DOI: 10.1111/mepo.12764

Middle East Policy

ORIGINAL ARTICLE

Evaluating the Practice of Lawfare Against Pro-Palestinian Groups

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Abstract

For nearly 20 years, nongovernmental organizations backing the Palestinian cause have promoted both "differentiation" and the better-known strategy of boycott, divestment, and sanctions (BDS). Differentiation is the practice of distinguishing between Israel and the occupied territories, terminating contracts with actors—irrespective of nationality—that contribute to and benefit from occupation-related activities, and seeking to promote Palestinian investments and exports. This strategy is fundamentally different from BDS, which targets not just the occupation but the Israeli state and its national entities. However, this article finds that laws and proposed legislation in the United States, the United Kingdom, and Israel do not delineate between Israel and Israeli-controlled territory, blurring the line between differentiation and BDS as tools to support Palestine. The evidence shows that courts have mostly ruled against differentiation practices, thus allowing harsh campaigns that impose heavy burdens on NGOs. These costs are both direct, through legal proceedings, and indirect in that they restrict the space for humanitarian action and delegitimize groups that employ differentiation. The study considers whether this constitutes lawfare, defined by experts as the exploitation "of the law of armed conflict to achieve tactical and strategic goals."

For nearly two decades, nongovernmental organizations supporting Palestinians and their right to self-determination have promoted similar but crucially distinct strategies: differentiation and boycott, divestment, and sanctions (BDS). Differentiation, as termed by the European Union, is the practice of distinguishing between Israel and national entities like businesses that exist within the state boundaries as they existed before 1967 and those Israeli enterprises that operate in the occupied territories.[1] Movements that employ differentiation impose burdens on Israeli authorities and firms trading in goods and services on what is seen as the land of a future Palestinian state.

The strategy of differentiation is narrower than that of BDS, which applies across Israel, and is grounded in international law: States must abide by strict procedures governing the acquisition of property, and they are prohibited from transferring their civilian population into an occupied territory. Israel's legalization of settlements in Palestinian areas runs counter to this.[2] The European Union and other NGOs have thus aimed to create disincentives against practices that legitimize Israel's appropriations in the West Bank and Gaza Strip.

Although they are different, the strategies of differentiation and BDS have been increasingly subjected to similar, negative treatment by Israel and its allies, most notably the United States and the United Kingdom. These states have proposed or adopted laws that do not distinguish between Israel proper and the occupied Palestinian territories, making it easier for governments and nonstate actors to use the courts against humanitarian and human-rights NGOs. This has direct costs for these pro-Palestinian organizations, especially when they are forced to bear fees for legal proceedings. But there are indirect costs, as well, such as delegitimizing and labeling as anti-Israel or antisemitic those groups that differentiate between Israeli territory and occupied lands, and restricting their freedom to operate according to their humanitarian mandates. For example, World Vision halted its operations in the Gaza Strip between 2016 and 2022 as it fought a court battle aimed at its director in the enclave, and Christian Aid UK faced a similar five-year proceeding in the United States.

Through such legal measures and court proceedings, the United States, United Kingdom, and Israel are impeding the ability of these humanitarian groups to work on the ground in the occupied territories and to advocate for Palestinians in accordance with international law. This article examines whether and how anti-BDS laws in those three countries have targeted the practice of differentiation—especially boycotts of Israeli settlements and of companies involved in occupation activities—and frustrated NGOs from aiding Palestinians and supporting their claims for justice. Having said this, humanitarian principles prohibit direct support to Hamas, services operated by Hamas, or aid that is controlled by the militant group.[3] This applies even though Hamas consists of different branches for making policy, managing Gaza's daily affairs, administering humanitarian efforts, and directing military operations.

[1] Anders Persson, "'EU differentiation' as a case of 'Normative Power Europe' (NPE) in the Israeli-Palestinian conflict," *Journal of European Integration* 40, no. 2 (2018): 193–208.

[2] Jakob Magid, "Cabinet okays legalization of 9 West Bank outposts in response to Jerusalem attacks," *The Times of Israel*, February 13, 2023; Jeremy Sharon, "Israel legalizes three West Bank outposts," *The Times of Israel*, September 7, 2023.

[3] For a review of EU funding to Gaza, East Jerusalem, and the West Bank, see EU Secretariat, "Communication to the Commission: Review of ongoing financial assistance to Palestine," C(2023) 8300 Final, 15: "This analysis has not identified breaches of contractual obligations."

This article asks whether these moves by the three countries should be considered lawfare. The analysis is based on extensive data, including laws, proposed legislation, court judgments, government statements, an executive order, and reports from the Israeli Ministry of Strategic Affairs and Public Diplomacy, whose mandate until 2021 was countering BDS.[4]

The article first specifies what is meant by BDS and discusses whether the strategy constitutes discrimination. It then examines measures adopted by the EU and other groups to differentiate between Israel and the occupied territories. Following this, the analysis reviews US and Israeli laws passed against the BDS movement, as well as legislation proposed in Britain and actions taken in the United States and Israel. The article then assesses the consequences NGOs have faced and identifies the international and domestic principles that allow groups to actively support Palestinians. It concludes after a review of World Trade Organization (WTO) and General Agreement on Tariffs and Trade (GATT) provisions on discrimination, as well as five judgments—including two that approved of differentiation—made by courts in France, the United Kingdom, and Canada.

BDS: BOYCOTT, DIVESTMENT, SANCTIONS

BDS can be dated to July 9, 2005, the one-year anniversary of an advisory opinion issued by the International Court of Justice on the legality of a wall constructed in occupied East Jerusalem.[5] While 175 NGOs were behind the movement's original call, many more such groups around the world support it, including the largest Norwegian trade union and several large Canadian trade unions.[6]

The BDS call includes three actions to be applied against the state, its institutions, and entities supporting it. *Boycott* entails voluntarily refraining from financial, diplomatic, or cultural cooperation. *Divestment* means to pull investments from Israel and entities "that sustain Israeli apartheid."[7] *Sanctions* are measures taken by states against Israel, including denying its membership in international forums, suspending military cooperation, and banning some forms of business with the country, especially in settlements. The United Nations has never adopted any kind of boycott of or sanctions against Israel. However, a 2018 UN Human Rights Council resolution on justice in the occupied territories advises states to ensure "that their public authorities and private entities do not become involved in internationally unlawful conduct."[8]

The BDS call makes three demands on Israel: ending the occupation; ensuring full equality for all citizens and not privileging the rights derived from Jewish identity; and respecting and allowing the right of return for Palestinian refugees. The demands are in line with international

[4] The Israeli Ministry of Public Diplomacy, a shorter name, was again in operation from 2022–2023, mandated to promote the Abraham Accords.

