action had violated the AECA.

The report from *US News & World Report* presented potentially explosive information:

As the Senate inquiry into President Bush's U.N. ambassador nominee John Bolton rages on, new tales are surfacing about his aggressive management style. Senate staffers are now said to be looking into how Bolton, as undersecretary of state for arms control, handled a State Department review of a July 2002 missile strike on a Gaza City building that killed the military leader of the Palestinian extremist group Hamas and 14 others. Several offices of the State Department, including the Bureau of Near Eastern Affairs and the legal office, believed Israel may have violated U.S. arms-export laws by using an American-made F-16 jet in the attack. Bolton disagreed, and officials drafted a 'split memo' for Secretary of State Colin Powell, laying out both positions. But late one evening, sources say, just before the memo went to Powell's office, Bolton recalled it and allegedly replaced it with a new memo, omitting the assessment that Israel may have violated the law. Powell never learned that some of his staffers took a different view, according to officials. 'After that, anytime Bolton was involved, we made sure that someone stayed until 10:30 or 11,' said one official. 'Fool me once...'⁸²

The question emerges of what happened between the initial heated comments from a variety of officials and the decision by the State Department not to report this as a possible violation of the AECA. The evidence is still not in, more than five years later. No whistleblowers have come forward in regard to Bolton's actions and State has not yet responded to a Freedom of Information Act request⁸³—nor is it likely to provide useful information—as of this writing. The case has all the makings of a cover-up to protect Israel, but full corroborating evidence has yet to emerge.

Perhaps Powell simply accepted the memo version offered by Bolton. Yet, Powell is known to have expressed how closely the United States was monitoring the situation in the initial days after the deadly strike. "We are constantly reviewing the manner in which the military equipment that we have provided to the state of Israel is used."⁸⁴ Powell might have been expected to put some penetrating questions to Bolton about precisely why this did not even rise to the level of possibly being a violation. It bears recalling that the threshold is only that a violation "may" have occurred. Short of a successful FOIA request, still more years may pass before the full story emerges—if it ever does.

Overall, the widespread initial dismay appears to have given way to domestic political considerations and a willingness to give Israel the benefit of the doubt, notwithstanding previous Israeli misuse of American weaponry. The moral concern regarding an ally resorting to increasingly unacceptable military actions was there in the immediate aftermath of the incident but apparently evaporated when political calculation was combined with the alleged sleight of hand of the ideologically motivated Bolton.

The failure of U.S. authorities to act on possible AECA violations has compelled human rights organizations to look for new ways to hold the Israeli military accountable for its actions. The Center for Constitutional Rights (CCR) and the Gaza-based Palestinian Centre for Human Rights brought a class action lawsuit against Avi Dichter, the former director of Israel's General Security Service, for his part in the F-16 attack on Gaza. They asserted he had committed war crimes and other human rights violations (*Matar v. Dichter* (S.D.N.Y., 05 Civ. 10270)). The likely violation of the AECA was not, however, an angle CCR pursued.⁸⁵

Caterpillar and the AECA

Perhaps the most unusual effort to date to apply the AECA to Israeli actions was initiated by the U.S. Campaign to End the Israeli Occupation. In conjunction with "Washington Wednesday," an ad hoc grouping of organizations addressing the Israeli-Palestinian conflict, the U.S. Campaign called for an advisory report from the General Accounting Office (GAO) "investigating possible violations by Israel of the Arms Export Control Act through its use of Caterpillar bulldozers in the occupied Palestinian territories."

The impetus for this undertaking came as a result of the death of American activist Rachel Corrie beneath a Caterpillar D-9 bulldozer attempting to demolish the Rafah home of Palestinian civilians Khaled and Samah Nasrallah.

While the U.S. Campaign was unable to press the government into recognizing that the misuse of the D-9 bulldozer against Rachel Corrie and Palestinian homes constituted a violation of the AECA, the efforts of Washington organizations did lead several members of Congress to inquire of the State Department as to whether a violation had taken place. The immensity of the uphill effort on the AECA became clear when a resolution calling for an American investigation into the death of Corrie managed to garner only 78 members of the U.S. House of Representatives willing to call for “a full, fair, and expeditious investigation into the death of Rachel Corrie.”⁸⁶

With the U.S. House of Representatives unwilling to stand up even for a slain American citizen, there can be no doubt that the climate is very poor for extending the AECA to Israel, whether on D-9 bulldozers or F-16 bombings of Gaza.

Implications for American Standing in the Region

The last quarter century has witnessed a significant degrading of American commitment to human rights, particularly where Israel is involved. The record, not good to begin with, has gone from bad to worse. Espinosa and Janka were already concerned enough to write in the early 1980s:

Whatever the outcome of the Israeli invasion, the utter collapse of American arms export control legislation due to selective application by our elected officials must remain a source of major concern for all Americans.⁸⁷

Yet the oversight of the early 1980s far surpasses today’s lax monitoring. Attention to such human rights concerns declined significantly with the Bush administration as a consequence both of 9/11 and of the administration’s strong religious/ideological support for an expansive Israel.

The failure to apply the rule of law undermines American democracy and undercuts the respect the nation once garnered from people around the world. The AECA is but one piece of the regional puzzle, but it points to the growing rift between American law and American practice. Too often in President Bush’s conception, the law is little more than an impediment to be sidestepped, undercut or ignored entirely. Ordinarily, this would rouse the anger of the Democratic opposition. Yet where Israel is involved, most Democrats have lost the courage of their convictions. Iraq can be addressed, if overlate, but Israeli wrongdoing appears to remain a nearly unapproachable subject for members of Congress.

