

Countering the BDS Movement against Israel through Legal Measures*

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During the past decade, supported and inspired by the BDS anti-Israeli boycott movement, some organizations, companies, churches, student councils and academic associations in countries across Europe, the U.S., Canada and Latin America, have applied either a wholesale boycott or a boycott of Israeli products, companies and universities with connections to the Israeli settlements. The movement has been especially prominent on California university campuses, where all student government councils approved divestment resolutions.¹ The anti-Israeli boycott movement, also known as the Boycott, Divestments and Sanctions movement ("BDS," or "Anti-Israeli boycott movement") began in 2005 with a campaign endorsed by Palestinian civil society organizations.² While the BDS movement has cast itself as a rights-based organization, in effect its far-reaching demands, aiming to undermine Israel's future as the Jewish State, have cast a doubtful light on their actual, underlying motivations: Is this a "peace-seeking movement" or one that incites discrimination and hatred against one country, its companies, universities and citizens? The prevalence of BDS activities in recent years has induced national states to decide on the legal status of anti-Israeli boycotts within their jurisdictions. Some countries have unequivocally declared that boycotting Israeli products is against the law.³ The basis for justifying these pronouncements, however, differs in each country, based on its own legal framework and culture. On the contrary, other countries like the Netherlands and Sweden have declared that anti-Israeli boycott activities are protected under the constitutionally protected right to freedom of expression.

This article presents some of the legal arguments raised against the BDS movement, including those based on (1) international human rights non-discrimination principles, (2) international trade agreements, (3) national incitement to discrimination prohibitions as well as (4) the *ultra vires*⁴ nature of non-governmental entities calling for a boycott of a foreign state.

Argument I: The Anti-Israel Boycott Is in Violation of the Guarantee of the Equal Treatment to all Nations

Generally speaking, a call to boycott or sanctions may be made according to Article 41⁵ of the UN Charter, which

authorizes the Security Council to initiate economic sanctions against a country when it deems there are threats

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1. Jennifer Medina and Tamar Lewin, *Campus Debates on Israel Drive a Wedge between Jews and Minorities*, N.Y. TIMES, May 9, 2015, available at www.nytimes.com/2015/05/10/us/campus-debates-on-israel-drive-a-wedge-between-jews-and-minorities.html?_r=0 (last visited Dec. 2, 2016).
2. Omar Barghouti, one of its founders, has described the movement's three main objectives: "ending the occupation, ending the racial discrimination in Israel and the system of apartheid and the right of return." Source: Glenn Greenwald, *Interview with BDS co-founder Omar Barghouti: Banned by Israel from traveling threatened with worse*, The Intercept, (May 13, 2016) available at theintercept.com/2016/05/13/interview-with-bds-advocate-omar-barghouti-banned-by-israel-from-traveling-threatened-with-worse/ (last visited Dec. 2, 2016).
3. The distinction between boycotting Israeli settlements and the wholesale boycott of Israel will not be discussed in this article, as it is not relevant to the arguments raised against BDS activities. The distinction is relevant, however, to arguments made by the BDS campaign against Israel, namely, the "obligation of non-recognition" argument: in essence, that third-parties are obligated to limit or cease economic activities with the Israeli settlements, the West bank and the Golan Heights, so as not to give any legal effect to an occupying entity's human rights violations. For a discussion on this argument, and the counter-argument, see Eugene Kontorovich, *Economic Dealings with the Occupied Territories*, 53 COLUM. J. TRANSNAT'L L. 584 (2015), available at jtl.columbia.edu/economic-dealings-with-occupied-territories/ (last visited Dec. 2, 2016).
4. "*Ultra vires*" – acting beyond one's vested powers or authority.

or breaches to the peace or acts of aggression.⁶ While the right to carry out economic boycotts or sanctions is recognized under the UN Charter, a boycott must nevertheless adhere to the rules of international human rights norms.