[5] BDS Campaign, "Palestinian Civil Society Call for BDS," July 9, 2005, https://bdsmovement.net/call; ICJ, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinions," ICJ Reports, 2004, 136.

[6] The Norwegian Confederation of Trade Unions includes one million members; the total membership of the various BDS-supporting trade unions in Canada exceeds one million. See Canadians For Justice and Peace in The Middle East, "Who supports BDS in Canada?" 2024, https://www.cjpme.org/who_supports_bds.

[7] BDS, "What Is BDS," https://bdsmovement.net/what-is-bds.

[8] UN Human Rights Council, "A/HRC/37/37, Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem," 2018, paragraph 8 (italics deleted). The vote was 27-4-15.

law. The global community has a duty to remove obstacles to Palestinians' exercise of the right to self-determination, which is recognized in the International Covenant on Civil and Political Rights (ICCPR), to which Israel is a party.[9] Israel has also ratified the International Covenant on Economic, Social, and Cultural Rights. Both agreements require nondiscrimination. On the right to return, observers frequently refer to a 1948 UN General Assembly Resolution.[10] The ICCPR's Article 12 also applies but receives less attention. Paragraph 4 of the article, interpreted by General Comment 27, reads: "No one shall be arbitrarily deprived of the right to enter his own country."[11] Israel did not express reservations to Article 12 when ratifying that covenant. The demand for the right of return is based on the special definition of Palestinian refugees, including all descending from those who fled in 1948. This is different from the refugee definition in the 1951 Convention Relating to the Status of Refugees.

Before considering whether BDS is discriminatory or antisemitic, it is important to ask whether the movement has been effective. Persson argues that it has not affected the Israeli economy.[12] But some companies with headquarters outside Israel have borne consequences for cooperation with the state, for example by not qualifying for participation in tender processes.

Do Boycott Campaigns Represent Discrimination and Antisemitism?

Discrimination is unjustified differential treatment. However, if differential treatment is undertaken with the purpose of ensuring substantive equality, and is proportionate, then it is not discrimination.

Contrasting positions on whether the BDS movement is discriminatory have been taken in the United States and Europe. In 2019, President Donald Trump issued an executive order that purported to combat antisemitism. "Discrimination against Jews may give rise to a Title VI violation [of the Civil Rights Act of 1964] when the discrimination is based on an individual's race, color, or national origin," the order declares.[13] Under that 1964 act, no discrimination is allowed in programs and activities receiving federal financial assistance. Although the term BDS is not used in the executive order, the movement's activities were the main motivation for it. The opposite approach can be seen in a 2020 judgment by the European Court of Human Rights.[14] It found that BDS statements in the form of information and encouragement to customers are protected under the freedom of expression and cannot be criminalized under anti-discrimination provisions.

[9] ICJ, "Legal Consequences."

[10] UN General Assembly, Resolution 194 (III), 1948, paragraph 11.

[11] A General Comment is generally held to be the most authoritative interpretation of the provisions of a treaty. Paragraph 20 of Human Rights Committee, General Comment 27, Article 12 (Freedom of Movement), 1999, says (extract): "The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ('no one'). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase 'his own country.' The scope of 'his own country' is broader than the concept 'country of his nationality.' It embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have been stripped of their nationality in violation of international law."

[12] Anders Persson, "Israel's Crusade Against BDS Comes at the Cost of Its Own Democracy," *Haaretz*, December 20, 2018.

[13] The White House, "Executive Order on Combating Anti-Semitism," December 11, 2019, paragraph 1, https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-combating-anti-semitism.

[14] European Court of Human Rights, Baldassi and others v. France; 15271/16, 15280/16, 15282/16, 15286/16, 15724/16, 15842/16 and 16207/16, 2020.

The BDS call defines three constitutive features of the state of Israel: Jewish, democratic, and without determined borders. Critics attack five aspects of the movement as part of their charge that it is antisemitic: its targeting of Israel, its demands and communications, its means, and its culture. It is worth considering all of these and the overall claim that BDS is antisemitic.

Some analysts have castigated the BDS movement for targeting only one regime of occupation. The Israeli activist and former politician Natan Sharansky has developed what he calls a 3D test to determine whether criticism of Israel is actually antisemitic: Does it delegitimize the state of Israel, does it demonize it, and does it employ double standards? Sharansky has used his test to label the BDS call as antisemitic.[15]

However, we must scrutinize such accusations and the definitions they are based on. The intergovernmental International Holocaust Remembrance Alliance (IHRA) issued this binding statement: "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."[16] Along with the working definition, the IHRA lists 11 examples of what it considers antisemitism. In seven of those, the state of Israel is explicitly mentioned or at least implied.[17] This includes condemning as antisemitic the practice of "applying double standards by requiring of [Israel] a behaviour not expected or demanded of any other democratic nation."[18] But this example should not form the basis for delegitimizing BDS, as the movement is calling for Israel to comply with principles followed by other democratic states. More broadly, the Jerusalem Declaration on Antisemitism disagrees with the IHRA and holds that political speech that some read as a double standard "is not, in and of itself, antisemitic."[19]

Two of the three BDS demands—full equality for all citizens and the right of return—and the three of them in combination are anti-Zionist and thus contrary to the basis of the state of Israel. This is not the same as antisemitism, although advocates have been trying to equate anti-Zionism and bias against Jewish people. Between 2023 and 2024, the US House of Representatives declared the IHRA's text the only valid definition of antisemitism, and it adopted a resolution that "clearly and firmly states that anti-Zionism is antisemitism."[20]

[15] US Special Envoy to Monitor and Combat Anti-Semitism, "Defining Anti-Semitism," June 8, 2010, https://2009-2017.state.gov/j/drl/rls/fs/2010/122352.htm; Israeli Ministry of Strategic Affairs and Public Diplomacy, "Behind the Mask: The Antisemitic Nature of BDS Exposed," 2019; Natan Sharansky, "Why BDS Fails My 3D Test on anti-Semitism," *Newsweek*, September 25, 2019, https://www.newsweek.com/antisemitism-bds-natan-sharansky-3d-test-1461305.

[16] International Holocaust Remembrance Alliance, "Working Definition of Antisemitism," n.d., https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism.

