Boycotts, Divestment, Sanctions and the Law

Jonathan Turner and Anne Herzberg

"It will hit the pocket of every Israeli if we don't deal with it. Every Israeli needs to make a decision. He needs to know that if there's not an arrangement his economic life will be harmed, and he needs to decide what he thinks about it," suggested MK Lapid, Israel's Finance Minister.[1]

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"I'm not saying that there will be an end to signs of boycotts, but this is not a cause for panic. Despite everything, Israel's engine is speeding ahead. The fourth quarter of this year was the most successful for Israeli high tech worldwide," responded MK Bennett, Israel's Minister of the Economy. [2]

They are both right.

Boycotts, divestment and sanctions (BDS) could have an increasingly significant impact if the threat is ignored. Israel's opponents are developing their tactics all the time and they may benefit from greater political and public support if Israel is blamed for a breakdown in negotiations with the Palestinians. They may also be bolstered if the International Criminal Court accepts the accession of "Palestine" as a "state". Equally, the impact of BDS to date has been limited and has been exaggerated by its proponents.[3] More importantly, much can be done by Israeli businesses and other actors to limit the potential future impact of BDS by prudent legal and commercial strategies.

This article seeks to review some of the legal implications of BDS and identify some arguments and strategies that can be developed in response to it.

BDS takes many different forms, giving rise to diverse legal situations, including ones that we cannot yet predict, and only a few examples can be covered in the context of this article. However, there are some general themes that regularly recur.

Use of "settlements" as a justification for BDS

A key tactic of Israel's opponents is to use the alleged illegality of Israeli "settlements" in "occupied territory" as a justification for BDS. They maintain that this illegality is clearly established in international law and applies to any Israeli construction, not only in Judea and Samaria, but also in "East" Jerusalem[4] and the Golan. They then argue that it is justified to engage in BDS against any business which has any link of any kind, however marginal, with Israeli settlements. On this basis, BDS could affect a large proportion of the Israeli economy.

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There are good arguments, supported by some highly respected exponents of international law, that "East" Jerusalem and the Golan are now within Israel's sovereign territory;[5] and that Israeli settlements in Judea and Samaria are also legitimate, at any rate until the final status of these areas has been resolved.[6] However, rightly or wrongly, these arguments

1. JERUSALEM POST, February 3, 2014, *http://www.jpost.com/Diplomacy-and-Politics/Lapid-Foreign-boycotts-a-very-real-possibility-340185*.
2. Jerusalemonline, February 6, 2014, *http://www.jerusalemonline.com/news/politics-and-military/politics/israeli-minister-bennett-boycott-threats-dont-mess-with-israel-3546*.
3. See, for example, *"Recycling Veolia"*, CHRISTIAN MIDDLE EAST WATCH AND UK LAWYERS FOR ISRAEL, September 2012, *https://www.dropbox.com/s/nupymvoy1d71b0x/Recycling%20Veolia%20Report-final.pdf*; *"Deutsche denies divestment from Israel's Elbit,"* REUTERS, 30/5/2010, *http://www.reuters.com/article/2010/05/30/us-deutsche-elbit-idUSTRE64T10W20100530*; "TIAA-CREF BDS Hoax," DIVEST THIS BLOG, June 24, 2012, *http://divestthis.com/2012/06/tiaa-cref-bds-hoax-social-investing.html*.
4. That is, the areas of North, South and East Jerusalem beyond the "Green Line," possibly including no-man's-land.
5. For example, Stephen Schwebel, *"What Weight to Conquest?"* 64 AJIL (1970) 521; Elihu Lauterpacht, *"Jerusalem and the Holy Places,"* Anglo-Israel Association (1968); Julius Stone, *"Israel and Palestin"* The Johns Hopkins University Press (1981).
6. For example, Eugene Rostow, *Notes and Comments*, 84 AJIL (1990) 717; Julius Stone, *op. cit.*; Report of the Commission to Examine the Status of Building in Judea and Samaria (Levy Commission, 2012) *http://www.pmo.gov.il/Documents/doch090712.pdf*.

may not be accepted by European courts and other authorities, particularly given the contrary view expressed in the advisory opinion of the International Court of Justice.[7]

But there are other weak links in the arguments of Israel's opponents, as recent decisions of appellate courts in France and the UK have identified.

