

Why Durban and the BDS Movement are problematic under International Law

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ISRAEL *and* INTERNATIONAL LAW

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Aspects of Legitimacy and International law

In early July 2021, Foreign Minister Sigrid Kaag informed the Dutch House of Representatives that the Netherlands "does not intend to participate in the Durban IV meeting, given the historical burden of the Durban process, the risk of a repeat of the misuse of this platform for anti-Semitic expressions and the disproportionate and one-sided focus on Israel as reflected in the original Durban Declaration."

This is a very important statement, as the 'Durban Declaration' of 2001 laid the foundation for the current 'Boycott, Divestment and Sanctions' (BDS) movement. The Dutch government has been pressured in recent months to participate in the 'Durban IV' conference to be held later this month (September 2021) in New York, which is intended to mark the 20th anniversary of the Durban Declaration.

Meanwhile, more than 15 countries, including the Netherlands, Australia, Canada, Germany, Italy, France, Bulgaria, Israel, the UK and the US, have decided to boycott the Durban IV conference in New York.

DURBAN

The NGO Forum of the UN World Conference against Racism, held in Durban, South Africa in 2001 ('Durban') was designed to combat racism and discrimination. This forum turned into a manifestation of open anti-Semitism and Israel-hatred. Israel was accused of racism, genocide and apartheid policies. Subsequent Durban conferences in 2009 and 2011 also saw their anti-Semitic incidents, with Iranian President Mahmoud Ahmadinejad declaring in 2009 that "world Zionism is the personification of racism".

The NGO Forum statement and action programme explicitly called for the use of legal procedures and economic measures to advance the political war against Israel. One of the resolutions at the end of the conference read:

" the imposition of a policy of complete and total isolation of Israel as an apartheid state, as in the case of South Africa, which means the imposition of compulsory and comprehensive sanctions and embargoes, the complete cessation of all ties (diplomatic,

economic, social, aid, military cooperation and training) between all states and Israel."

With this statement, the current BDS movement was in fact born.

THE BDS MOVEMENT

The BDS movement was officially launched in 2005 by 171 Palestinian NGOs. Relying on Durban and the precedent of the successful anti-apartheid movement that overthrew the white regime in South Africa, they called for economic and diplomatic pressure on Israel until it submits to Palestinian demands for self-determination, "...in accordance with international law."

The core idea of the BDS movement is that Israel is an illegal state because it was founded on an injustice, namely a racial distinction between Jews and other people, as expressed in the 1975 UN resolution "Zionism is racism".

The BDS movement denies the legitimacy of Zionism as an expression of the Jewish people's right to self-determination. Their method is to encourage and/or pressure governments and businesses to boycott products made in occupied territories, to divest from Israeli businesses and to impose sanctions on Israel.

The ultimate goal of the BDS movement is thus the dismantling of the State of Israel as an expression of Jewish

national identity. Essentially, the BDS movement seeks to "turn back the clock" to the situation as it existed in 1918. This is not possible; in the meantime, based on a series of binding international instruments, the Jewish State of Israel has come into existence, which has the right to be treated as sovereign state, entitled (inter alia) to political inviolability and territorial integrity, just like other states.

INTERNATIONAL LAW

The BDS movement claims that boycott, divestment and sanctions are necessary to pressure Israel to comply with international law, but international law does not support the claims of the BDS movement. On the contrary, both the BDS movement and the actions of states under the influence of the BDS movement, violate the fundamental rights of Israel and the Jewish people under international law.

Here we highlight some of the issues.

"Apartheid"

It has become popular to accuse Israel of being an apartheid state. In April 2021, Human Rights Watch (HRW) published a report titled "[A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution](#)" in which HRW "concludes" that Israeli leaders should be prosecuted for "apartheid" and "persecution" because of the oppression and discrimination

against Palestinians by Israel, both in Israel itself and in the 'West Bank'.

Apartheid is a crime against humanity under the 'Rome Statute' (the Statute of the International Criminal Court). It is defined as "widespread or systematic attack directed against a civilian population, with knowledge of the attack ... inhuman acts ... committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any another racial group or groups and committed with the intention to maintain that regime" (Article 7, Rome Statute).

In principle, the Prosecutor of the International Criminal Court could investigate and possibly prosecute Israeli leaders for the crime of apartheid. (In 2020, the Court determined that it has the jurisdiction to prosecute crimes committed by Israeli leaders on the "territory of Palestine", which it defined as Gaza, East Jerusalem and the 'West Bank'; this decision is highly controversial, and likely to be challenged, but for the time being it gives the Prosecutor the green light to investigate any possible Rome Statute crimes committed on this territory. See [The ICC's controversial ruling on "Palestine" – pushing the boundaries of law – thinc.](#))

No person or state has been prosecuted for the crime of apartheid as it is

defined in the Rome Statute, so there are no precedents. The definition sets a very high bar. The HRW report created its own definition of 'apartheid' which differed in important respects from that in the Rome Statute.

It is highly questionable whether the Rome Statute concept of 'apartheid' applies to the relationship between Jews and non-Jews (a) in Israel, and/or (b) in the "occupied territories".

Even if it were established that there is widespread and systematic discrimination between Jews and others in Israel (which is highly questionable), the claim that Israel maintains an "institutionalised regime" of "systematic oppression and domination", with the intention of oppressing non-Jews, in no way takes into account the history and context of Israel itself and of Judea and Samaria.