[17] Ibid. For criticism, see Kenneth S. Stern, "Written Testimony of Kenneth S. Stern at U.S. House of Representatives Hearing on Examining Anti-Semitism on College Campuses," November 7, 2017, https://docs.house.gov/meetings/JU/JU00/20171107/106610/HHRG-115-JU00-Wstate-SternK-20171107.pdf; and Jamie Stern-Weiner, "The Politics of a Definition: How the IHRA Working Definition of Antisemitism Is Being Misrepresented," April 2021, https://www.documentcloud.org/documents/20689366-stern-weiner-j-fsoi-the-politics-of-a-definition.

[18] IHRA, "Working Definition of Antisemitism," example 8. For a discussion of the comparison of Israel and "nations…surrounding Israel in the Middle East," labeling BDS antisemitic, see Parlia, "BDS applies an unfair double standard to Israel," August 18, 2020, https://www.parlia.com/a/bds-applies-unfair-double-standard-israel.

[19] "The Jerusalem Declaration on Antisemitism," March 25, 2021, paragraph 15, https://jerusalemdeclaration.org/wp-content/uploads/2021/03/JDA-1.pdf.

[20] US House of Representatives, H.Res. 894, December 5, 2023, paragraph 4, https://www.congress.gov/bill/118th-congress/house-resolution/894/text. The vote was 311-14-92. And US House of Representatives, H.R. 6090, May 1, 2024. The vote was 320-91.

But this is not persuasive. As the Jerusalem Declaration notes, it is not antisemitic to oppose Zionism and argue for an alternative constitutional order that does not relegate Palestinians to second-class citizenship.[21] Thus, BDS communications such as an appeal cosigned by founder Omar Barghouti that ends with the slogan "until liberation and return" are anti-Zionist and not antisemitic.[22]

As for the question of the BDS movement's means, they are targeted against Israel, its institutions, and its national businesses. Accusations that "BDS leaders and supporters repeatedly seek to hold Jews collectively accountable for the actions of an Israeli government" are not accurate.[23] The movement is not boycotting Jews due to their identity. As the Jerusalem Declaration defines it, "Antisemitism is discrimination, prejudice, hostility or violence against Jews as Jews (or Jewish institutions as Jewish)."[24]

A final argument against BDS is that it has nurtured an antisemitic culture. This is a complex issue. While the movement is anti-Zionist, relationships between Jewish individuals and the state of Israel differ.[25] Some will always feel that actions against or criticisms of Israel are actually targeting the Jewish people. But this does not mean that anti-Zionism is antisemitic. In the United States, surveys show an age-related division on this question. Those under 30 mostly favor BDS.[26] In Europe, polls have found that most people associate pro-boycott views with antisemitism.[27] Some countries have sought to distance themselves from the movement.[28]

[21] Jerusalem Declaration, paragraphs 12 and 13.

[22] Ali Abunimah and 21 others, "Palestinian writers, activists disavow racism, anti-Semitism of Gilad Atzmon," Electronic Intifada, March 13, 2012, https://electronicintifada.net/tags/gilad-atzmon.

[23] Quoted by Ali Abunimah, "EU spreads more lies about BDS," Electronic Intifada, July 3, 2020, https://electronicintifada.net/blogs/ali-abunimah/eu-spreads-more-lies-about-bds.

[24] Jerusalem Declaration, introductory text.

[25] In the United States, home of approximately 5.3 million Jews, 58 percent report to feel very or somewhat attached to Israel; the figure for those aged 18–29 is 48 percent. Other responses also show a generational divide. See Pew Research Center, "Jewish Americans in 2020," https://www.pewresearch.org/religion/2021/05/11/jewish-americans-in-2020.

[26] I am aware of only two surveys asking about BDS: Pew Research Center, "Modest Warming in U.S. Views on Israel and Palestinians," 2022, 17–20, https://www.pewresearch.org/religion/2022/05/26/modest-warming-in-u-s-views-on-israel-and-palestinians. It shows that 15 percent have heard about BDS (with small differences between cohorts); among that 15 percent, only those 18–29 were in favor. A similar tendency is seen in a student survey for the US State Department. See Itamar Eichner, "Over half of US students exposed to BDS, support boycotting Israel: survey," Y Net, September 28, 2022, https://www.ynetnews.com/article/rjtke00wfo.

[27] The question is, "Would you consider a non-Jewish person to be antisemitic if he or she supports boycotts of Israeli goods/products?" Identifying a person as antisemitic is considerably stronger than identifying a person as conveying antisemitic expressions. In all eight surveyed countries, more than half agreed, the highest proportion in France (85 percent), and the lowest proportion in Sweden (53 percent). See Lars Dencik and Karl Marosi, *Different Antisemitisms: Perceptions and experiences of antisemitism among Jews in Sweden and across Europe*, Institute for Jewish Policy Research, 2017, 20. For (overall negative) UK responses from 2016 and 2017 regarding boycott, see Daniel Stanetsky, *Antisemitism in contemporary Great Britain: A study of attitudes towards Jews and Israel*, Institute for Jewish Policy Research, 2017, 29.

[28] Abunimah, "EU spreads more lies." There are anti-BDS declarations by a dozen heads of state. For states specifying that they will not fund BDS-promoting NGOs, see NGO Monitor, "NGO Monitor Triggers Major Changes in Holland, UK, and Switzerland," June 16, 2016, https://www.ngo-monitor.org/press-releases/ngo-monitor-triggers-major-changes-in-holland-uk-and-switzerland. Norway has since 2017—though not in 2018—expressed similar restrictions in its state budgets.

DIFFERENTIATION AND THE LEGAL BACKLASH

Pursuing a course different from that of the BDS movement, a number of actors promote taking economic measures only against those engaged in activities related to the occupation. This practice of differentiation between Israel within its pre-1967 borders and the Palestinian territories was, like BDS, launched in 2005.[29]

The Treaty on the Functioning of the European Union prohibits the "application of different conditions to similar transactions with other trading partners." However, this does not preclude imposing special conditions on imports from territories that are considered occupied.[30] Therefore, labeling products with advisory statements like "territory occupied by the state of Israel," and the name of the specific settlement, is considered to be information relevant to consumers. The EU has also adopted guidelines for labeling goods produced in settlements.[31] Its fact sheet states: "The Commission will only help the Member States to apply existing EU legislation."[32] So measures regarding the differential treatment of settlement products are to be implemented not by the union itself but by the member states. Domestic policies that make compulsory the labeling of goods as "made in Israeli settlements" and the specifying of the given settlement have been approved by the EU Court of Justice.[33] Within the European Free Trade Area, Norway has introduced a labeling scheme that applies to food products.[34] NGOs have lobbied city councils to make decisions based on differentiation. Some of the decisions made by municipalities in the United Kingdom have been brought before courts; none have been overruled.[35]

