

## Israel – An “Illegitimate” State?

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In May 2008, Israel celebrated its sixtieth birthday as an independent state. This places the modern State of Israel – even ignoring its roots in antiquity and all prior incarnations – among the older half of countries in the world.

In those sixty years, Israel has absorbed immigrants from around the world – refugees from the Arab world, post-Nazi European camps, and Ethiopia, as well as migrants from Russia, Argentina, India, and almost every other conceivable place. It has developed an economy strong enough to rate membership in the O.E.C.D. and that boasts some of the world’s most impressive research and technological achievements. It has become a regional powerhouse and its military has been strong enough to repulse several simultaneous invasions by its neighbors, as well as repeated and concerted terrorist attacks.

Yet, during those sixty years, Israel has also been under continuous attack – diplomatically and politically as well as militarily. Since Israel first declared its independence, its Arab neighbors have denied Israel’s legitimacy as a state and its right to exist. While it may seem that after sixty years the question is no longer relevant or appropriate, foes of the Jewish state continue to mark Israel as illegitimate.

Iran’s current regime, for instance, has continuously attacked the legitimacy of Israel, while simultaneously threatening to destroy the Jewish state. In July 2008, Hussein Shariatmadari, an advisor to Iran’s supreme leader Ayatollah Ali Khamenei, rejected Syrian negotiations with Israel in an interview with the newspaper *Asharq al-Awsat* on the grounds that Israel is “an illegitimate, non-existent state.” Khamenei repeatedly refers to Israel as the “fake Zionist state.” Iranian President Mahmoud Ahmadinejad has, of course, repeatedly labeled the State of Israel “illegitimate.”

Hard-liners in the Palestinian camp likewise have repeatedly rejected the legitimacy of Israel. Issa Nakhleh, author of the *Encyclopedia of the Palestine Problem* and one-time representative of the Arab Higher Committee for

Palestine, refers to Israel as the “so-called Israel [which is] not a state in fact or law.” Article 15 of the PLO Charter calls for the elimination of Israel, as does article 19 of the Fatah Constitution and article 6 of the Hamas Charter. The chorus of voices proclaiming Israel’s illegitimacy can be heard as well throughout the rest of the Arab world.

Attacks on Israel’s legitimacy have not been confined to the region in conflict. In Europe, too, voices can be heard declaiming the illegitimacy of Israel. For example, in April 2005, as part of her ongoing efforts to bring about a boycott of Israeli universities, Sue Blackwell, a Birmingham lecturer, explained that the boycott was a necessary part of what she described as the mission of combating the “illegitimate State of Israel” and the prevention of treating Israeli academics as “normal citizens from a normal state.” On January 3, 2001, *The Guardian* published an op-ed by Faisal Bodi, identified as a “Muslim journalist,” which stated that “Israel has no right to exist” and that Israel’s claims to legitimacy are, at best, “dubious.”

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Legal scholars who reject these offensive claims of Israel’s “illegitimacy” nevertheless rapidly find themselves flummoxed by the charge. This is because, simply put, there is no such thing in international law as an “illegitimate” state. States either are or are not. As recognized in the UN Charter, and the most basic principles of sovereign equality, all states are equal. There are no states that are more legitimate or less legitimate than any others.

International law tells us how to recognize whether an entity holding itself out as a state is actually entitled to call itself one. However, if a state has the requisite ingredients, it is a state, and cannot be illegitimate. Conversely, if the entity lacks the ingredients of statehood, it is not a state, and legitimacy does not enter into the discussion.

There can be no dispute that according to the rules of international law, Israel is a state. It has all four of the traditional ingredients known as the *Montevideo criteria*: territory, a permanent population (i.e., a population that is not merely transient), a government capable of governing the territory and population, and the capacity to carry on foreign relations. Notwithstanding disputes about sovereignty over a number of lands, Israel has sovereignty over a core of territory. Israel has a settled population of over seven million. It has a government whose form has been in place since independence, and whose personnel are chosen according to the results of periodic elections, together with a civil service system. Israel clearly has the capacity to carry on foreign relations; Israel has diplomatic relations with 162 states and is a member of the UN.