First, the key legal objection to settlements is based on Article 49(6) of the Fourth Geneva Convention, which prohibits a contracting state from transferring parts of its civilian population into occupied territory.[8] By contrast, the operation of a factory or farm, or the construction of a railway or road, does not constitute a transfer of population. This distinction was rightly observed by the UK's Supreme Court in its recent decision in *Richardson v. DPP*.[9]

In this important case, two BDS activists had been convicted for disrupting the operation of a retail store of the Ahava group in London by immobilizing themselves on the floor. It was a requirement of the offense that the activity disrupted was "lawful." The activists argued that the operation of the shop aided and abetted breaches of Article 49(6) by Israel, since the products sold were made by the Ahava group in an Israeli settlement in the West Bank. They also submitted that the products sold were the proceeds of this "crime".

The Supreme Court rejected these and other arguments on the ground that any alleged offenses committed by the Ahava group were not integral to the activity of operating the shop. However, significantly, the Court also stated:

> If therefore a person, including the shopkeeper company, had aided and abetted the transfer of Israeli civilians into the OPT, it might have committed an offence against these provisions. There was, however, no evidence beyond that a different company, namely the manufacturing company, had employed Israeli citizens at a factory in the West Bank and that the local community, which held a minority shareholding in that manufacturing company, had advertised its locality to prospective Israeli settlers. It is very doubtful that to employ such people could amount to counselling or procuring or aiding or abetting the Government of Israel in any unlawful transfer of population. Such an employer might be taking advantage of such a transfer, but that is not the same as encouraging or assisting it.[10]

Similarly, in *AFPS & PLO v. Alstom & Veolia*, the Court of Appeal of Versailles rejected arguments that the French defendants had acted unlawfully by participating in the construction and operation of the Jerusalem light rail system, which serves some Israeli and Arab suburbs of "East" Jerusalem as well as "West" Jerusalem and what was no-man's land between 1948 and 1967. The Court referred to Article 43 of the Hague Regulations and observed:

> On the basis of this article, it was considered that the occupying power could and even should restore a normal public activity of the occupied country and accepted that administrative measures could concern all activities generally exercised by state authorities (social, economic and commercial life) … ; that as such, it could construct a lighthouse [or] a hospital. It has even been recognized that the establishment of a means of public transport formed part of the acts of the administration of an occupying power (construction of a subway in occupied Italy) so that the construction of a tramway by the State of Israel was not prohibited.[11]

The important point that commercial activity and investment in infrastructure do not constitute a transfer of population contrary to Article 49(6), and that an occupying power even has a responsibility to promote economic activity in occupied territory, also has the merit of consistency with political arguments that have broader international support. Thus former U.S. Senator George Mitchell, whose report[12] demanded the cessation of "settlement activity" by the Israeli government in the West Bank, recently praised the contribution made by Sodastream's factory at Mishor Adumim to laying the

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7. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004] ICJR 136.
8. A similar provision is contained in Art. 8(2)(b)(viii) of the Rome Statute of the International Criminal Court, which may be applied if the accession of "Palestine" as a "state" to this Statute is accepted.
9. [2014] UKSC 8.
10. *Ibid.* §17.
11. Judgment of March 22, 2013, translated from original French by Rejane Cohen Frey and Jonathan Turner.
12. Report of the Sharm El-Sheikh Fact-Finding Committee, April 30, 2001.

groundwork for peace, by demonstrating the economic benefits of working together.[13]

Another important point in these recent decisions is the courts' acceptance that even if one company in a group engaged in activities that promoted the transfer of Israeli population into occupied territory, this did not necessarily affect the legality of connected activities of another company in the group. In *Richardson v. DPP*, the UK Supreme Court firmly held that even if the Israeli manufacturing company could have been aiding and abetting an unlawful transfer of population, that could not amount to an offense by the separate UK retailing company, "whatever the corporate links between the two companies."

