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# Why Israel Is Free to Set Its Own Borders

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**D**URING THIS spring's election campaign in Israel, Ehud Olmert was candid about his Kadima party's plan for disengagement from the West Bank. His message was simple: with no one to talk to on the Palestinian side, Israel would have to act unilaterally to define and secure its borders.

Kadima's plan for "realignment" mainly amounted to withdrawing at least 60,000 settlers into blocs adjacent to the so-called Green Line (the ceasefire line established in 1949 at the end of Israel's War of Independence) and declaring a permanent border. Olmert was careful not to describe the exact contours of this settlement evacuation, but he made clear that it would bring all the settlers within Israel's yet-to-be-completed security barrier, which has been under construction since 2002. An estimated 193,000 Israelis already live in the 8 percent of Judea and Samaria that is between the projected route of the barrier and the 1949 boundaries.

Given that the government of the Palestinian Authority (PA) is now controlled by the terrorists of Hamas, the Bush administration has gently indicated that, while it prefers a negotiated deal with the Palestinians, it is open to supporting Israel's unilateral drawing of borders to include limited amounts

of territory gained in the Six-Day war of 1967. As Secretary of State Condoleezza Rice put it, employing a delicately diplomatic double negative, "I would not on the face of it just say absolutely that we don't think there's any value in what the Israelis are talking about." When newly elected Prime Minister Olmert visited Washington in May, President Bush gave a similarly positive, if ambiguous, response, praising the Israeli leader for his "bold ideas."

Other elements of the international community, however, have wasted no time in decrying Israel's effort formally to incorporate small parts of the West Bank. Speaking to the European Parliament in April, Javier Solana, the European Union's top foreign-policy official, lamented the "lack of dialogue with the Palestinian people in determining Israel's borders." Not to be outdone, former President Jimmy Carter, writing in *USA Today*, condemned Kadima's program as a naked "land grab," a violation of international law that no "objective member of the international community could accept." On May 25, the *New York Times* chimed in, denouncing the idea of Israel's setting its own borders and lumping together Hamas, the government of Israel, and Bush as "two culprits and an enabler."

In the view of Solana, Carter, the *Times* editorial board, and many other "objective" observers, the boundary between Israel and its Arab neighbors that prevailed between 1949 and 1967 is not just a historical baseline; it is a legitimate and well-established international border, one that the Jewish

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state has now ignored for nearly four decades. Such borders cannot be altered by force. As these critics see it, the Six-Day war of 1967 resulted in Israel's "occupation" of the West Bank (as well as of the Gaza Strip, Golan Heights, and East Jerusalem). Much as that action might have been required by the exigencies of the time, it gives Israel no ongoing title to those lands. Indeed, in the view of the critics, it makes Israel's long-term presence there nothing less than an ongoing crime.

But are these claims supported by the history of Israel's conflict with its Arab neighbors, to say nothing of the standards of international law? In the West Bank, is Israel, in fact, an "occupier"?

WITH RESPECT to Jewish settlement on the West Bank, the first document of any legal consequence dates from the San Remo Conference of 1920, where the victorious allied powers of World War I assigned the League of Nations mandate for Palestine to Great Britain. In doing so, they recognized, in the words of the mandate, "the historical connection of the Jewish people with Palestine" and the "grounds for constituting their national home in that country." Article 6 of the document even "encouraged close settlement by Jews on the land," land very much including the modern West Bank.\*

Though the League of Nations ceased to exist after World War II, the established right of Jews to live in the territories of Palestine remained in force. When the United Nations was created in 1946, its charter specifically preserved the existing mandates of the League. A year later, in Resolution 181, the UN, facing Great Britain's withdrawal from its mandate, recommended the partition of Palestine. Though the resolution, like all actions of the General Assembly, lacked legislative authority—and thus did not vest territorial rights in the region's Jews or Arabs—it did express the wishes of the international community.

Or, at any rate, most of the international community. For partition of Palestine was rejected from the start by the Arab states. As Israel prepared to claim its independence, the forces of Egypt, Iraq, Lebanon, Syria, and Saudi Arabia made ready to invade, hoping to strangle the Jewish state in its cradle. Though this act of aggression failed, it did result in Jordan's forcible acquisition of the West Bank, in direct violation of the UN partition resolution and of the UN Charter. Jordan went so far as to purport to have annexed the area, but between 1949 and 1967, only two UN member states (Great Britain and Pakistan) recognized its sover-

eignty there. Indeed, even while asserting its claim over the West Bank, Jordan insisted that the dividing line established in 1949 was not an international border but rather, in the words of the armistice agreement, a provision "dictated exclusively by military considerations."

