

# International Legitimacy and International Law

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The campaign of delegitimization directed against Israel has a strong and worrying legal aspect, both in the attempt to establish legal principles that can be used as tools against Israel and in the effort to harness international institutions as part of that campaign. It is worth taking a step backwards to recall how this situation has developed over time.

Broadly speaking, the campaign against Israel in international institutions has developed in three stages. Until some thirty years ago, most of the attempts to delegitimize Israel were limited to the political fora of the international community – such as the notorious vote on “Zionism is racism” in 1975 in the UN General Assembly. In the decades that followed there was a deliberate attempt, led primarily by the Arab group in the UN, to expand the circle of influence provided by their “automatic majority” in the General Assembly to the humanitarian and human rights institutions of the international community. This is the period which gave birth to some of the shocking abuses mentioned in Professor Cotler’s article in relation to the Human Rights Commission, culminating in the travesty of the Durban conference.

The last two decades seem to reflect an attempt to expand this hostile circle of influence still further into a “third arena” – the legal and judicial institutions of the international community. This period has witnessed the politicization of the Statute of the International Criminal Court (ICC), with the deliberate inclusion of “crimes” intentionally crafted to target Israel, as well as a political UN initiative which resulted in the referral of the issue of Israel’s security fence – alone out of all the issues to be dealt with in Israel-Palestinian negotiations – to the International Court of Justice (ICJ) in The Hague. There have also been widespread attempts to abuse the principle of universal jurisdiction, as described by Irit Kohn.

This politicization of the international legal arena has a number of implications for Israel. First, on many occasions, Israel is deprived of the opportunity to

do the right thing. For example, at the Rome Conference which adopted the statute of the ICC, Israel's representative, Judge Eli Natan, a great humanitarian, a Holocaust survivor, and a longtime advocate of the court, had to stand up and explain why Israel could not join this permanent war crimes tribunal. Second, Israel frequently finds itself in the complex dilemma of deciding to what extent it should participate with organizations which have become instrumentalized by political initiatives. On the one hand, through cooperation Israel may be able to influence the outcome. On the other, any degree of engagement will inherently give more legitimacy to the institution.

The reality is that international law and international legal institutions have become a convenient forum for anti-Israel campaigning. Why should this be? To a great extent it is the result of three significant developments in international law. The first is quite simply the speed at which international law develops. It used to be that to develop a principle of customary international law was a long and painstaking process. Today, in an era of globalization, instant communications, and shared threats, the process has become much faster. In part, this acceleration has also come about because the international community has developed a number of rather worrying shortcuts. One example of this is customary international law, those principles of international law which are binding on states whether or not they are parties to a treaty. Customary international law is supposed to reflect the "extensive and virtually uniform practice of states." Yet the three-volume encyclopedia of customary international law recently published by the International Committee of the Red Cross demonstrates a marked move from focusing on the way states actually behave to the way they *say* they would behave, and a reliance on military manuals and public statements rather than on actual state practice.

The second development in the nature of international law is a significant change in the nature of the players on the international legal plane. Historically, international law was clearly seen as a set of rules governing relations between states. Yet today players in the international legal arena include many kinds of non-state actors. Why has this happened? To a certain extent it is a result of a gradual change that has taken place in the way statehood is perceived, in particular the move from an "effectiveness paradigm" to an "entitlement paradigm." In the past, to be internationally recognized, a state had to bully its way onto the international arena. Over time, the test for membership in the club was one of *right* rather than *capacity*. The implied promise of the principle of self-determination was that if a people had a *right* to statehood,

then the international community would ensure they would be given the *capacity*. Unfortunately, the international community did not always follow through on its promise and many new states suffered from a “capacity deficit” between entitlement and effectiveness. This vacuum has drawn new actors into the international arena to make up the shortfall.

Among these actors are the NGOs (non-governmental organizations) described by Gerald Steinberg. In some ways the power they wield is greater, or at least more concentrated, than that of states. They are not subject to the same constraints as states, such as concerns of reciprocity and the need to balance competing interests. Accordingly, they can be extremely single-minded, and are powerful agents for change. According to U.S. statistics there are some thirty thousand international NGOs, and obviously a far greater number of domestic NGOs. In recent years, NGOs have had a dramatic effect on the development of international law, particularly in emotive areas such as landmines and protection of the environment.

International organizations are another important new player on the scene. In theory an international organization is simply a mechanism established by a treaty for allocating responsibilities between member states. Over time international organizations have developed their own identities, their own agendas, and their own survival mechanisms.

The same is true of multilateral corporations. Bill Gates is greeted almost as a head of state when he visits another country, and to a great degree rightly so. He heads a corporation whose turnover is equal to the GNP of many states. The shift in the allocation of power among different actors over time is reflected in what has been called the “skyline test”: In the year 1800 the tallest buildings in any European city would probably have been those of religious institutions – the churches; in 1900, the tallest buildings were probably the governmental buildings, power having been transferred from the church to the organs of the state. Today, the tallest and most impressive buildings do not belong to religious or governmental institutions, but rather to multilateral corporations and international organizations.

What all these new actors have in common is that they play a role in creating international law, yet they themselves are not bound by it. In a troubling asymmetry, international law remains the law that is binding on states.

The final problematic development is the question of enforcement. In the past, questions were raised as to whether international law, toothless and unenforceable, could really be called law. Increasingly today, bodies of

international law – be it trade law, disarmament agreements, or international criminal law – have stronger verification, arbitration, and sanctioning mechanisms. This is linked to the point made by Irit Kohn that, in addition to all these new actors, individuals themselves play an increasing role on the international plane – since they have standing before human rights tribunals and bear individual criminal responsibility for international crimes.