[29] The first decision, by the Presbyterian Church (USA) at its 2004 General Assembly applied the wording "phased selective divestment in multinational corporations operating in Israel": Presbyterian Church (USA), "Minutes 216th General Assembly 2004, Part I Journal," 66. Therefore, this was no differentiation decision. In 2006, this was amended to "be invested in only peaceful pursuits": Presbyterian Church (USA), "Minutes 217th General Assembly 2006, Part I Journal," 944. The World Council of Churches Central Committee, "Minute on Certain Economic Measures for Peace in Israel/Palestine," February 21, 2005, https://www.un.org/unispal/document/auto-insert-209302. See also World Council of Churches Central Committee, "Statement on Economic Measures and Christian Responsibility toward Israel and Palestine," July 7, 2014, https://www.oikoumene.org/resources/documents/statement-on-economic-measures-and-christian-responsibility-toward-israel-and-palestine.

[30] EU Court of Justice, Case C-386/08, Brita GmbH v Hauptzollamt Hamburg-Hafen, February 25, 2010. See Olia Kanevskaia, "EU labeling practices for products imported from disputed territories," in *The Legality of Economic Activities in Occupied Territories: International, EU Law and Business and Human Rights Perspectives*, ed. Antoine Duval and Eva Kassoti (London: Routledge, 2020); EU Regulation No. 1169/2011 on the provision of food information to consumers; and European Commission, "EU new code Y864 for goods imported into the EU with preferential origin from Israel as from 16 May 2023," https://trade.ec.europa.eu/access-to-markets/en/news/new-code-y864-goods-imported-eu-preferential-origin-israel-16-may-2023.

[31] European Commission, "Interpretative notice on indication of origin of goods from the territories occupied by Israel since June 1967," 2015, 7834.

[32] European Commission, "Fact sheet," https://eeas.europa.eu/sites/eeas/files/20151111_fact_sheet_indication_of_origin_final_en.pdf. See also Josep Borrell, "Answer given by High Representative/Vice-President Borrell on behalf of the European Commission," June 30, 2020, 4, https://www.europarl.europa.eu/doceo/document/P-9-2020-000918-ASW_EN.html.

[33] European Court of Justice, Case C-363/18, Organisation juive européenne and Vignoble Psagot (Grand Chamber), November 12, 2019.

[34] Norwegian Ministry of Foreign Affairs, "Næringsmidler med opprinnelse i områder okkupert av Israel [Foodstuffs originating in territories occupied by Israel]," press release, June 10, 2022. For differentiation measures by European states, see https://ecfr.eu/special/differentiation-tracker.

[35] See Ilze Jozepa, Philip Loft, and James Mirza-Davies, "Economic Activity of Public Bodies (Overseas Matters) Bill 2022–23," UK House of Commons Research Briefing, 2024, 18–20. See moves by the Swansea City Council, 2010, and Leicester

Despite the fact that differentiation is clearly targeted and aims to curb support for the occupation, the United States and Israel have created laws that do not distinguish between this practice and the broader BDS movement, and the United Kingdom tried to pass legislation that by its wording went beyond the American and Israeli measures. In 2011, Israel adopted the Law for Prevention of Damage to State of Israel through Boycott. This applied not just to efforts against the state but also "Israeli-controlled" territories.[36] Four years later, the Supreme Court confirmed that the law applied to those calling for a narrow boycott, only of settlement products.[37] Amendment 28 of the 2017 Entry into Israel Law similarly employed the term "Israeli-controlled" when referring to the areas that could not be targeted, and it replaced "boycott" with "BDS." In none of Israel's laws, therefore, are any distinctions made between actors, such as NGOs, that promote differentiation and those that promote BDS.

In the UK, the House of Commons in 2024 approved the Economic Activity of Public Bodies (Overseas Matters) Bill, which does not distinguish between Israel, the occupied Palestinian territories, or the occupied Golan Heights.[38] The measure would prevent public bodies in the United Kingdom, in decisions they make on procurement and investment, "from being influenced by political or moral disapproval of foreign states when taking certain economic decisions." This provision against differentiation is actually broader than US legislation, which applies only to "Israeli-controlled" areas. The practical difference is minor, however. After passage in the House of Commons, the bill was presented to the House of Lords, where it was met with opposition. It had not been passed before the British prime minister called for elections in July 2024, and it was subsequently dropped.

American law introduced the concept of "Israeli-controlled" areas only in 2016, with the United States-Israel Trade and Commercial Enhancement Act.[39] Earlier US measures do not use this term.[40] Two provisions of the act refer to actions by foreign-based entities. First, it specifies that the scope of the reports the president is required to issue must include "foreign…corporate entities…that limit or prohibit economic relations with Israel…or any territory controlled by Israel."[41] Hence, any corporation with activities in illegal settlements is subject to the same assessment as firms operating in Israel proper. Second, it declares that the United States will not recognize or enforce judgments by foreign courts against American individuals or firms for operating in "territory controlled by Israel."[42] Although he signed the law, President Barack

City Council, 2014. Note that the 2014 decision by the Gwynedd Council, and four nonverified decisions by the Scottish Council, did "call for a trade embargo with Israel," which is not differentiation. UK Lawyers for Israel claims to be instrumental in halting a proposed decision in Belfast City Council in 2019 that by its wording applied to Israeli nationals; therefore, this would be BDS and not differentiation. See UK Lawyers for Israel, "BDS motion at Belfast City Council withdrawn," July 9, 2019, https://www.uklfi.com/bds-motion-at-belfast-city-council-withdrawn.

[36] Knesset, Law Preventing Harm to the State of Israel by Means of Boycott, https://law.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf.

[37] Yohah Jeremy Bob, "High Court upholds part of Anti-Boycott Law, strikes part and splits on '1967 Israel,'" *Jerusalem Post*, April 15, 2015.

[38] See HL Bill 38, https://bills.parliament.uk/publications/53574/documents/4223.

[39] United States, Public Law 114–125, Trade Facilitation and Trade Enforcement Act of 2015, section 909.

[40] Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (New York: Oxford University Press, 2016), 252–255.

[41] United States, Public Law 114–125, section 909(d)(2)(D).

[42] Ibid., section 909(e), specifies that "no domestic court shall recognize or enforce any foreign judgment [determining] that the United States person's conducting business operations in Israel or any territory controlled by Israel or with Israeli entities constitutes a violation of law."