Likewise, in *AFPS & PLO v. Alstom & Veolia*, it was held that even if Israel's alleged objective of promoting the transfer of part of its population into "occupied East Jerusalem" made its contract with the CityPass company unlawful, the defendant companies were not themselves parties to that contract and could not be liable for any such illegality.

An obvious lesson of these decisions is to structure groups of companies so that companies doing business in Europe cannot be said to be responsible for any activities connected with "settlements" in "occupied territory".

A third point which can be discerned in these decisions is a general reluctance of courts to be used as vehicles to decide essentially political issues. But clearly their decisions have to be based on legal premises, such as adhering to the actual terms of applicable international conventions, and recognizing the separate legal personalities of different companies.

Where weak links in their arguments are identified, Israel's opponents do not stand still – they are busily devising means to by-pass these links, some of which will be discussed below. But it is now appropriate to examine some of the different situations that can arise.

Boycotts

As regards boycotts, it is important in Europe to distinguish between the public sector (government and utilities) and the private sector or individual consumers. Public sector procurement is subject to strict regulation under EU and EEA law,[14] as well as domestic laws of some European countries.[15] The EU and Israel are also parties to the World Trade Organization Agreement on Government Procurement. In general, significant public contracts must be awarded in the EEA on economic grounds, and political considerations must be disregarded. However, there are numerous exceptions and variations, resulting in a complex body of law.

Israel's opponents have sought, in particular, to invoke provisions of the EU Directives[16] and national implementing legislation under which an economic operator can be excluded if it "has been guilty of grave professional misconduct", which they say includes involvement with "illegal" Israeli settlements. The EU Court of Justice has held that "'professional misconduct' covers all wrongful conduct which has an impact on the professional credibility of the operator at issue"; and that "'grave misconduct' must be understood as normally referring to conduct by the economic operator at issue which denotes a wrongful intent or negligence of a certain gravity on its part." Furthermore, "in order to find whether 'grave misconduct' exists, a specific and individual assessment of the conduct of the economic operator concerned must, in principle, be carried out."[17]

So far, public authorities in the UK have rejected arguments that operators should be excluded under this provision, on the ground that connected companies provide services to Israeli settlements. However, one cannot rule out the possibility that this argument may be accepted by some public authorities in Europe, particularly if they are ill-disposed towards Israel; or that further interpretations of this provision by the courts, or its amendment by future EU legislation, may cause problems for some Israeli companies.

The position regarding boycotts by the private sector or individual consumers is more mixed. Boycotts are illegal in some countries, such as France, where supporters of Israel or Israeli companies, most recently Sodastream,[18] have won a succession of cases. In other countries, such as the UK, there is no general prohibition against boycotting businesses on political grounds. However, there may be particular circumstances on which a legal

13. TIMES OF ISRAEL, October 26, 2013, *http://www.timesofisrael.com/senator-mitchell-peace-begins-with-tech-prosperity-2/*.
14. EU Directives 2004/17 and 18. EU and EEA Member States are required to implement these Directives in their internal legislation and practices. While non-compliance does occur, the EU Commission makes significant efforts to ensure full implementation, including by legal actions in the Court of Justice of the EU.
15. For example, in the UK, Local Government Act 1988, Section17, although this has recently been weakened by amendment by the Public Services (Social Value) Act, 2012.
16. EU Directive 2004/18, Art. 45(2)(c), EU Directive 2004/17, Art. 54(4).
17. Case 465/11 *Forposta v Poczta Polska*.
18. SAS OPM *France v AFPS*, Judgment of the Tribunal de Grande Instance de Paris, January 13, 2014.

claim could be based. For example, it could be argued that the Co-operative Group, which operates a substantial retail chain in the UK, is guilty of unfair discrimination in breach of its constitutional rules,[19] since it refuses to purchase any products from companies that have dealings with Israeli "settlements" in the West Bank and the Golan, but does not implement a similar policy in relation to other disputed territories[20] or other, often more serious, contraventions of international law.