On the basis of the UN Charter articles guaranteeing the equal treatment to all nations,⁷ the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of Racial Discrimination ("CERD"), Aleksandra Gliszczynska-Grabias, of the Poznan Human Rights Center at the Polish Academy of Sciences, argues that the anti-Israeli boycott and the calls to boycott in UN forums may involve actions that constitute discrimination on the basis of nationality or incitement to hatred or violence against Israelis, and are thus in violation of the UN Charter's guarantee of equal treatment to all nations.⁸ That is to say, the call to boycott may be deemed a case of discrimination against Israeli citizens if they are singled out on the basis of their nationality.⁹ It is important in this respect to note some examples of the unequal treatment of Israel by the UN Human Rights Council, which has been extensively documented and commented on.¹⁰

The UN's and the EU's treatment of Israel has been widely criticized as a "singling out of Israel," holding it to higher standards than those demanded of other countries.¹¹ The UN Human Rights Council in March 2016 voted to create a "blacklist" of companies operating in the West Bank, East Jerusalem and the Golan Heights, a motion that passed with 32 countries voting in favor, and none against. "The United Nations and Antisemitism" Report Card¹² states as follows: "Paradoxically, one of the greatest violators on the UN Charter's equality guarantee has been the UN body charged with establishing and enforcing international human rights, the Human Rights Council."

Decades-long singling out activities have undoubtedly prepared the ground for the anti-Israeli boycott movement. Holding one member state to a higher standard than others is in breach of the right to equality. The EUMC Working Definition of Antisemitism determines that this singling out and holding of Israel to higher standards not expected or demanded of any other democratic nation is an example of antisemitism.¹³ In a complementary manner, from a legal perspective, this treatment is discriminatory and unequal. Israel, like any other country, has the right to a balanced, equal, non-selective application of the rule of law. Some legal scholars have pointed to the European Union's treatment of Israel as another example in the international arena, that may be seen as an unequal and inconsistent treatment of Israel, as compared to its handling of other countries with disputed territories.¹⁴

Argument II: Anti-Israeli Boycotts May Be in Violation of International Trade Agreements

Economic sanctions against Israel may violate specific trade and commerce treaties; specifically, World Trade Organization agreements. For example, WTO's Government Procurement Agreement requires all

5. U.N. Charter art. 41: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."
6. U.N. Charter art. 39 is also relevant: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."
7. The U.N. Charter, which binds all its Member States, also determines that nations must be treated equally (art. 1(2) and 2(1)).
8. Aleksandra Gliszczynska-Grabias, *Anti-Israeli Boycotts: European and International Human Rights Law Perspective* in *DECIPHERING THE NEW ANTISEMITISM* (Alvin H. Rosenfeld ed., 2015), pp. 430-453.
9. *Id.*
10. For a comprehensive summary, see, The UN and Israel, Key Statistics from UN Watch, UN Watch (Aug. 23, 2016), available at www.unwatch.org/un-israel-key-statistics/ (last visited Dec. 2, 2016).
11. Hillel Neuer, *The Demonization of Israel at the United Nations in Europe Focus on the Human Rights Council and Specialized Agencies*, Jerusalem Center for Public Affairs (2014), available at jcpa.org/demonization_of_israel_at_the_united_nations/ (last visited Dec. 2, 2016).
12. The United Nations and Anti-Semitism, 2004-2007 Report Card, U.N. Watch, Nov. 1, 2007, available at www.ajc.org/atf/cf/%7B42d75369-d582-4380-8395-d25925b85eaf%7D/UNWreport112007.pdf (last visited Dec. 6, 2016).
13. EUMC Working Definition of Antisemitism, European Parliament Working Group on Antisemitism, available at www.antisem.eu/projects/eumc-working-definition-of-antisemitism/ (last visited Dec. 2, 2016).
14. For an elaboration of this argument, see Talia Naamat, *The Anti-Israeli Boycott as Discrimination against Jewish Groups and Israeli Persons* (2016), Kantor Center, Tel Aviv University, available at antisemitism.org.il/webfm_send/174 (last visited Dec. 2, 2016).