Obama added a nonbinding statement that "certain provisions of this Act, by conflating Israel and 'Israeli-controlled territories,' are contrary to… United States policy, including with regard to the treatment of settlements."[43]

This 2016 law requires the president to report to Congress every year on "politically motivated actions for boycotts of, divestment from, and sanctions against Israel," including "Israeli-controlled territories."[44] Moreover, the reports on BDS activities shall cover measures by "foreign countries or international organizations against United States persons operating or doing business in Israel, with Israeli entities, or in Israeli-controlled territories."[45] A summary of these presidential submissions asserts, "Debate is ongoing…about whether economic differentiation…constitutes a form of BDS."[46] The 2019 report refers to "Israeli anti-BDS and anti-differentiation efforts."[47] It adds, "Israel's government and many of its leading political figures draw little or no distinction between economic measures targeting settlements and those targeting areas clearly inside of Israel."[48] I concur with this view. In addition, the most recent report notes that 38 US states have enacted anti-BDS legislation.[49]

ARE COURT ACTIONS VS. PRO-PALESTINIAN GROUPS LAWFARE?

We have seen that the United States, Israel, and the United Kingdom have passed or closely considered laws that prohibit the boycotting of Israel, its national entities, and any goods produced there—and that prevent NGOs and other actors from distinguishing between Israel proper and "Israeli-controlled" territories, including settlements, which are illegal under international law. This section shows that organizations supporting Palestinians are often targeted by governments and pro-Israel NGOs. But do such actions constitute lawfare, and does that term also characterize criticism of Israel's conduct?

Charles J. Dunlap first coined the term lawfare with this conceptualization: "law as a substitute for traditional military means."[50] Lawfare was further specified by a group of 25 experts as the exploitation or abuse "of the law of armed conflict to achieve tactical and strategic goals."[51] This does not specify by whom and against whom lawfare is conducted—for example, by states

[43] The White House, "Signing Statement for H.R. 644," February 24, 2016, https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/signing-statement-hr-644.

[44] United States, Public Law 114–125, section 909(d)(1). For three reports issued in 2019, 2017, and 2015, see Congressional Research Service, "Israel and the Boycott, Divestment, and Sanctions (BDS) Movement," December 3, 2019, https://www.everycrsreport.com/reports/R44281.html.

[45] United States, Public Law 114–125, section 909(d)(2)(A).

[46] Congressional Research Service, "Israel and the Boycott, Divestment, and Sanctions (BDS) Movement," 2017 and 2019; the 2015 report refers to "debate on…whether EU 'differentiation'…constitutes or promotes BDS-related activity" (note omitted).

[47] Ibid., 2019 report, 1.

[48] Ibid., 2019 report, 3.

[49] Ibid., 2019 report.

[50] Charles J. Dunlap Jr., "Lawfare Today: A Perspective," *Yale Journal of International Affairs* 3, no. 1 (2008): 146–154, 146. See also Charles J. Dunlap Jr., "Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts," paper presented to Humanitarian Challenges in Military Intervention Conference, Carr Center for Human Rights Policy, Harvard University, Washington, November 29, 2001.

[51] Michael Scharf and Elizabeth Andersen, "Is Lawfare Worth Defining—Report of the Cleveland Experts Meeting—September 11, 2010," *Case Western Reserve Journal of International Law* 43, no. 1 (2010): 11–27, 23. It had been noted that

against other states, by states against nonstate actors, or even by nonstate actors against other such agents. Moreover, by referring explicitly to "the law of armed conflict," the experts do not seem to adequately acknowledge that lawfare can be initiated in wartime and peacetime.

I assert that lawfare can be initiated either by states or nonstate actors, against either states or nonstate actors, as part of a strategy to delegitimize the other party and curb its rights. On its face, it appears that this is a strategy pursued by Israel and its allies. The Fourth Geneva Convention, which specifies the duties of the occupying power, requires that "an impartial humanitarian organization" be allowed to administer relief. But pro-Israel actors have created ways to prevent NGOs from pursuing these actions: promoting justice for Palestine, frustrating Israel's ability to normalize the occupation, and preventing settlements and those who do business with them from profiting from arrangements that violate international law and norms. Israel and its supporters can block the work of these groups not just through police actions or injunctions, which might be seen as violating rights like freedom of expression or association, but also by making the work of pro-Palestinian activists too expensive—even if the legal proceedings are ultimately dismissed.

Outside the formal legal system but in the court of public opinion, some groups publish information about and apply labels to pro-Palestine organizations they want to delegitimize and obstruct. One tactic has been to accuse NGOs of having ties to terrorism. NGO Monitor has engaged in this practice.[52] It has also wrongly condemned groups that promote differentiation, contending that they advocate BDS.[53] NGO Monitor was eventually jettisoned by the Jerusalem Center for Public Affairs, which in 2007 stated it was "difficult to establish the accuracy of the facts presented" by the organization.[54]

This informal practice of labeling can provide an impetus for other actors to call for or even initiate lengthy legal proceedings against these NGOs or their employees. This is a strategy to restrict their ability to work and to foster indignation across governments and the public, leading to increased costs, reductions of funding, or even suspensions of entire programs that support Palestinians. In short, it may be lawfare.

Legal Proceedings against NGOs and Employees

Several tools are available for actors based in the United States to frustrate groups that differentiate between Israel proper and the occupied territories. One is the 1863 False Claims Act, which allows court proceedings if an entity presents to federal authorities "a false or fraudulent claim for

the term does not yet appear in the Oxford English Dictionary. See Dunlap, "Lawfare Today," 12. Today, Oxford Reference Online defines lawfare as "legal action undertaken as part of a hostile campaign against a country or group."

[52] The Norwegian Refugee Council has been closely tracked by NGO Monitor, with 29 news pieces since 2013. So far, the funding has not been affected, and GIZ (Deutsche Gesellschaft für Internationale Zusammenarbeit) became a new partner in 2020. See NGO Monitor, "Norwegian Refugee Council (NRC)," October 6, 2022, https://www.ngo-monitor.org/funder/norwegian_refugee_council_. See also NGO Monitor, "UK-DFID Funding for NGO 'Lawfare': Description and Analysis," https://committees.parliament.uk/writtenevidence/47767/html; and NGO Monitor, "Norwegian Refugee Council Activities after the October 7 Pogrom," October 30, 2023, https://www.ngo-monitor.org/reports/norwegian-refugee-council-activities-after-the-october-7-pogrom.

