

**AN EXPERT OPINION  
ON THE QUESTION OF  
ISRAEL'S RIGHT TO EXIST**

Report by Professor John Dugard SC

Produced for CAGE's judicial review of the secretary of state for education's letter on anti semitism

# **JUDICIAL REVIEW OF THE SECRETARY OF STATE FOR EDUCATION'S LETTER TO SCHOOLS ON ANTISEMITISM**

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24 August 2021

# STATEMENT OF QUALIFICATIONS

1. I give this Report in my personal capacity.

2. I am an advocate of the High Court of South Africa. I was appointed as Senior Counsel (equivalent of Queen's Counsel)

by President Mandela in 1998. I am an Associate Tenant of Doughty Street Chambers, London. I practice as a private legal consultant on matters of international law in The Hague, Netherlands.

3. I was Professor of Law at the University of the Witwatersrand, Johannesburg, for 33 years and Dean of the Faculty of Law of that University from 1975 to 1977. From 1978 to 1990 I directed the Centre for Applied Legal Studies attached to the University of the Witwatersrand which conducted research, litigation and advocacy in the field of human rights in apartheid South Africa. I was Professor of International Law at the University of Leiden, Netherlands, from 1998 to 2006.

4. I was a Visiting Professor of Law and Director of the Lauterpacht Centre for International Law at the University of Cambridge from 1995 to 1997. I hold the LLB and LLD degrees of that University.

5. I was a member of the United Nations International Law Commission from 1997 to 2011.

6. I served intermittently as Judge ad hoc of the International Court of Justice

from 2000 to 2018.

7. I have written extensively in the field of international law, human rights and apartheid. My publications include Dugard's International Law. A South African Perspective, 5th ed, Juta, Cape Town, 2018; Human Rights and the South African Legal Order, Princeton University Press, 1978; Recognition and the United Nations, Grotius, Cambridge, 1987; The Secession of States and their Recognition, Hague Academy, 2013.

8. I was United Nations Special Rapporteur on the Situation of Human Rights in the Occupied Palestinian Territories from 2001 to 2008. I have chaired two international Commissions of Inquiry into violations of human rights and international humanitarian law in occupied Palestine: the first in 2001; the second in 2009. I have written a number of articles on in scholarly journals on the situation in occupied Palestine.

9. I have read Practice Directions 345 and I believe that I comply with the qualifications required of an independent expert.

10. In writing the present Report I have relied principally on:

V Kattan, From Co-Existence to Conquest. International Law and the Origins of the Arab-Israeli Conflict, Pluto Press 2009;

J Quigley The Statehood of Palestine. International Law in The Middle East Conflict, Cambridge University Press, 2010;

J Dugard, Confronting Apartheid. A Personal History of South Africa, Namibia and Palestine, Jacana, 2018.

# ISRAEL'S RIGHT TO EXIST

## B. THE LEGALITY OF THE CREATION OF THE STATE OF ISRAEL

11. The right of a State to exist is not a concept recognized by international law. It is not recognized in any treaty, in customary international law or in legal literature. Accordingly, the 1949 Draft Articles of the International Law Commission on Rights and Duties of States make no mention of such a right.

See Yearbook of the International Law Commission, 1949;  
General Assembly Resolution 375 (IV) of 6 December, 1949.

12. A State has a right to its territorial integrity and political independence and not to be forcibly attacked by another State.

See Article 2(4) of the UN Charter.

This, however, is not a right to exist. A State may cease to exist by dissolution (as in the cases of Yugoslavia and Czechoslovakia), union with another State (as with West and East Germany), or by incorporation into another State (as with Somaliland into Somalia, 1960) without any suggestion that a right has been violated.

13. States do not come into existence in the exercise of a right. Instead they come into existence when they are recognized as a State by other States or

when they are admitted to membership of the United Nations. That there is no right to exist as a State is demonstrated by the fact that a State may be recognized as a State by some States but not by others. Consequently it is a State for those State that recognize it but not for States that do not recognize it.

Palestine, for instance is a recognized as a State by 138 States but its statehood is disputed by those States that do not recognize it.

So too with Kosovo that is recognized by some 100 States. Neither of these States is a member of the United Nations which has refused to admit them to membership.