signatories to "treat suppliers equally." In this vein, the UK Government stated that since both the EU and Israel were signatories, any trade between them would fall under the agreement's provisions — and any discrimination against Israeli suppliers in this regard would violate this Agreement.¹⁵ The Policy Note also states that any procurement boycotts are in breach of international trade agreements. As both the EU and Israel are signatories, this would include any trade between the UK and Israel. The Policy Note determines that "Any discrimination against Israeli suppliers involving procurements would therefore be in breach of the Agreement." Therefore, the UK's interpretation of its provisions, stating that the boycotting of Israeli products violates this agreement, is significant beyond the scope of UK domestic law and could be argued to have implications on all EU countries and their economic relations with Israel. Similarly, the United States-Israel Trade and Commercial Enhancement Act of 2015 declares that: "[T]he boycott, divestment, and sanctioning of Israel by governments, governmental bodies, quasi-governmental bodies, international organizations, and other such entities is contrary to the General Agreement on Tariffs and Trade (GATT) principle of non-discrimination."¹⁶

Generally speaking, the U.S. free trade agreement with Israel has been interpreted as applying to Israeli settlement products.¹⁷ On February 24, 2016, the "Trade Facilitation and Trade Enforcement Act" of 2015 became law. This Act includes the United States-Israel Trade and Commercial Enhancement Act.¹⁸ Section (b) of the law states:

Congress –
 – 3. (...);
 4. opposes politically motivated actions that penalize or otherwise limit commercial relations specifically with Israel such as boycotts, divestment or sanctions;
 5. notes that the boycott, divestment, and sanctioning of Israel by governments, governmental bodies, quasi-governmental bodies, international organizations, and other such entities **is contrary to the General Agreement on Tariffs and Trade (GATT) principle of non-discrimination**;
 6. – 8. (...).

According to U.S. Federal law, therefore, boycotts against Israel are considered a violation of WTO agreements. Thus, both the U.S. and the UK governments have stated that in their view, the boycott against Israeli products was in breach of WTO agreements. It is important to reiterate that the boycott violates these agreements on the basis of

its breach of the non-discrimination principle guaranteed therein.

Argument III: The Anti-Israel Boycott Constitutes Discrimination on the Basis of Nationality

France has been considered a pioneer in its utilization of legal tools to counter the BDS movement.¹⁹ At least ten court cases have already been tried against anti-Israel boycotters.²⁰ Two separate court cases involving anti-Israel boycott activists were upheld in 2016 by the French Cassation Court, the highest court of final appeal, which convicted them of inciting to discrimination (also of hate crimes, when involving the base offense of vandalism),

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15. United Kingdom, Procurement Policy Note: Ensuring compliance with wider international obligations when letting public contracts, Information Note 01/16, Feb. 17, 2016, available at <https://www.gov.uk/government/publications/procurement-policy-note-0116-complying-with-international-obligations> (last visited Dec. 2, 2016). Press release, Gov.UK, Putting a stop to public procurement boycotts (Feb.17, 2016), available at <https://www.gov.uk/government/news/putting-a-stop-to-public-procurement-boycotts> (last visited Dec. 2, 2016).
 16. H.R. 1907, 114th Cong. (2015), § 608 (The United States-Israel Trade and Commercial Enhancement), available at www.congress.gov/bill/114th-congress/house-bill/1907/text#toc-H120DCF285460437E86AE86CCD2241263 (last visited Dec. 2, 2016).
 17. *Recent Legislation*, 129 HARV. L. REV. 2029 (2016), available at cdn.harvardlawreview.org/wp-content/uploads/2016/05/2029-2038-Online.pdf (last visited Dec. 2, 2016).
 18. H.R. 644, 114th Cong. (2015), § 909 (United States-Israel Trade and Commercial Enhancement), available at <https://www.congress.gov/bill/114th-congress/house-bill/644/text> (last visited Dec. 2, 2016). Section (a) of the Act: "More than \$45 billion in goods and services is traded annually between the two countries in addition to roughly \$10 billion in United States foreign direct investment in Israel."
 19. It should be noted, however, that France has long been against advocating for boycotts, well before the current boycott movement against Israel. Interestingly, the same law which is used in France to counter boycotts against Israel is also used to prohibit any boycotts of Iran in protest of its nuclear program.
 20. *BDS a Hate Crime? In France, Legal Vigilance Punishes Anti-Israel Activists*, HAARETZ, Feb. 15, 2015, available at <http://www.haaretz.com/jewish/1.574361> (last visited Dec. 2, 2016).