What did all this mean for the West Bank's legal status? According to Sir Elihu Lauterpacht, editor of *Oppenheim's International Law*, one of the field's authoritative reference works, no state had sovereignty over the West Bank at the onset of the 1948-49 war. Jordan certainly could not then lay legitimate claim to the territory after acquiring it through armed aggression.† Nor could the UN, since its partition proposal was merely hortatory—a recommendation—and in any event the organization's charter contains no authorization for it to assume territorial sovereignty anywhere. In these circumstances, Lauterpacht concludes, the British withdrawal from the territory of the mandate resulted in a lapse or vacancy of internationally recognized sovereignty. The West Bank was, in legal jargon, *res nullius*: a thing belonging to no state. In such a case, sovereignty in international law may be acquired by any state in a position to assert effective and stable control without resort to unlawful means—a situation that would not exist until 1967.

IT WAS with the Six-Day war of 1967 that Israel first came into possession of the West Bank, bringing down upon itself the now familiar charge of being an illegal "occupier" there. But a charge does not acquire moral or legal force simply through repetition over time, even if such repetition establishes it as conventional wisdom. Like the notion that Jordan or the UN or some other entity held valid title to the West Bank after 1949, the related notion that Israel's presence in the territory constitutes an "occupation" is utterly specious.

On May 15, 1967, President Gamal Abdel Nasser of Egypt sent his troops into the Sinai peninsula and massed them near the Israeli border. Syrian troops simultaneously assembled in the Golan Heights. A week later, Egypt closed the Straits of Tiran to Israeli shipping and blockaded the port of Eilat, thus halting the flow of oil to the Jewish state

\* It was Britain's 1922 carving of "Transjordan" as a separate Hashemite state out of the territory of mandatory Palestine, and the exclusion of Jews from this new entity, that in fact represented a violation of the agreed-upon legal arrangement.

† This remains an important point today. The Palestinian Authority's current claim to the territory is predicated on Jordan's having ceded its own legal claims to the PLO in 1988. International law has, however, consistently adhered to the norm of "*nemo dat quod non habet*": no one can give that which he does not own.

from its main supplier, the Shah's Iran. Under intense pressure from Nasser, Jordan's King Hussein signed a "defense pact" with the Egyptians. Algeria, Iraq, Kuwait, and Saudi Arabia also contributed troops and arms to the build-up.

About the purpose of these military measures there could be no ambiguity. Hafez al-Assad, then the defense minister of Syria, exultantly declared his forces ready "to explode the Zionist presence in the Arab homeland." Nasser stated that "our basic objective is the destruction of Israel," adding that the Arabs "will not accept any coexistence with Israel." The Iraqi president, Abdur Rahman Aref, seconded these bloodthirsty sentiments in terms recently echoed by the current president of Iran: "The existence of Israel is an error which must be rectified. . . . Our goal is clear—to wipe Israel off the map."

For Israel, these actions and statements constituted an unambiguous *casus belli*. Availing itself of the customary rights of international law, as well as the specific provisions of Article 51 of the UN Charter, the Jewish state set out to defend itself.

Surrounded on all sides and with its survival in the balance, Israel launched a remarkable series of air strikes on the morning of June 5, destroying the Egyptian and Syrian air forces while their pilots slept or ate breakfast. Simultaneously, Israeli armored units engaged Egyptians in the Sinai, while a small unit of the Israeli Defense Force (IDF) heroically held off Syrian troops entrenched on the Golan Heights and then pushed them back. That same day, Israeli Prime Minister Levi Eshkol sent a message to King Hussein of Jordan, promising that Israel would not attack if Jordan stayed out of the fight. But Hussein, convinced that the Arabs would win, rejected the offer, and the Jordanian Legion began shelling West Jerusalem. Jordan also made thrusts westward, including the occupation of Government House in Jerusalem, which had been used by UN observers. Israel retaliated, and within two days the IDF had routed the Jordanians and achieved, miraculously to the mind of Israelis, the reunification of Jerusalem. No less fatefully, the Jewish state, having initially planned to remain purely defensive on the Jordanian front, had now overrun Jordanian positions throughout Judea and Samaria—that is, the West Bank.