14. Both the decision of States to recognize an entity as a State and the decision of the United Nations to admit a State to membership (and thereby confirm its statehood) are based on political grounds. Legal standards guide States in making such decisions but in the final resort political considerations prevail. There is no right to recognition or to membership of the United Nations. In other words there is no right on the part of an entity claiming statehood to exist as a State.

15. Entities that wish to become recognized as States often make declarations of their claim to statehood. Rhodesia made such a claim when it unilaterally declared independence in 1965. But this claim of the right to exist was denied by the United Kingdom and the United Nations. So too Tibet. It claims the right to exist as a State but this is denied by China and the international community accepts this.

Other entities that claim to be States are Kurdistan and Catalonia but they make no claim to a right to exist as States.

16. Israel claims that it has the right to exist because the legality of its creation was contested and is still a matter for debate. In order to assert its legitimacy as a State and the legality of its creation it asserts its “right to exist”. This assertion is not made in the exercise of any right recognized by international law. It is simply a political appeal designed to justify the morality and legality of Israel’s creation and existence as a State.

17. Israel’s appeal for recognition of its right to exist is principally an appeal to States to recognize the legality and morality of its creation. This is clear from its Declaration of Independence of 14 May 1948. In this Declaration Israel’s Provisional Council of State justified its assertion of Israel’s independence and existence as a State on the history of the Jewish people, the Balfour Declaration of 1917, the Mandate of the League of Nations, the Holocaust and the November 1947 resolution of the General Assembly recommending the partition of historic Palestine into a Jewish State and an Arab State (General Assembly Resolution 181(II)).

18. The Declaration’s assertion of Israel’s right to exist as a State on the basis of the Balfour Declaration, the Mandate of the League of Nations and the General Assembly’s Partition Resolution are all challenged on legal grounds and have been since 1948.

19. The Balfour Declaration of 1917 did not recognize the right of the Jewish people to a State in Palestine. It simply stated that the British Government viewed “with favour the establishment in Palestine of a home for the Jewish people” but that this was to be without prejudice to the “civil and religious rights of existing non-Jewish communities in Palestine.”

See The Times, 2 November 1917 (Letter from Foreign Secretary Arthur Balfour to Lord Rothschild).

20. Although the Mandate for Palestine incorporated the provisions of the Balfour Declaration it made no provision for a Jewish State. The British Government as mandatory power accordingly sought to balance the competing interests of Jews and Arabs in Palestine without success and ultimately handed over the problem to the United Nations to resolve in 1947.

21. The Partition Plan recommended by the General Assembly in Resolution 181 (II) of 1947 was highly controversial. It was adopted by 33 votes to 13 with 10 abstentions. Unable to support the Resolution, Britain abstained from voting. Arabs in Palestine rejected the Resolution on account of its unfairness: it gave the Jewish community comprising 33 per cent of the population of Palestine 57 per cent of the land and 84 per cent of the agricultural land. The legal competence of the General Assembly to adopt Resolution 181 (II) was also seriously questioned. In these circumstances it was impossible for the United Nations to implement the Partition Plan. Accordingly the United Nations turned to other possibilities. The United States proposed that a United Nations Trusteeship be established over Palestine as a single State.

22. Britain, the Mandatory Power, announced that it would evacuate its administration on 14 May 1948. This prompted the Declaration of Independence by Israel on 14 May 1948. The new State of Israel was immediately recognized by the United States but not by Britain.

23. The Declaration of the State of Israel resulted in armed conflict between the forces of the newly created Israel and Arab States in the region. This resulted in

the displacement of 750,000 Arabs in Palestine in what is today known as the Catastrophe, the Nakba.

24. As a result of this conflict Israel expanded the territory proposed for the State of Israel by the United Nations in Resolution 181(II) from 57 per cent to 78 per cent of historic Palestine. This expansion was confirmed by an Armistice Agreement in 1949.

25. On 11 May 1949 Israel was admitted to the United Nations. Unable to support this admission, the United Kingdom abstained from voting in both the Security Council and the General Assembly.

26. Although Israel still justifies its right to exist as a State on the basis of Resolution 181 (II), the better view is that Israel forcibly seceded from the Mandate Territory of Palestine. This view is based upon the considerable expansion of Israel's borders by the use of force in 1948-1949. Thus James Crawford, Whewell Professor of International Law at Cambridge and later judge of the International Court of Justice states:

“Israel was effectively and lawfully established as a State by secession from Palestine in the period 1948 to 1949. Its original territory was the armistice territory, not the partition territory”  
( The Creation of States in International Law, OUP, 2nd ed, 2006 p.434).