Universities in the EU are covered by EU public procurement rules if more than 50 percent of their budget is contributed from public funds.[21] In addition, academic boycotts by universities or unions are generally considered to be illegal under anti-discrimination laws of the UK[22] and probably other European countries. On the other hand, a claim against a university teachers' union for harassment of its Jewish members in passing anti-Israel motions was emphatically rejected by the London Employment Tribunal.[23]

Disruption of commercial or artistic activities, obstruction of access, and harassment and intimidation of customers and staff are regularly used by Israel's opponents to promote their boycott campaigns. Such conduct is often illegal, but the police and courts may be ineffective or even unwilling to enforce the law. For example, when a performance by the Israel Philharmonic Orchestra in London was seriously disrupted by shouting and chanting, the police refused to prosecute offenders on the ground that they had not been asked to intervene by the venue.[24]

As mentioned above, two activists were eventually prosecuted and convicted for disrupting the Ahava shop in central London. However, the hostile atmosphere created by weekly demonstrations outside the shop led to complaints by neighbouring shops to the landlord, who refused to renew Ahava's lease.[25] In another case, activists who vandalized the offices of a manufacturer of military equipment supplied to the IDF (amongst others) were acquitted on the basis of their defense that this was justified to protect the property of Palestinians in Gaza.[26] However, the judge was officially reprimanded[27] for his political summing-up to the jury.[28]

Civil claims in these situations may or may not be effective and worthwhile. Some of the activists have, or claim to have, no funds and live on welfare. But others do have jobs and families, and might be discouraged by being forced to pay compensation to those affected by their unlawful activities.

These situations require careful handling to make the best use of local Israel supporters, available legal tools and experience gained in addressing them in the country concerned.

Divestment

Under English law, trustees have a fiduciary obligation to follow an investment strategy in the best interests of the beneficiaries, without regard for their political views. On this basis, it was held[29] that trustees of a pension fund for coal miners were not entitled to exclude oil companies and overseas investments from the portfolio. However, in a subsequent case,[30] the court ruled that the Commissioners of the Church of England were entitled to take ethical considerations into account in forming their investment policy, provided this did not risk financial detriment to the trust assets.

In the absence of clear criteria or a system of professional accreditation for ethical investment, anti-Israel activists

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19. The Co-operative Group Limited is registered under the Industrial and Provident Societies Acts 1965-2003, and its rules are the equivalent of the Articles of Association of a company registered under the UK Companies Acts.
20. The Co-operative Group claims that the only territories for which there is an international consensus of illegality are the "settlements" in "Israeli Occupied Territories" and the Moroccan "settlements" in Western Sahara: *http://www.cooperative.coop/Corporate/CSR/downloads/human_rights_and_trade_policy_2012.pdf*. However, it does not impose a similar secondary boycott on suppliers dealing with Moroccan "settlements" in Western Sahara, ignores the consensus against the Turkish occupation of Northern Cyprus, and disregards other disputed territories such as Tibet, Abkhazia, South Ossetia and presumably, now, Crimea.
21. Case C-380/98 *The Queen v. HM Treasury, ex p The University of Cambridge*, CJEU. The UK Government considers that this no longer applies to most UK universities, following changes in funding arrangements in recent years.
22. Equality Act 2010. Advice of Michael Beloff QC and Pushpinder Saini QC to this effect was published by "Stop the Boycott" Campaign.
23. *Fraser v. University & College Union*, Judgment of March 22, 2013.
24. *http://www.thejc.com/news/uk-news/61841/call-prosecute-anti-israel-proms-protesters*.
25. *http://www.thejc.com/news/uk-news/55465/ahava-%EF%AC%81nally-closes-its-doors-london*.
26. *R v. Saibene and others*, June 30, 2010. *http://www.thejc.com/35771/judge-bathurst-norman-full-summing*.
27. *http://www.telegraph.co.uk/news/uknews/law-and-order/8048382/Judge-reprimanded-for-alleged-anti-Israel-comments.html*.
28. *http://www.thejc.com/35771/judge-bathurst-norman-full-summing*.
29. *Cowan v. Scargill* [1985] Ch 270.
30. *Harries v. Church Commissioners* [1992] 1 WLR 1241.