After six days of fighting, Israel might easily have marched on to Cairo, Damascus, and Amman. Under the traditional laws of war, it certainly would have been justified in doing so, with the aim of neutralizing its bellicose enemies. But having no desire to wage offensive war, Prime Minister

Eshkol and his cabinet yielded to American wishes and on June 10 accepted a unilateral ceasefire. At this point, a series of diplomatic and juridical maneuvers took place, the consequences of which are still relevant today.

THE DAY after the ceasefire, the Soviet Union, which had been humiliated along with the Arab clients it had armed and supplied, introduced in the UN Security Council a resolution branding Israel the aggressor and calling for its immediate withdrawal to the boundaries that had existed before the conflict. The resolution was defeated. The USSR then switched its efforts to the General Assembly, where a similar resolution was also defeated. When the Security Council reconvened in the fall of 1967, the USSR tried yet again, only to be rebuffed a third time. The UN was not prepared to demand that Israel return, without condition, territory that it had taken in a defensive war provoked by its enemies' aggression.

It was in this context that Resolution 242, introduced by the British ambassador, was adopted unanimously by the Security Council on November 22. The resolution had something for both sides. On the one hand, it called for the "withdrawal of Israeli armed forces from territories occupied in the recent conflict"; on the other hand, it described the necessary backdrop for such a withdrawal as the right of "every state in the area to live in peace within secure and recognized boundaries free from threats or acts of force." Since Israel had never denied the legitimacy or the existence of its sovereign neighbors, the onus was clearly on its Arab enemies to acknowledge Israel. Such acknowledgment, as we know, was not to be had, thus foreclosing the possibility of the "secure and recognized borders" contemplated by the resolution.

Despite decades of misinformation to the contrary, the text of Resolution 242 did *not* require Israel to withdraw to the truce lines that existed before the war. Testimony by Arthur J. Goldberg, the former Supreme Court Justice who was then serving as U.S. ambassador to the UN, is telling. As he wrote in 1988,

The notable omissions in language used to refer to withdrawal are the words *the, all,* and the *June 5, 1967 lines*. . . . [T]here is lacking a declaration requiring Israel to withdraw from *the (or all the)* territories occupied by it on and after June 5, 1967. Instead, the resolution stipulates withdrawal *from occupied territories* without defining the extent of the withdrawal. And it can be inferred from the incorporation of the

words *secure and recognized boundaries* that the territorial adjustments to be made by the parties in their peace settlements could encompass less than a complete withdrawal of Israeli forces from occupied territories [emphases in the original].

Goldberg's interpretation may in fact understate the original meaning of Resolution 242. According to George Brown, Britain's foreign secretary at the time, the explicit and well-understood point of the text was that "Israel will not withdraw from all the territories."<sup>\*</sup>

Commentators wishing to contest this view have emphasized Resolution 242's assertion of the principle of "the inadmissibility of the acquisition of territory by war." Setting aside the fact that a great many countries include within them territory obtained through armed conflict, this principle simply does not apply to Israel's seizure of the West Bank, or to its continuing control of the area today. The expression "by war" is not a legal synonym for "as a result of armed conflict." The principle pertains only to the conquest of territory through *military aggression*, of which Israel was manifestly not guilty.

In 1967, Israel fought not to extend its realm but to preserve its very existence and to establish a secure frontier—actions with obvious legitimacy in international law. As Judge Steven Schwebel, who would later head the International Court of Justice, noted in a 1970 article in the *American Journal of International Law*, "Where the prior holder of territory [in this case, Jordan] had seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has . . . better title."

Israel's legal claim to the West Bank is also supported by the principle of prescription. As the U.S. Supreme Court noted in the case of *Arkansas v. Tennessee* (1940), prescription in international law refers to "the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty." The point of this principle is straightforward enough; it rests, in the words of the eminent legal scholar Lassa Oppenheim, on "the same rational basis as prescription in municipal law—namely, the creation of stability and order." Based solely on these criteria, Israel's claim is plainly stronger than that of Jordan, Great Britain (the mandate holder), or Turkey (the prior colonial ruler), all of which were dispossessed from the West Bank long ago.