[53] "Enough with the criminalisation of the BDS movement for justice in Palestine! Let's support right to boycott!" https://www.eccpalestine.org/wp-content/uploads/2016/05/endorsements-right2BDS.doc-27.pdf. One of the endorsers is Norwegian Church Aid.

[54] Policy Working Group, "Shrinking Space," 2018, 11 and 16.

payment or approval."[55] Those who initiate such lawsuits are considered to be whistleblowers and can receive part of any fine imposed on individuals or groups found guilty of infringing the law.

In one case, Norwegian People's Aid, which received USAID support for projects in South Sudan, was taken to court because a Hamas member attended one of its courses on democracy held in the Gaza Strip. While the course was not funded by the federal government, this contact with Hamas violated USAID's guidelines, and the group was found to have represented a "false…claim for payment." Norwegian People's Aid settled out of court for $2.02 million.[56] The whistleblower in this case was David Abrams, the Director of the New York-based Zionist Advocacy Center, which has been accused of using lawfare strategies against advocacy groups—and reportedly earned about $300,000 from the outcome.[57] Abrams also played this role in similar cases against two British firms. Christian Aid spent nearly five years and about $850,000 before the case was dismissed.[58] Oxfam Great Britain was targeted in 2018, but dismissal came after several months.

In addition, Trump's 2019 Presidential Executive Order on Combatting Anti-Semitism specifies the loss of federal support as a possible measure against activities deemed to be antisemitic.[59] The order has been most actively used by The Lawfare Project, a US-based advocacy group. That organization has also used New York state law, which has prohibited boycotts of Israel as discriminatory, against groups supporting the BDS call.[60]

Another case, this one brought before an Israeli district court, indicates the importance of analyzing whether legal actions against NGOs or their employees should be considered lawfare. In 2016, Israeli authorities arrested Mohammed El Halabi of the US-based Christian aid group World Vision, accusing him of diverting $48 million to Hamas over the course of six years.[61] That amount is greater than World Vision's budget for that period.[62] El Halabi, the regional director of programs in the occupied territories, refused to settle out of court, as he would have been compelled to admit that "funding for the Christian humanitarian aid organization was diverted to support terrorism."[63]

[55] United States, 31 U.S. Code §§ 3729-3733 (1863).

[56] Ben Parker, "Oxfam faces $160 million legal threat over Palestine aid project," *The New Humanitarian*, September 12, 2019.

[57] Tor Aksel Bolle, "Israel-aktivist vil saksøke Oxfam for 1,4 milliarder," *Panorama Nyheter*, September 16, 2019.

[58] Lizzy Davies, "Christian Aid claims it was subject to act of 'lawfare' by pro-Israel group," *The Guardian*, March 2, 2023. The legal proceeding was initiated in 2017. The case against Oxfam Great Britain was initiated 2018, the complaint was launched August 16, 2019, and it was dismissed by the court in December 2019. See Charity and Security Network, "Lawfare Suit against Oxfam GB Unsealed," https://charityandsecurity.org/false-claims-act-lawsuits/lawfare-suit-against-oxfam-gb-unsealed.

[59] The White House, "Executive Order," paragraph 1.

[60] Jeremy Sharon, "Pro-BDS group settles lawsuit for discrimination against Israeli entities," *Jerusalem Post*, May 20, 2020.

[61] Israeli Ministry of Foreign Affairs, "Behind the Headlines: Hamas exploitation of World Vision in Gaza to support terrorism," August 4, 2016, https://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Behind-the-Headlines-Hamas-exploitation-of-World-Vision-in-Gaza-to-support-terrorism-4-August-2016.aspx.

[62] Oliver Holmes, "Lawyer criticises secretive Israeli case against Gaza aid worker," *The Guardian*, November 28, 2019. For figures displaying alleged gaps between incomes and expenditures for the whole operations, see NGO Monitor, "World Vision's Operations in Israel, the West Bank, and Gaza," February 13, 2020, https://www.ngo-monitor.org/reports/world-visions-operations-in-israel-the-west-bank-and-gaza.

[63] Ken Chitwood, "Verdict Nears for Palestinian Accused of Diverting World Vision Funds," *Christianity Today*, September 13, 2021.

Reports show that El Halabi and his defense team were not allowed access to all of the evidence that Israel said would support its accusations, and the information was not made available to the public. The authorities also claimed that the World Vision employee had confessed, though this statement was also never released and the defense claimed it was forced. In addition to the secrecy of the evidence and proceedings, El Halabi was subjected to 167 court hearings over six years, with long and unpredictable intervals between them, in violation of the International Covenant on Civil and Political Rights.

In 2022, El Halabi was finally found guilty of membership of a terrorist organization, financing terrorist activities, transmission of information to a terror group, and possession of a weapon.[64] He was sentenced to an additional six years' imprisonment. World Vision deplored "a lack of substantive and publicly available evidence," and four UN special rapporteurs called for his release due to "deeply flawed proceedings and egregious violations of the right to a fair trial."[65] The judgment was not appealed.

But this case did not simply impact an individual. World Vision halted its work in Gaza throughout the six-year investigation and trial, so the legal proceeding clearly impeded its ability to support Palestinians. The aid group also suffered monetary damages. Not only did it pay the costs of the El Halabi's defense, it dedicated one full-time staffer to follow the case.[66] More onerous was World Vision's reportedly spending $3 million on an independent investigation of El Halabi's activities in Gaza—a probe that found no evidence of financing of terrorism, thus exonerating the defendant.[67] World Vision has resumed its operations in Gaza, but we must consider whether this episode was lawfare.[68]

An investigation of alleged terrorist financing does not in itself constitute lawfare, and the Israeli Ministry of Foreign Affairs presented the case as "Hamas exploitation of World Vision," instead of as an illegal conspiracy led by the NGO.[69] The long legal process and the concealing of evidence could have simply been driven by court decisions and not by political entities or other powerful actions. Indeed, the authorities' offering El Halabi the chance to settle out of court can be seen as an attempt to speed up the proceedings. Taking these facts into consideration, and not being privy to the motives and strategy of Israeli officials, it would be difficult to brand this case as one of lawfare.

However, if it can be proven that the drawn-out process and lack of public evidence were due to political interference in an attempt to delegitimize and strain the finances of an NGO operating in "enemy territory"—a label Israel uses to define Gaza—this can be considered lawfare. Indeed, Netanyahu hailed El Halabi's indictment when it was first announced, and World Vision was

[64] The Associated Press and Jack Khoury, "Israel Sentences Gaza Humanitarian to 12 Years in Jail Over Funneling Millions to Hamas," *Haaretz*, August 30, 2022, https://www.haaretz.com/israel-news/2022-08-30/ty-article/gaza-aid-worker-sentenced-to-12-years-over-terror-charges/00000182-ede0-de6c-a1da-fdf0d34c0000.