and fined them with penalties.²¹ The French court rulings highlight the relatively new legal terrain of extreme anti-Israeli rhetoric, and specifically political statements and demonstrations that cross a certain threshold and become prohibited discrimination or incitement to hatred. The answer to this is based on, among other things, the prosecutor's or judge's interpretation of when the one turns into the other. However, two other factors in France's legal framework should also be emphasized in this regard. Firstly, it is helpful that the French incitement law includes protection of "national groups" and thus was employed for convicting hate speech directed at groups based on nationality (i.e., Israeli persons). This has turned out to be effective in prohibiting boycott statements made against Israel, since the boycott is targeting Israeli products. Secondly, French law recognizes the concept of "economic discrimination."

In this sense, France is one of the first countries²² to expressly address, via legal measures, the connection between extreme anti-Israeli rhetoric and prohibited hate speech. Criticizing policies (Israeli or otherwise) is protected under the right to freedom of expression, whereas the use of inciting, hate-filled speech targeting a national group (e.g., Israeli persons) is not. It is important to clarify this distinction, as it is at the heart of the current debate between the right to hold a political opinion and the prohibition to incite against a person based on a protected category. The distinction between expressing a political opinion and the incitement to hatred or discrimination against a national group must be addressed by following France's example and amending incitement laws to include the protected category of "nationality," or "national groups," and to call for training of justice and law enforcement departments across Europe regarding these new forms of hate speech.

The European Court of Human Rights' ruling on *Willem v. France* also illustrates the difference between merely expressing a political opinion and inciting to discrimination. The case involved the applicant, Jean-Claude Willem, former mayor of the French city of Seclin.²³ In 2002, Willem announced during a town council meeting that he intended to boycott the sale of Israeli products in his municipality, as a protest of Israeli government anti-Palestinian policies. After receiving a complaint from the Jewish community, the public prosecutor charged Willem with inciting to discrimination under the Press Act of 1881. Willem was acquitted by the Lille Criminal Court, but the ruling was overturned on appeal in 2003, and he was fined 1,000 euros. The French Court of Cassation upheld the verdict. Willem appealed before the European Court. He argued that since his call to boycott Israeli

products had been part of a political debate that was a matter of public interest, his conviction under the French courts had violated his right to freedom of expression, protected by Article 10 of the European Convention of Human Rights. The European Court ruled that there was a difference between stating a political opinion and inciting to commit a discriminatory act, and that Willem had been convicted of the latter. Since Willem did not merely denounce a certain policy, but had gone further and called for action—a boycott of Israeli products—he had been convicted for this rather than for expressing a political opinion.²⁴ The Court further held that Willem's actions constituted incitement to discrimination that was not protected by the European Convention on Human Rights.