27. This brief history of the creation of the State of Israel explains why its claim of a “right to exist” in law and morality is debatable. The principal bases of its legal

claims are all contested on reasonable grounds. Furthermore the expansion of Israel's borders beyond those envisaged by Resolution 181 (II) was premised on the forcible displacement of 750, 000 Palestinians in the course of the Nakba.

## **C. THE LEGALITY OF ISRAEL'S PRESENT POLICIES AND PRACTICES**

28. The legitimacy of Israel and its "right to exist" is today debated in the light of both the justification for its creation and subsequent developments relating to the recognition of the right of self-determination as a peremptory norm of international law and of apartheid as an international crime.

29. Inevitably, it is argued that today Israel would not be recognized as a State because of its denial of self-determination to the indigenous population in the same way that Rhodesia was denied recognition as a State. Questions are asked as to why the United Nations, whose Charter proclaims the right of self-determination, did not apply the same standards to the admission of Israel to the United Nations that it was later to apply to Rhodesia when it called on States not to recognize Rhodesia.

See Crawford *op cit* pp 129-130.

30. When I was UN Special Rapporteur I drew attention in my reports to the Human Rights Council and Third Committee of the General Assembly that Israel's policies and practices in occupied Palestine resembled those of

apartheid South Africa.

See A/HRC/4/17 of 29 January 2007.

Since then more and more evidence and argument had been produced to support this charge, including reports by the leading Israeli human rights NGO, B'Tselem, and the premier international

Human rights NGO, Human Rights Watch, which argue that Israel applies apartheid in Israel itself as well as in occupied Palestine.

See V Tilley (ed) *Beyond Occupation. Apartheid, Colonialism and International Law in the Occupied Palestinian Territories*, Pluto Press, 2012;

J Dugard & J Reynolds, "Apartheid, International Law and the Occupied Palestinian Territory" (2013) 24 *European Journal of International Law* 867;

B'Tselem, *This is Apartheid*, 12-01-2021. <http://www.btselem.org/publications/fulltext/202101>;

Human Rights Watch, *Apartheid: A Threshold Crossed. Israeli Authorities and the Crime of Apartheid and Persecution*, 27 April 2021. <https://www.hr.org> ISBN 978-1-62313-900-1.

31. The international Criminal Court is currently investigating crimes committed by Israel in occupied Palestine, including the crime of apartheid. Apartheid is recognized as crime against humanity in Article 7 of the Rome Statute of the international Criminal Court. Article 7(2)(f) defines the crime of apartheid

as “inhumane acts...committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group.” Evidence has been presented to support the argument that Israel practices this crime in occupied Palestine.

32. During the apartheid era in South Africa arguments were raised that South Africa should no longer be recognized as a State and should be expelled from the United Nations. Although South Africa was not expelled from membership of the United Nations, the credentials of the South African government were not accepted and it was denied the right to participate in the work of the General Assembly. In effect, this meant that many States believed that South Africa no longer had the right to exist as a State because of its policy of apartheid.

33. Today the same argument is raised in respect of Israel.

In essence this argument is based on the principle that States should not recognize as lawful a situation created by the serious breach of a peremptory norm of international law, such as apartheid.

See Articles 40 and 41 of the Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol II, Part Two., 26.

34. Israel's claim of a right to exist as a State is a plea for acceptance of the legality, and hence legitimacy, of its creation and of the legality of its actions and policies today. The legality, and hence legitimacy, of its creation and existence today is, however, contestable both in terms of the law of 1948 and of 2021. In these circumstances there can be no balanced discussion of the Israel/Palestine

problem without a discussion of the right of Israel to exist or without the study of the literature on this subject. The statehood of Palestine and whether it meets the requirements for statehood and admission to the United Nations is a subject for debate. So too must the claim of Israel that it has a right to exist as a State be debatable. Students, scholars, lawyers and the general public should be free to debate Israel's right to exist both in terms of its creation and its present policies. It is a legitimate subject for lawyers, political scientists, historians, students, scholars, teachers and the general public to examine, consider and debate. To exclude this subject from debate would be a serious violation of academic freedom and freedom of expression.

## D. CONFIRMATION

35. I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

35. I understand that proceedings for contempt of court may be brought by anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

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24th August, 2021 Avi Shlaim



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