Israel itself has been silent about the status of its presence in the West Bank, declining to recognize

the application of Israeli law to the hostile indigenous population even as it has established Jewish settlements in the area (an act of sovereignty). Because of this ambiguity, Israel's claim based on prescription is less than invincible—although it remains better than the claim of any other state.

AS FOR those Israeli settlements, some number of which would be preserved under Prime Minister Olmert's withdrawal plan, it is often asserted that they themselves constitute a breach of international law. More specifically, it is argued that the Israeli towns violate the Fourth Geneva Convention, ratified in 1949 to protect civilians in wartime. In the words of the convention, to which Israel is a signatory, an occupying power "shall not deport or transfer parts of its own civilian population into territory it occupies."

As we have already seen, there are strong reasons to hold that Israel is not the aggressive occupier of the West Bank but its sovereign. For this reason alone the Fourth Geneva Convention is arguably inapplicable. Nor is that the only reason: under its own article 2, the convention applies only to cases involving the "occupation of the territory of a High Contracting Party [i.e., state], by another such Party." Before 1967, as we have seen, the West Bank was not a recognized part of any other such "High Contracting Party."

But let us set this legal argument aside. Even so, it is highly doubtful that the Fourth Geneva Convention, according to its original meaning and intent, would forbid the settlement of Jews in the West Bank. The convention was established in response to the Nazi practice of forcibly transporting populations into or out of occupied territories in order to liquidate them, or to use them as slave labor. Even if Israel were an occupying power in the West Bank, and if the Fourth Geneva Convention were applicable, Jewish settlement would be forbidden there only if, in the language of the convention, such transfers "impair[ed] the economic situation or racial integrity of the native population."

But this condition hardly obtains. For all of the protests that have long surrounded Israel's presence in the West Bank, the past four decades have seen

<sup>\*</sup> The French version of the draft resolution was framed possibly more ambiguously, speaking of a "*retrait des forces armées israéliennes des territoires occupés*." But as Eugene V. Rostow showed, independent linguistic checks of the text were made in different foreign ministries and the original English text was allowed to stand as formulated. The use of the phrase "*des territoires occupés*" ("from the occupied territories") has been attributed even by many French grammarians to the requirements of the French language, not to a divergent interpretation of the resolution.

the territory's "native population" skyrocket, with a growth rate far exceeding that of Israel itself. Moreover, as Efraim Karsh has exhaustively documented in these pages, the West Bank, while under full Israeli control, prospered as have few other corners of the Arab world, whether one looks at health, education, or economic development.\* One might even argue that, far from being a cruel occupier, Israel has done more to enhance the "economic situation" and "racial integrity" of the Palestinians than have the Palestinians themselves.

IT IS beyond the scope of this essay to consider *why* much of the world (including, alas, the United States) has seen fit to assign to Israel the unhappy epithet of "occupier." But one of the most striking findings for those who do research in this area is that the term "occupied territories" seems to apply only to Israel's administration of the West Bank (and, previously, Gaza). The term is rarely if ever used in discussing other bitter, long-standing territorial disputes. Indian Kashmir, for instance, is merely a "disputed region" in the eyes of the U.S. Department of State. Nor is it easy to find international actors ready to point an accusing finger at "occupation forces" in Kurdistan and Northern Cyprus or, for that matter, in Quebec, Catalonia,

and Ulster. When it comes to the concept of "occupied territory," Israel would appear—unjustly—to have a monopoly.

None of this is to suggest that Israel's legal and historical claims to sovereignty in the West Bank require it to remain there. But neither is it required to consult either the Palestinian Arabs or the self-appointed representatives of the "international community" if it decides to withdraw from some territory and determine its own borders. As Ariel Sharon and now Ehud Olmert have argued, it may well be in Israel's national interest to disentangle itself, as much as prudence requires, from the Palestinians and the territory in which they predominate. As many Israelis see it, to do any less might court the risk of Israel's itself becoming an "occupied territory"—and at the hands of a far less benign power.

It would be best to bring about any such disengagement through negotiations with a credible and well-meaning Palestinian counterpart. But for now and the foreseeable future, the seat on the other side of the table remains empty. In this circumstance, exactly as in the 1967 war of aggression that attempted its annihilation, Israel, if it chooses to do so, has every legal right to act alone.

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\* See "What Occupation?" in the July-August 2002 Commentary.