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21. The first appeals ruling from 27 October 2015 involved two incidents on 26 September 2009 and 22 May 2010, during which 12 anti-Israel boycott activists held demonstrations in and around a supermarket, handed out pamphlets, and, while calling for a boycott of Israeli products, vandalized the store and threw kosher products on the floor. A local criminal court convicted the activists who planned and took part in the incidents of "calling for discriminatory acts" and a penalty of €12,000 (€1,000 for each perpetrator). The French Cassation Court upheld this conviction and stated that actions undertaken in order to place a boycott were hate crimes and constituted prohibited discrimination. On 30 March 2016, in a second appeals ruling, the French Cassation Court upheld a lower criminal appeals court's ruling which convicted seven boycott activists who had demonstrated in 2010 outside a supermarket selling Israeli products of inciting discrimination and fined them each with a €1,000 penalty. The Cassation Court upheld this conviction in 2016.
 22. In Germany, a court in Essen ruled that extreme anti-Israeli rhetoric (chanting "Death to the Zionists") was used as a code for Jews and was therefore deemed to be prohibited incitement. The judgment was upheld by an appeals court. See, Report: *German Court Rejects Appeal of Man Who Shouted 'Death to Zionists' at Protest*, THE ALGEMEINER, May 26, 2015, available at <http://www.algemeiner.com/2015/05/26/report-german-court-rejects-appeal-of-man-who-shouted-death-to-zionists-at-protest/#> (last visited Dec. 2, 2016).
 23. *Willem v. France*, Application No. 10883/05, ECtHR judgment of Dec. 10, 2009. There is no official English translation of the judgment (which was issued in French). All translations of the excerpts from the judgment are by Aleksandra Gliszczynska-Grabias, *supra* note 8.
 24. *Id.* para 35.

The European Court stressed, however, that while this was the case according to French law, it would give other member states a "margin of appreciation" to handle these matters. That is, since French law and case law was so clear on the matter of boycotts,²⁵ the European Court upheld the French courts' decision in this case. However, if the European Court would be asked to decide upon a call to boycott case originating from a different member state, with different incitement laws, then its ruling may be different as well. At any rate, this court ruling highlights an important point. There is a crucial difference between expressing a critical view of a government and calling for an action that may be deemed discriminatory.

While in the private realm a person is entitled, obviously, to hold a political opinion riddled with double standards, this is not the case when this opinion is catapulted into a call for collective action, which may thus be deemed discriminatory. In this vein, the Israel Supreme Court also considered the boycott as a form of discrimination, stating that: "Discrimination on the basis of affiliation to a country of origin harms the individual based on actions and behaviors that are not dependent upon him, and constitute a sort of "collective punishment" that is inappropriate."²⁶ Moreover, there is also a difference between expressing a political opinion and crossing the line into "hate speech" (forbidden in European countries) that incites to discrimination and hatred against a national group. In recent years, anti-Israeli expressions and activities have been examined in the light of laws prohibiting "incitement to hatred" across Europe, to varying degrees of success.

Argument IV: Anti-Israeli Boycott Measures Are Taken by Non-governmental Entities that Are Not Authorized to Call for a Boycott of a Foreign State

The prevalence of the BDS movement has resurfaced a somewhat basic legal question: who, exactly, is entitled to call for a boycott of another state?

Generally, economic boycotts or sanctions may be carried out under international law.²⁷ Any state may, in principle, sever diplomatic relations, limit or cease its economic relations with another state. But the state must show, according to international law, that its measures do not violate international trade agreements and that – "its actions were taken in response to tortious actions of another state that immediately threatened its security...the reaction should not exceed the harm posed by the acting state."²⁸ That is, an individual person acting on his own behalf has the autonomy to decide for oneself whether or not to buy a certain product. A sovereign state also has the right to decide to sever economic ties with another state (provided this does not violate trade agreements, as shown above). However, entities situated anywhere between a

state and an individual person – town councils, companies, municipalities, persons in official capacities (including representatives of state universities) – do not have an automatic right to call for a boycott, and the lawfulness of any such call must be examined via the applicable domestic framework.

The European Court case of *Willem v. France*, described above, illustrates this point. In calling for a boycott, Willem was deemed to have deviated from the powers vested in him as mayor. The European Court accepted the French public prosecutor's position that only a government authority was authorized to declare sanctions or boycotts from another country. To be clear: if an individual person decides, for him/or herself, to boycott any product for any reason, politically motivated or otherwise, this is obviously protected by the right to the freedom of thought and conscience. But once a mayor, or any person in an official position, imposes such a decision on his constituents, this cannot be considered as remaining within the realm of protected free speech.