It is also highly debatable whether the Jewish people constitute a "racial group" and the Palestinians "another racial group" within the meaning of article 7 of the Rome Statute.

The "Palestinian territories"

The international community has decided that on the basis of the San Remo Resolution (1920), the Mandate for Palestine (1922) and the Covenant of the League of Nations (1922), the Jewish people should have their own "home" in the land of Palestine – a

home which would respect the civil and religious rights of all communities in the land. This decision covered the whole territory of Palestine, including Jerusalem and what was later called the 'West Bank' (Judea and Samaria).

Article 80 of the UN Charter ensured that the rights granted under the Mandate with respect to the establishment of a Jewish homeland in Palestine remained valid, despite the termination of the Mandate itself and the replacement of the League of Nations by the United Nations.

Under these legitimate instruments of international law relating to Palestine, Israel does have a claim to sovereignty beyond the 'Green Line', and the right to negotiate this territorial sovereignty with another entity. Indeed, Israel and the PLO committed themselves in the 'Oslo Accords' to negotiate on issues such as borders, the status of 'settlements' and Jerusalem.

Israel's sovereignty

Israel is a State and a member of the United Nations. Like all other UN Member States, Israel has the right to territorial integrity and political independence, and deserves to be treated equally with all UN Member States. This right is enshrined in the United Nations Charter and in customary international law.

Israel's right to territorial integrity and security is also expressed in UN Security Council Resolutions 242 and 338. These resolutions prescribe peace negotiations based on "the cessation of all claims or states of war and respect and recognition of the sovereignty, territorial integrity and political independence of every state in the area and their right to live in peace within secure and recognised borders, free from threats or acts of violence".

The PLO – now "officially" Israel's negotiating partner – consistently denies the right of the Jewish people to exist as a sovereign nation and insists on using violence and terrorism against the Jewish people. Both are contraventions of international law.

Until an agreement is reached with the PLO, Israel has the right to retain control of the 'West Bank' and the Golan Heights and to defend itself against threats to its national security, territorial integrity and political independence.

The Palestinian “right to self-determination”

The right of the Arab Palestinian people to self-determination does not constitute an absolute right to a state. Whether or not the Arab Palestinians will have their own state depends on many factors. A Palestinian state can only come about if a peace treaty is first concluded in which a balance

(compromise) is reached between the claimed Arab Palestinian right to self-determination and the pre-existing rights of the Jewish people and the State of Israel, including the right to secure borders.

The Palestinian “right of return”

The Palestinians insist on a "right of return", i.e. the right of all (now over 5 million) Palestinian "refugees" to return to the homes their ancestors left (forcibly or otherwise) in the 1947-1949 war.

Persons who are considered refugees under general international law do not have the right to return to the areas from which they fled. Rather, the host countries have certain obligations to take them in. Thus, even if Arab Palestinians were considered "refugees" under the 1951 UN Refugee Convention (which is not the case for most of them), they have no "right of return" under international law. Neither does UN General Assembly resolution 194 (1948) support a “right of return” as is often claimed.

“Palestinian territory”

International law provides no basis for calling East Jerusalem or the 'West Bank' "Arab" or "Palestinian" territory. These areas were part of the Mandate for Palestine, which recognised that they were part of the Jewish homeland. In addition to Arabs, peoples of other races and ethnic groups have always

lived and still live in these areas, such as Jews, Bedouins and Druze. The "Arabs" have no recognised legal right to these areas. Under the Oslo Accords, the status of most of these territories remains a matter of negotiation between Israel and the PLO.

Anti-Semitism

The BDS movement and the claim that the Jewish state of Israel is a racist "apartheid state" are forms of anti-Semitism as defined by the International Holocaust Remembrance Association (IHRA). The IHRA working definition states:

" Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities."

According to IHRA, this includes “[d]enying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.”

BDS – FAR AND NEAR

Although a number of countries formally reject the Durban Declaration, and with it the BDS movement, 'Durban' is today approved by a majority of UN member states. The Jewish State of Israel is increasingly

accused of apartheid and discrimination, and pressure is mounting to isolate and punish Israel for its "violations of international law".

Banks, pension funds and other companies do not want to do business with Jews living in Judea and Samaria, or with parties associated with them. In recent months, there has been much ado about Ben & Jerry's decision to stop selling ice cream to shopkeepers in Israeli settlements in Judea and Samaria, on the basis that all settlements are illegal under international law.

In the Netherlands, the Dutch Food and Consumer Product Safety Authority (NVWA) – at the behest of BDS activists – fined the Israel Products Centre for importing bottles of wine from Hebron without labels labelling Hebron as an "illegal settlement".

These examples show that 'Durban' today enjoys popular support in many Western countries. More and more

people believe that Israel is guilty of systematic oppression of Palestinians.

ZIONISM – PROBLEM OR SOLUTION

It is important to realise that the BDS movement is not just about removing the Israeli military regime in the 'West Bank'. It is also not about creating a viable "Palestinian state" adjacent to Israel. It is about challenging Israel's fundamental right to exist as an expression of Jewish national identity.

The ultimate goal of the BDS movement is the replacement of Israel as a Jewish state with one state in which Palestinian Arabs will be in the majority. Therefore, the right of return is a central tenet of the BDS movement.

It is clear that this would mean the end of the State of Israel as a Jewish and democratic state in which there is room for all inhabitants regardless of their ethnicity or religion.

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