A very small number of international law scholars hold to the so-called constitutive recognition theory of statehood, according to which states that fulfill the Montevideo criteria must also be recognized by other states before they can be considered to have fulfilled the requirements of statehood. Even this minority position must recognize Israel, given the fact that, as noted, Israel has diplomatic relations with 162 states and is a member of the UN.

Some foes of Israel like to focus on how Israel emerged as an independent state. This is surely an interesting historical episode. But this history too, at least for purposes of legitimacy, is legally irrelevant. Some states, like the U.S., emerge by revolution. Some, like Canada, are created by withdrawal of the previous sovereign. In rare cases such as East Timor, states arise due to a decision of the UN or by decision of the superpowers. Some states, like Jordan, were created by treaty out of mandatory territory. Some states, like Syria, were created out of mandatory territory despite the opposition of the mandatory authority.

It is historically true and interesting that in 1947, six months before Israel became an independent state, the General Assembly voted to recommend the creation of a Jewish state on part of the mandate designated for the Jewish homeland in Palestine. But this historical quirk is legally irrelevant, as it neither added to nor subtracted from the elements that make Israel a state.

It is also true that if the League of Nations had not, in 1922, entrusted Britain with the mandate of Palestine, charging it with the creation of a homeland for the Jewish people, very probably there would not be a Jewish state today. While this is an important point when discussing borders, it is not important for the question of whether the State of Israel exists.

Since Israel has the necessary ingredients, it is a state irrespective of the history that preceded its creation. So the real legal questions are not questions about the legitimacy of Israel's existence. The real legal questions that must be answered are questions concerning behavior. When discussing the question of Israel's "legitimacy," the questions are first, does Israel act in such a way as to make it "illegitimate," and second, are states entitled to treat Israel as an "illegitimate" state?

As we have already seen, the first question is easily answered. Since there is no such thing as an illegitimate state, there is nothing Israel can do to transform itself into an illegitimate state. One may identify the behavior of Israel in any given particular as legal or illegal, but this does not have the capacity to alter the legal status of Israel to "illegitimate."

Thus, the more important question is whether states may treat Israel as illegitimate. Here, the answer is more complicated. States are under no obligation to "like" one another or to engage in commerce with one another. In that sense, no one is required to recognize the "legitimacy" of Israel.

But in a more important sense, international law forbids treating states as illegitimate. The UN Charter guarantees the sovereign equality of all states. It is therefore illegal to exclude Israel from full and equal membership in the organization by, for example, authorizing so-called regional groupings to control procedures even though Israel is the only member state excluded from full membership in a regional grouping.

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The UN Charter forbids states from threatening the sovereignty of other states. Thus, for example, it is illegal for Iran to threaten Israel with destruction, notwithstanding an Iranian right to "dislike" Israel.

The UN Charter forbids the use of force in international affairs, aside from a handful of exceptions. Thus, it is forbidden for states like Syria or Libya to maintain that they are in a continuous state of war with Israel.

The UN Charter and other international documents guarantee all peoples the right to self-determination and the Articles of Mandate for Palestine specifically guaranteed the self-determination rights of the Jewish people. Thus, it is contrary to the law for states such as Malaysia to attempt to deny the Jewish state the right to express the Jewish right of self-determination, notwithstanding animus against the Jewish people. Likewise, international law denies the validity of actions such as the General Assembly's labeling of Jewish self-determination (Zionism) as "a form of racism and racial discrimination."

The UN Charter and customary international law protect various rights of sovereign states: for instance, the right to self-defense, the right to determine their form of government, the right to control their borders and determine immigration policies, and the right to tax and to dispose of their budgets. Indeed, international law guarantees the inherent rights of states to control their internal affairs, unless specifically forbidden, and while there are restrictions on the behavior of states in some respects, in general a state is sovereign over its own affairs. Thus, attempts to impose on Israel more restrictive standards of immigration, self-defense, and international commerce than those otherwise recognized in international law are offensive to the law of sovereignty.

Attacks on the sovereignty of another state are themselves violations of international law under Article 2(4) of the UN Charter. These and many other important issues regarding the treatment of Israel as if it were an "illegitimate" state must be dealt with if international law is to retain its legitimacy.