have been able to target ethics committees to promote divestment from companies doing business in Israel. In some countries, notably the Netherlands, such activists have secured places on corporate boards and corporate social responsibility (CSR) consultancies.[31] A recent paper[32] by a coalition of Dutch NGOs, aimed at institutional investors, provides a detailed toolkit for divestment based on "involvement" of targeted companies in the "occupation of the Palestinian territories".

Corporations wishing to avoid negative publicity may accede to the demands of anti-Israel activists with little independent analysis or evaluation of the underlying issues. However, when confronted by supporters of Israel with information countering the claims, companies have sometimes re-examined their positions. For example, a concerted counter-effort by the pro-Israel community recently led the PGGM pension fund in Holland to re-evaluate its decision to divest from Bank HaPoalim.

It is therefore important to provide companies targeted by the BDS movement with timely information countering their materials and exposing their real goals. Supporters of Israel should also take a more active role in corporate governance and CSR initiatives.

Many BDS initiatives can in fact be traced to a small group of activists and NGOs, such as the Palestinian NGO, Al Haq; the Israeli NGO, Coalition of Women for Peace; the Rights Forum;[33] and the Dutch Church NGOs, ICCO, Ikv Pax Christi, and Cordaid. Most of these organizations receive substantial funding directly and indirectly from the EU and from national governments in Europe. A coherent strategy to counter BDS campaigns should take this into account and address the funders.[34]

Sanctions

Sanctions may take the form of government measures or legal or quasi-legal claims initiated by private parties.

Bans on trade, even with "settlements", on the part of European governments seem unlikely at present and may be impermissible under GATT.[35] On the other hand, the EU Court of Justice has held that products originating in "occupied territory" do not benefit from preferential tariff treatment under the EC-Israel Association Agreement.[36] There are detailed provisions in this Agreement defining origin[37] and some businesses may find it helpful to arrange their affairs so that they are entitled to claim Israeli origin for their products, despite some operations occurring beyond the "Green Line".

European countries are increasingly likely to require products originating beyond the "Green Line" to be labelled to inform consumers that they are made in "occupied territory" and not "made in Israel". In *Richardson v. DPP*, the UK Supreme Court upheld the helpful finding of the trial court that labelling the products as "Made by Dead Sea Laboratories Ltd, Dead Sea, Israel" was not "likely to cause the average consumer to take a transactional decision he would not have taken otherwise", so as to breach the UK regulations implementing the EU Unfair Commercial Practices Directive (2005/29). The Court affirmed that it was clearly open to the trial judge to find that "If a potential purchaser is someone who is willing to buy Israeli goods at all, he or she would be in a very small category if that decision were different because the goods came from illegally occupied [sic] territory."

However, those opposed to Israel or its policies may well seek to change public opinion in this regard, and thereby achieve a different conclusion even without further legislation. More generally, it will be difficult to resist requirements to provide consumers with clear information, and it may be best to look for ways of describing origin which cannot be said to mislead, but equally do not detract from the perceived value of the merchandise to most consumers.