[65] Bethan McKernan, "Israeli court finds Gaza aid worker guilty of financing terrorism," *The Guardian*, June 15, 2022; the article quotes Sharon Marshall from World Vision. Four UN special rapporteurs, "Israel: UN experts seek justice for imprisoned Palestinian aid worker Mohammed El-Halabi," September 6, 2023.

[66] Information provided by Jack Munayer, who served as advocacy officer at World Vision's Jerusalem office, 2016–2019.

[67] Gideon Levy, "The UN Called Him a Humanitarian Hero. Israel Is Accusing Him of Funneling Money to Hamas," *Haaretz*, October 21, 2019, https://www.haaretz.com/israel-news/2019-10-21/ty-article/.premium/the-un-called-him-a-humanitarian-hero-israel-is-accusing-him-of-funding-hamas/0000017f-f211-d487-abff-f3ff4fe40000.

[68] World Vision, "Ongoing conflict in occupied Palestinian territory and Israel," October 17, 2023, https://www.wvi.org/newsroom/middle-east-crisis-response/ongoing-conflict-occupied-palestinian-territory-and-israel.

[69] Israeli Ministry of Foreign Affairs, "Behind the Headlines."

severely criticized in the court's judgment.[70] The reputational damage, the many years World Vision suspended its program, and the financial consequences can contribute to a chilling effect not just to that organization but to others like it.

The impact of an escalation of measures against NGOs that support Palestinians can be severe. In the spring of 2024, the Zionist Advocacy Center succeeded again: The Washington-based Middle East Institute think tank settled with the US government for more than $700,000 over a case that the pro-Israel group filed under the False Claims Act.[71] However, groups targeted by NGO Monitor have not seen their funding restricted.

INTERNATIONAL AND DOMESTIC LAW AND COURT RULINGS

While advocates for the Palestinian cause claim that they are subjected to lawfare even if they are practicing differentiation, Israel's allies have charged that measures to restrict commerce with the Jewish state violate international trade law. This section reviews the relevant provisions of two agreements under the WTO and examines five court judgments that indicate the diversity of rulings on the issue of whether Israel can fairly be targeted through sanctions or other actions against its ability to trade.

The United States-Israel Trade and Commercial Enhancement law declares that "boycotts of, divestment from, and sanctions against Israel by governments, governmental bodies, quasi-governmental bodies, international organizations, and other such entities are contrary to [the] principle of nondiscrimination under the GATT [General Agreement on Tariffs and Trade] 1994."[72] To provide some nuance, a brief insight into the GATT exception provisions is necessary. Moreover, as the issue of labeling is central, we should clarify the Agreement on Technical Barriers to Trade (TBT Agreement).

To comply with GATT, the trade-restricting measure in question must be found not to constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[73] As Israel does not differentiate between products originating from illegal settlements and from within its pre-1967 boundaries, one can argue that the "same conditions" do not prevail for Israeli exports as compared to other states' exports. Indeed, a listed exception in GATT's Article XX is public morality, similar to provisions found in Israel's free trade agreements with the EU (Article 27), the European Free Trade Association (Article 8), and the United States (Article 7). Public morality is interpreted by the WTO's dispute resolution panel as implying that a "concern exists" in the population.[74] This wording, specifying

[70] AP and Khoury, "Israel Sentences Gaza Humanitarian." The only translation of (parts of) the judgment that has been found is a nonverified version. See NGO Monitor, "Verdict in case of Mohammad El-Halabi/World Vision Diversion of Funds to Hamas, Summary and Key Quotes," translated from Hebrew by NGO Monitor, June 16, 2022, https://www.ngo-monitor.org/verdict-mohammad-el-halabi-world-vision.

[71] Michael Schaffer, "He's Waging 'Lawfare' Against Israel's Critics—And Pocketing a Lot of Money," *Politico Magazine*, July 10, 2024, https://www.politico.com/news/magazine/2024/07/10/pro-israel-lawfare-00166457.

[72] United States, Public Law 114–125, section 909(b)(5).

[73] World Trade Organization, "Disputes: clarifying the rules," n.d., https://www.wto.org/english/tratop_e/envir_e/disputes_e.htm.

[74] World Trade Organization, WT/DS472/R (EU)/ WT/DS497/R (Japan), Brazil—Certain measures concerning taxation and charges, reports of the Panel, August 30, 2017, paragraph 7,568. This was upheld by the Appellate Body; see WTO,

neither the depth of the concern nor any numerical requirement, allows a relatively low threshold for fulfilling the public morality exception.

The TBT Agreement, which must be complied with for the EU labeling scheme, specifies that the procedure must fulfill a legitimate purpose and not create unnecessary barriers to international trade.[75] When the EU's labeling scheme was launched, Israel considered bringing the union before the WTO's dispute resolution system, though it did not follow through.[76] This can be explained by the risks involved, and the likelihood of not winning the dispute proceeding.

To win a case in the WTO, states must demonstrate why the restrictive measures are necessary to achieve well-defined policy objectives and show that there are no other ways in which the aims can be achieved, taking into account alternative measures. In short, they must prove a legitimate aim, necessity, and proportionality.

In addition to international law, we have seen some key actions in domestic legislation and court actions. The Irish proposal for an Occupied Territories Bill, which passed the upper house and had an initially positive reception in the lower chamber, was until the last stage included in the 2020 draft government platform.[77] However, the wording was taken out in the final version.[78] A review of the legislation emphasized, "This bill was seen by the Jewish people as part of the increasingly discredited [BDS] movement."[79] Both the term "the Jewish people" and the linking to the BDS movement demonstrate the difficulties faced by anti-occupation initiatives.

Court judgments from Canada, France, and Britain show the challenges to groups that differentiate between Israel and the occupied territories. Table 1 shows that only one judgment from France and one from the United Kingdom have found that differentiation measures comply with the controlling domestic laws. The French ruling specified the terms that that could not be applied to characterize products from Israeli settlements in the territories. The British one specified that differentiation applied only to portfolio investments, not to public procurement. The Canadian judgment differs by not recognizing international conventions as relevant sources of law for interpreting obligations under domestic law.