As seen, the AECA application gap between the Reagan and Bush II administrations suggests a United States increasingly prepared to look the other way on Israeli human rights violations and the breaking of American law. The absence of engagement and of an American presence on the Israeli-Palestinian front frees Israel to exert itself with American weapons in a manner that is enormously harmful to Palestinian civilians as well as to the long-term standing and residual moral authority of the United States.

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NOTES

1. Rene Wadlow, "United Nations Urges Ban on Cluster Bombs," *Peacework Magazine*, <http://www.peacework-magazine.org/node/400>.
2. The author would like to thank Les Janka for his research suggestions for this article and Georgetown graduate student Zachary Bernstein for his thoughtful contributions in a March 2007 discussion about the AECA in which he commented on the growing inaction of the U.S. Congress in response to possible Israeli AECA violations.
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4. Email correspondence of March 8, 2007 with Nasser Hamdan of the Gaza Strip.
5. Grimmert, "U.S. Defense Articles and Services Supplied to Foreign Recipients: Restrictions on Their Use," *CRS Report for Congress*, Updated March 14, 2005, 2-3. Also cited in detail by William Espinosa and Les Janka, *Defense or Aggression? U.S. Arms Export Control Laws and The Israeli Invasion of Lebanon* (Washington, DC: American Educational Trust, 1982) p. 10.
6. Espinosa and Janka, *Defense or Aggression?* pp. 10-11. See <http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t21t25+2614+0++%28%29%20%20AND%20%28%2822%29%20ADJ%20USC%29%3ACITE%20AND%20%28USC%20w%2F10%20%282753%29%29%3ACITE%20%20%20%20%20%20%20%20>. The authors prominently cite Section 3 of the Arms Export Control Act.
7. Hon. Paul N. McCloskey in *Congressional Record* of May 1, 1978 citing H.D.S. Greenway in the *Washington Post*, April 30, 1978, p. 12031.
8. Thomas Friedman, *From Beirut to Jerusalem* (New York: Farrar, Straus and Giroux, 1989), p. 161.
9. Robert Fisk, *Pity the Nation* (New York: Atheneum, 1990), pp. 277-78.
10. Grimmert, *CRS Report for Congress*, "U.S. Defense Articles," p. 6.
11. National Security Council Memorandum for Richard V. Allen from Robert M. Kimmitt, <http://www.fas.org/asmp/resources/govern/NSCmem11jun81.pdf>.
12. *Ibid.*
13. Author's email interview of April 24, 2007 with Raymond Tanter. Delivery of two F-15s was also temporarily suspended.
14. Jeffrey Donovan, "Iran: Pressure Builds on Washington to Promote 'Regime Change,'" June 17, 2003, <http://www.globalsecurity.org/wmd/library/news/iran/2003/iran-030617-rfel-151041.htm>.
15. Glenn Kessler, "Israel May Have Misused Cluster Bombs, U.S. Says," *Washington Post*, January 30, 2007, p. A13.
16. Fisk, *Pity the Nation*, p. 278.
17. The language of the Mutual Defense Assistance Agreement is quite similar to that of the AECA and states in relevant part: "The Government of Israel assures the United States Government that such equipment, materials, or services as may be acquired from the United States...are required for and will be used solely to maintain its internal security, its legitimate self defense, or to permit it to participate in the defense of the area of which it is a part, or in United Nations collective security arrangements and measures, and that it will not undertake any act of aggression against any other state." Grimmert, "U.S. Defense Articles," *CRS Report for Congress*, p. 5.
18. *Ibid.*
19. Associated Press, "Cluster Bomb Device Still Shipped to Israel," *The New York Times*, September 30, 1982. Robert Pierpoint of CBS News first broke the story. <http://query.nytimes.com/gst/fullpage.html?res=9501E2D81E38F933A0575AC0A964948260>.
20. "The Use of United States-Supplied Military Equipment in Lebanon," House of Representatives, Committee on Foreign Affairs, Subcommittees on International Security and Scientific Affairs and on Europe and the Middle East, July 15, 1982, p. 5.
21. Espinosa and Janka, p. 15, citing *The New York Times*, June 30, 1982, p. A12, and the *Washington Post*, June 18, 1982.
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25. Hon. Paul N. McCloskey, *Congressional Record*, May 1, 1978, p. 12030.
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32. Kevin Danaher, "Israel's Use of Cluster Bombs in Lebanon," *Journal of Palestine Studies* 11, no.4/12, no. 1 (Sum./Aut. 1982) p. 52.
33. BBC News, "HARDtalk with Tim Sebastian – Interview with Jimmy Carter," December 12, 2002, <http://news.bbc.co.uk/1/hi/programmes/hardtalk/2568809.stm>.
34. The American Presidency Project, <http://www.presidency.ucsb.edu/ws/index.php?pid=42804>. An alternative reading of this passage is that President Reagan had long since lost patience with the journalist.
35. House of Representatives, Committee on Foreign Affairs, Subcommittees on International Security and Scientific Affairs and on Europe and the Middle East, "The Use of United States-Supplied Military Equipment in Lebanon," July 15, 1982, pp. 8-9. Rep. Hamilton, a short time previously, asked of Amb. Cluverius, "In considering how to report, are they considering whether or not Israel is ineligible to receive U.S. defense articles and services? I understand this statute. The sanction is a very tough sanction. It has never been applied before." He then went on to say, "We always get a report from the President saying that there may have been a violation, which begs the question, and that is the report we will get this time, too, but I am just asking you now whether or not the question is even under consideration that Israel should be rendered ineligible?" Cluverius stated that the answer was "implied" in the decision of whether to "send up a report or not," and James H. Michel, Deputy Legal Adviser at the State Department, asserted that a judgment was "imminent." p. 6.
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