25. The following laws and articles are relevant for understanding France's position on boycotts:

(1) Article 225-1 and 225-2 of the French Penal Code, prohibiting unlawful discrimination. This article is also applied to actions contrary to an "ordinary exercise of any economic activities." Moreover, France has well-established case-law which recognizes the concept of "economic discrimination."

(2) Article 24 of the Freedom of the Press Act of 1881 ("Loi Gaysott") on inciting to racial discrimination. This article provides an exception to the protection of the media's freedom of expression, namely any "incitement to discriminate."

(3) Another law adopted in 2003 (the so-called "Lellouche Law") provided higher punishment and further anti-discrimination protection to "national groups," and is also relevant to countering nationality-based discrimination.

26. HCJ 5239/11, HCJ 5392/11, HCJ 5549/11, HCJ 2072/12, *Uri Avineri et al. v. Knesset et al.*, Justice H. Melcer, Supreme Court Justice Decision, summary in English by Adalah, available at www.adalah.org/uploads/Boycott_decision_apri_2015_english_summary.pdf (last visited Dec. 2, 2016).

27. Preston L. Greene Jr., *Arab Economic Boycott of Israel: The International Law Perspective*, 11 VAND. J. TRANSNAT'L L. 77 (1978).

28. *Id.* at 93.

The same argument is seen in the UK Government's Policy Note published in February 2016,²⁹ which aims to "stop inappropriate procurement boycotts by public authorities." It reminds public authorities that only the UK Government is authorized to call for formal legal sanctions. Therefore, any public authorities, including town councils, public bodies and local authorities,³⁰ funded in any way by the Government, may not impose procurement boycotts (i.e., boycotting tenders of suppliers from certain countries) on their own accord.

This line of argument also appears in a law suit regarding the academic boycott of Israel in U.S. academic institutions.³¹ In April 2016, U.S. professors affiliated with the American Studies Association filed a lawsuit in the Federal District Court of the District of Columbia. The law suit alleges, among other things, that the activists who pushed for adopting the Association's resolution to boycott Israel had abused their positions within the association, and thus violated the association's own stated mission of promoting knowledge and advancing the study of American culture.

The suit further claims that since a non-profit must operate in accordance with its own charter, therefore in calling for the resolution, the activists had acted *ultra vires*, beyond the authority vested in them, and were thus in violation of the District of Columbia's Non-Profit Corporation Act. Jerome Marcus, legal counsel to the plaintiffs, argued that non-profits must act within the scope and for the purposes they were established, and on the basis of which they were entitled to non-profit status and benefits. Calling for a boycott was not within this scope. The case is still pending. If the court will decide to accept

the plaintiffs' legal arguments, this will no doubt encourage more law suits countering the academic boycott. ■

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29. *Supra* note 15.

30. This Policy Note was issued subsequent to three UK councils, passing motions to boycott products from companies operating in "illegal" settlements in the West Bank, between 2010 and 2014. Most striking was George Galloway's call to make the city of Bradford West an "Israel-free zone," that is, free of Israeli persons as well. Jewish Human Rights Watch brought judicial charges against the councils on the grounds that they had ignored their duty to eliminate discrimination and harassment of British Jewish people. In 2016, the High Court ruled in favor of the council, stating that the councils' resolutions did not affect any existing or potential contracts. The organization announced it would appeal the decision. The new guidance extends to central government, executive agencies, non-departmental public bodies, the wider public sector, local authorities and National Health Service bodies.

31. During the past years, the American Studies Association, the Anthropological Association as well as Women's Studies have instituted a boycott against Israeli academia. The academic boycott is based on the premise that all Israeli academic institutions are complicit in "planning, implementing, and whitewashing Israel's regime of oppression." *See supra* note 1.