In July 2013, the EU published "Guidelines on the eligibility of Israeli entities and their activities in the

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31. For example, several board members of Royal Haskoning and the PFZW Pension Fund had links to the NGOs lobbying them to sever ties with Israel: *http://www.ngo-monitor.org/article/ngos_responsible_for_dutch_pension_fund_divestment_pggm_pfzw_dutch_funding_for_ngo_lobby_efforts; http://www.ngo-monitor.org/article/dutch_support_for_bds_campaigns_icco*.
32. "Dutch Institutional Investors and Investments related to the Occupation of the Palestinian Territories," *http://www.business-humanrights.org/media/vbdo_dutch_institutional_investors_7.pdf/*.
33. *http://www.ngo-monitor.org/article/the_rights_forum*.
34. See *www.ngo-monitor.org* for details on the activities of these organizations and funding sources.
35. Art. XXVI.5(a) provides that "Each government accepting this Agreement does so in respect of its metropolitan territory and the other territories for which it has international responsibility …". Although (c) provides for such a territory to become a party if it acquires full autonomy, sponsorship through a declaration by the responsible contracting party [Israel] is also required. The position was discussed in an Opinion of Prof. Thomas Cottier, available at *http://www.mne.gov.ps/epp/EPPI/EPP_WYO_Work/1.pdf*.
36. Case C-386/08 *Brita*, CJEU.
37. Protocol 4 to the EC-Israel Association Agreement.

territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards."[38] Although the EU's discrimination against Israel is itself objectionable, the extensive coverage in the media may have obscured the limited impact of this notice. For example, it only applies to activities of Israeli entities; other entities and Israeli individuals are not barred, even in relation to activities beyond the "Green Line" – so it would seem that these restrictions can be avoided altogether by operating through a non-Israeli entity with Israeli personnel.[39]

Perhaps the most serious threat of sanctions against Israel will be from legal or quasi-legal claims initiated by individuals, NGOs or the PLO. So far, such cases have generally been rejected by courts.[40] In *AFPS & PLO v. Alstom & Veolia*, the claims were dismissed on the grounds that Israel's obligations under international law did not bind private French companies and that the companies' own ethical commitments did not create legally binding obligations. In *Bil'in v. Green Park*, the Superior Court of Quebec declined jurisdiction on the basis of *forum non conveniens* over claims against construction companies incorporated in Canada for tax reasons in respect of residential developments for Israelis in the West Bank.[41] The Quebec Court of Appeal upheld this decision[42] and the Canadian Supreme Court refused permission to appeal. However, we anticipate that Israel's opponents will seek to circumvent these results by bringing legal actions on different grounds and/or in different jurisdictions.

Alternatively, Israel's opponents may invoke the OECD Guidelines for Multinational Enterprises by complaints to National Contact Points (NCPs) in contracting states. Such complaints are already pending against G4S in the UK (apparently for supplying equipment used at checkpoints in the West Bank)[43] and against CRH in Ireland (for supplying cement used in the security barrier in the West Bank).[44] More cases of this nature may be anticipated. Even if unsuccessful, they may have a chilling effect on international companies' willingness to do business with Israel.

In summary, the BDS threat to Israel should not be overrated, but neither should it be ignored. It should be carefully and skilfully addressed. ■

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38. OJ C 205/9 (2013).
39. This conclusion might be affected in relation to grants by Section 6(a) of the Guidelines and Art. 122(2) of the Financial Regulation 966/2012, but this provision does not apply to non-eligible or special purpose entities.
40. See e.g. Anne Herzberg, *"NGO 'Lawfare': Exploitation of Courts in the Arab-Israeli Conflict," http://www.ngo-monitor.org/data/images/File/lawfare-monograph.pdf, and "Kiobel & Corporate Complicity – Running with the Pack," AMERICAN J. OF INT'L LAW AGORA, January 2014, http://www.asil.org/sites/default/files/AGORA/201401/Herzberg%20AJIL%20Unbound%20e-41%20(2014).pdf.*
41. (2009) QCCS 4151.
42. *http://www.jugements.qc.ca/php/decision.php?liste=75400801&doc=2AA0F2DA87EBA24C7315096A65498EA4D63BC4CBD39DEFEA4180DE43BC9CAA24&page=1.*
43. *http://lphr.org.uk/wp-content/uploads/LPHR-Public-Statement-November-2013.pdf.*
44. *http://oecdwatch.org/cases/Case_215.*