Taken together, these developments have transformed international law from a cumbersome, state-centered, non-enforceable body of law into a fast, flexible, non-state-guided body of law, with the potential to create binding and enforceable results. Obviously, this makes it a particularly attractive tool in any campaign against Israel.

So the question facing Israel today is how to navigate in this new environment. One crucial part of Israel's strategy must be to turn the tables. If legal principles and institutions are being used to question the legitimacy of Israel, then Israel in turn must question the legitimacy of the principles and institutions being harnessed against it. Specifically, in seeking to determine whether law is being used fairly, there are five key questions which must be asked:

## **I. Is It Law?**

There are certain principles and documents cited in accusations against Israel that are quite simply not binding law. Perhaps the most striking and common examples of this are General Assembly resolutions which are political rather than legal statements. On other occasions international legal principles are simply invented. During recent fighting in Gaza the EU presidency issued a demarche calling on Israel to refrain from all activities that endanger civilians. It asserted that "such activities are contrary to international law." Yet there is no principle of international law which states that when missiles are fired from the heart of populated areas it is unlawful to take defensive measures. Rather, even when civilians are endangered, the question is what constitutes a lawful, proportionate response.

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## **2. Is It Lawful?**

Frequently, as pointed out by Dr. Abraham Bell, initiatives intended to delegitimize Israel are frequently themselves not legitimate. A striking example was the referral of the issue of Israel's security fence to the ICJ, an initiative which trampled a series of procedural requirements. Even though the ICJ statute provides that only states can appear before the court, the Palestinians were given the right to appear. Yet in its advisory opinion, the ICJ found that terrorism originating from Palestinian areas does not give Israel the right to self-defense under the UN Charter because it does not emanate from the territory of a state. On the one hand, Palestinian areas were enough of a state to appear before the court. On the other, they were not enough of a state for terrorism emanating from these areas to give rise to the right to self-defense.

## **3. Is the Application of the Legal Principle or Institution Universal?**

Clearly, justice selectively applied is justice denied. Regrettably, in Israel's case there are countless examples of selective application. One clear example was the convening of the parties to the Fourth Geneva Convention – twice – to condemn Israel for not applying *de jure* the provisions of the Convention relating to occupied territory. These are the only two occasions on which the parties have convened to condemn a party state. Yet, the practical application of provisions of the Convention dealing with occupation in the territories is actually – with the exception of the campaign in Iraq – the only occasion on which they have ever been practically applied by any state in the history of the Convention.

#### 4. **Is It Impartial?**

Often, those who make public determinations of international law have their own interests to protect. In recent months, there have been extensive debates about the legal status of the Gaza Strip. It has been interesting to note the legal acrobatics that some NGOs and others have performed in order to allow themselves to claim that even after the dismantling of the military administration, and the removal of all Israeli soldiers and civilians, the Gaza Strip is still “occupied territory.” Israel has not denied that it still exercises certain responsibilities in relation to Gaza, and that these must be exercised in accordance with international law. But the attempt to place total responsibility at Israel’s doorstep, whether or not Israel is actually exercising authority in the sphere in question, reflects not international law but political expediency.

#### 5. **Does the Presentation of International Law Correspond to Reality?**

In other words, does it give guidance which can be implemented in practical terms? In the opinion on Israel’s security fence that the UN Secretary General submitted to the ICJ, he concluded that Israel had the right to take measures in self-defense against terrorists “as long as these did not impact on the lives of Palestinians.” In addition to being a serious misrepresentation of international law, such a principle flies in the face of practical common sense. When terrorists deliberately place themselves in civilian areas, utmost care must be taken to avoid or limit collateral injury to civilians. But failing to act against terrorists because they are shielded by civilians is not an option; such a policy is simply an invitation to terrorist groups to set up shop inside schools, hospitals, and kindergartens.

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The author met with a very eminent group of jurists writing a report examining Israel's compliance with international law. After hearing their strong criticism of many aspects of Israel's policy, he posed the following question: "You are legal experts who visit conflict situations throughout the world. Looking at the situation in Gaza today, what would you say would be a lawful and proportionate response to the terrorist threat by Israel?" The question was met with a full minute's silence. After a minute the chairman of the group muttered, "Well, that of course is an a-contextual question." It was clear that this group was more interested in ivory tower criticism than any practical guidance that could improve the situation on the ground.

These are not the only questions to be asked, but they can provide a useful yardstick in gauging whether international law is being applied in a legitimate manner or as a political tool.

If Israel adopts this approach, and turns the tables by questioning the legitimacy of international law, two key points must be borne in mind. The first is that international law is not Israel's enemy: the enemy is the *abuse* of international law. Similarly, not all developments in international law are negative from Israel's point of view. There are areas of international law that are developing in important and constructive directions. Sometimes these developments place burdens on Israel – for example the establishment of standards and obligations in relation to money laundering, trafficking in women, or environmental protection. Yet even with the additional responsibilities that they create, it cannot be denied that these are positive advances and are to be welcomed.

The second point to remember is that international law is not static. It is constantly changing, and Israel itself can actually play a role in changing it. Among the established sources of international law, set out in the Statute of the ICJ, are treaties, state practice, and the juristic writings of legal experts. So by the way that Israel acts, and by the efforts of jurists and academics to participate in the development of international law and to publish learned articles about legal issues, we too can have an effect on its outcome.

This last point is extremely significant, because it encourages certain humility. As much as we may criticize negative developments in international law, we are reminded that to some degree, at least, we have the international law that we deserve.