CONCLUSION

Israel and its allies have engaged in a campaign, through domestic and international law and court rulings, to render illegal the boycotting of, divesting from, or imposing sanctions on the state and private actors doing business in Israel. But Israel and the United States have broadened this by adopting laws that define the state to exist not just within its pre-1967 boundaries but also in the occupied Palestinian territories. (The United Kingdom came close to doing so, as well.) By not allowing pro-Palestinian groups to practice differentiation, these measures are contrary to

WT/DS472/AB/R (EU)/ WT/DS497/AB/R (Japan), Brazil—Certain measures concerning taxation and charges, reports of the Appellate Body, December 13, 2018.

[75] European Commission, "Interpretative notice"; European Commission, "Fact sheet."

[76] Barak Ravid, "Israel Considers Suing EU Over Decision to Label Settlement Products," *Haaretz*, November 19, 2015.

[77] Frances Black, "July 2019 Update: Occupied Territories Bill," July 2019, https://www.francesblack.ie/single-post/OTBillJuly2019. Government of Ireland, "Programme for Government—Our Shared Future," 2020, 127, https://static.rasset.ie/documents/news/2020/06/draft-programme-for-govt.pdf.

[78] Government of Ireland, "Programme for Government: Our Shared Future," 2020, 112, https://www.greenparty.ie/wp-content/uploads/2020/06/ProgrammeforGovernment_June2020_Final_accessible.pdf.

[79] Chai Brady, "Mixed reaction as Occupied Territories Bill dropped," *The Irish Catholic*, June 18, 2020.

TABLE 1 National judgments related to differentiation

Country	Judgment	Reasoning	Source
Canada	Wine from Israeli settlements can be labeled "Made in Israel."	"International law is not a directly binding source of substantive law that supplements, modifies or ousts the authentic meaning of domestic law."	Canada Federal Court of Appeal, 2020[a]
France	Select terms cannot be applied to SodaStream products from Israeli settlements: illégal, frauduleu, illicite.	Use of incorrect designations about a company's products may result in liability under the civil code.	Tribunal de Grande Instance de Paris, 2014[b]
France	International humanitarian law does not bind private actors who are not parties to a conflict.	The occupying power should restore normal public activity in the occupied territories, including public transport.	Versailles Court of Appeals, 2013[c]
United Kingdom	Municipal pension funds may refrain from investing in companies based on their being related to the Israeli occupation.	Only in tender processes are municipalities prohibited from promoting "policies that are contrary to UK foreign policy."[d]	UK Supreme Court, 2020[e]
United Kingdom	Selling products from Israeli settlements is legal; the actual sale in the Ahava store in London is Ahava's core business.	Violation of the privacy or property of others ("trespass") is not permitted, provided that the property is used for legal activity.	UK Supreme Court, 2014[f]

[a]Canada Federal Court of Appeal, 2020 FCA 164, Attorney General of Canada v. Dr. David Kattenburg and Psagot Winery Ltd., paragraph 31.

[b]Tribunal de Grande Instance de Paris, S.A.S. Y Z et al. v. Association Palestine Solidarité, 4e chambre 2e section N° RG: 13/06023 (2014). For two different interpretations, see Adri Nieuwhof, "Amid Scarlett Johansson row, French court upholds right to boycott SodaStream," Electronic Intifada, February 12, 2014; and AFPS, "Call to boycott Israeli products: French High Court decision is cause for concern for freedom of expression," October 24, 2015, https://www.france-palestine.org/Call-to-boycott-Israeli-products-French-High-Court-decision-is-cause-for.

[c]Versailles Court of Appeals, R.G. No 11/05331, Association France-Palestine Solidarité "AFPS" c. Societé Alstom Transport SA, March 22, 2013, 20, http://www.volokh.com/wp-content/uploads/2013/04/French-Ct-decision.pdf.

[d]Cabinet Office and Crown Commercial Service, "Procurement Policy Note 01/16: complying with international obligations," 2016, paragraph 7, https://www.gov.uk/government/publications/procurement-policy-note-0116-complying-with-international-obligations.

[e]UK Supreme Court, R (on the application of Palestine Solidarity Campaign Ltd and another) (Appellants) v. Secretary of State for Housing, Communities and Local Government (Respondent), [2020] UKSC 16, April 29, 2020, paragraph 18, https://www.supremecourt.uk/cases/docs/uksc-2018-0133-judgment.pdf.

[f]UK Supreme Court, Richardson and another (Appellants) v. Director of Public Prosecutions (Respondent), [2014] UKSC 8, February 5, 2014, paragraph 17, https://www.supremecourt.uk/cases/docs/uksc-2012-0198-judgment.pdf.

international law. Most notably, the Fourth Geneva Convention specifies strict requirements for the occupying power, including prohibitions on the taking of property and resource extraction. So NGOs should not be accused of "targeting Israel" when they adopt differentiation strategies. But under these laws in Israel and the United States, NGOs promoting differentiation can be excluded from contracts.[80]

These practices also raise concerns about freedom of expression and accusations of bias based on national, ethnic, or religious identity. The European Court of Human Rights has ruled that BDS statements, in the form of information, are protected by freedom of expression.[81] In addition, based on the Jerusalem Declaration's definition of antisemitism, merely supporting the BDS call should not be a basis for categorizing a person or an NGO as antisemitic. However, a 2023 US congressional resolution has equated anti-Zionism and antisemitism.

As we have seen, the US and Israeli systems have arguably allowed the practice of lawfare against even those NGOs differentiating between Israel proper and Palestinian land. Several organizations have been labeled as having "ties to terrorism" or taken to court for violating the US False Claims Act. However, employing the term "lawfare" is not as important as creating a wider understanding of the possible consequences of the laws and the targeted measures that they enable.

If Israel, encouraged by the laws of its allies, actually prevents humanitarian NGOs from doing their jobs by exposing them to a lawfare strategy, this may be contrary to the state's obligations to allow relief to the "protected population" in accordance with international law. Humanitarian NGOs must also abide by the procedures laid down by donors, such as the EU.[82] The case of World Vision shows that court proceedings can cause severe damage to an aid group's activities, but most of all to the population in the territories, especially Gaza, which before October 7, 2023, was subject to blockade.

How to cite this article: Haugen, H. M. Evaluating the Practice of Lawfare against Pro-Palestinian Groups. *Middle East Policy*. 2024;1–16. https://doi.org/10.1111/mepo.12764

[80] Human Rights Watch, "US: States Use Anti-Boycott Laws to Punish Responsible Businesses," April 23, 2019, https://www.hrw.org/news/2019/04/23/us-states-use-anti-boycott-laws-punish-responsible-businesses.

[81] European Court of Human Rights, Baldassi and others v. France.

[82] EU Secretariat, "Communication to the Commission."