

# CIVIL RIGHTS? BUT NOT FOR YOU: CHILLING A GLOBALIZED PALESTINIAN RESISTANCE MOVEMENT'S FREEDOM OF EXPRESSION PROTECTIONS AS GUARANTEED BY THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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## ABSTRACT

*The past decade has seen both an increase in Israeli violence against Palestinians and a notable surge in global solidarity with Palestine. One of the most effective solidarity movements has been the Boycott, Divestment, and Sanctions (BDS) movement, created by a coalition of Palestinian civil society activists in 2005. With the increase in popularity of this global movement, many countries began to fiercely respond to BDS with legislation limiting participation in the movement. Most notably, states in the U.S. and EU, and of course the State of Israel itself, have all passed anti-BDS laws. In violation of international law treaties that each of these states and entities are party to, these anti-BDS laws generally prohibit participation in the movement based on disingenuous anti-discrimination justifications and the interest of protecting State of Israel.*

*Spurred by the European Court of Human Rights' decision in Baldassi and Others v. France in July 2020, and its similarity in reasoning to the United States Supreme Court decision in NAACP v. Claiborne Hardware and the United Nations Human Rights Committee decision in Ballantyne and Others v. Canada, this article assesses whether proposed and passed anti-BDS laws in the United States, France, and Israel are legal under international law. BDS is a coordinated global solidarity movement and a principled nonviolent effort of resistance in the face of devastating settler colonialism. As a key to the overall movement for Palestinian rights, BDS activities are legal and*

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*protected by law in the respective states discussed in this article; yet they are consistently legislated against. Therefore, in the interest of further protection, this article turns to the International Covenant for Civil and Political Rights and the United Nations Human Rights Committee’s interpretation of the treaty to prove the BDS movement must be protected by international human rights law.*

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I. INTRODUCTION

Across the globe, there is a cultural shift toward increased concern over Israel’s human rights record. For more than a decade a wide range of groups have taken steps to challenge the status quo of ignoring Israel’s abuse of Palestinian rights.<sup>1</sup> At the same time, opponents have attempted to smear Palestinian activism as anti-Semitic or discriminatory in nature, in hopes of gaining standing with a legally cognizable claim of discrimination.<sup>2</sup> The past few years have also seen an increase in legislation aimed at curbing Palestinian activism across the globe.

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1. Brief of Amici Curiae, The Center for Constitutional Rights and Palestine Legal, Supporting of Plaintiffs-Appellees, *Jordahl v. Brnovich*, 789 F. App’x 589 (9th Cir. 2020) (No. 18-16896) [hereinafter CCR & PalLegal Brief].

2. See, e.g., David French, *The Anti-Semitic BDS Movement Advocates Illegal Discrimination*, NAT’L REV. (July 18, 2019, 3:59 PM), <https://www.nationalreview.com/2019/07/the-anti-semitic-bds-movement-advocates-illegal-discrimination>.

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The main target of these actions has been the Boycott, Divestment, and Sanctions (BDS) movement. Legislative actions aimed at restricting participation in and the success of the BDS movement are on the rise in the United States, Europe, and Israel, alongside litigation that challenges these legislative attempts as violations of the right to freedom of speech and expression. At the same time, in July 2020, the European Court of Human Rights (ECtHR) released a decision and opinion in the case of *Baldassi and Others v. France*.<sup>3</sup> The ECtHR determined that a French law imposing a criminal penalty on individuals participating in the BDS movement is indeed a violation of the right to freedom of expression and speech,<sup>4</sup> enshrined in both the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR).<sup>5</sup>

This Note explains the objective of the BDS movement and explores the legality of these legislative actions in the United States, France, and Israel under the ICCPR. First, this Note will review the premises and goals of the BDS movement, demonstrating that it works within the limits of international law. Then, this Note will discuss a variety of legislative actions seeking to silence the call for boycotts, divestment, and sanctions, and some of the litigation challenging these laws. Finally, this Note will conclude with a legal analysis of the relevant legislation and litigation using the United Nations Human Rights Committee's case law as precedent to determine whether there is a violation of Article 19 of the International Covenant on Civil and Political Rights. Ultimately, under the human rights standards of the ICCPR, these domestic prohibitions on the BDS movement do not meet the standard for legitimate restrictions on speech and expression. Based on the international legal precedent that will be discussed below, the United States, France, and Israel remain in violation of Article 19 of the ICCPR for their limitations on non-violent activism in support of Palestine and Palestinians across all countries and territories.

### A. *What is BDS?— Background and Origins*

In 2005, the BDS movement was founded as a way to leverage non-violent pressure against Israel.<sup>6</sup> The movement aims to end the Israeli

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3. *Baldassi and Others v. France*, App. No. 15271/16, Judgment, § 81 (June 11, 2020), <https://hudoc.echr.coe.int/eng-press?i=003-6718555-8953654>.

4. *Id.*

5. Eur. Comm'n H.R. art. 10, ¶ 1, *opened for signature* Nov. 4, 1950, C.E.T.S. 231 [hereinafter ICCPR].

6. *What is BDS?*, BDS, <https://bdsmovement.net/what-is-bds> (last updated Feb. 9, 2020).

occupation of Palestine, dismantle the illegal apartheid wall, secure the rights of citizens of 1948 Palestine—referred to as historic Palestine, and what is now known as Israel<sup>7</sup>—and uphold the right of Palestinian refugees to return home per United Nations Resolution 194.<sup>8</sup> The founders of the BDS movement assert the importance of global support as a necessary indication of “solidarity with the Palestinian struggle for freedom, justice, and equality.”<sup>9</sup> While the founders of the BDS movement lament the fact that the international legal community has failed to hold Israel accountable for its settler colonialism and apartheid regime over Palestinian land and people, they do acknowledge that historically it has been “people of conscience in the international community” who have shouldered the fight against injustice.<sup>10</sup> The Palestinian BDS movement credits the South African antiapartheid movement as the inspiring template based on the success that resulted from applying economic pressure in the form of boycotts and international sanctions and embargoes against the apartheid government in South Africa.<sup>11</sup>

It is commonly understood that when ordinary diplomacy fails, economic, cultural, academic, and political boycotts are subsequently utilized as non-violent tools to persuade a state to change its practices.<sup>12</sup> The BDS movement employs three strategies: boycotts, divestment, and sanctions. The first process is through boycotts, including “withdrawing support for Israel and Israeli and international companies that are involved in the violation of Palestinian human rights, as well as complicit Israeli sporting, cultural, and academic institutions.”<sup>13</sup> The second level of pressure on the State of Israel is divestment. The BDS movement’s call for divestment encourages the international community to divest funds from both Israeli companies and any other international businesses complicit in violating Palestinian rights.<sup>14</sup> These include companies operating in Israel and its illegal settlements, and foreign companies profiting from Israeli occupation.<sup>15</sup> The focus on

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7. See, e.g., EDWARD W. SAID, *THE QUESTION OF PALESTINE* 9–10, 121 (Vintage Books ed., 1992).

8. *Id.*

9. *Id.*

10. Palestinian Civil Soc’y, *Palestinian Civil Society Call for BDS*, BDS (July 9, 2005), <https://bdsmovement.net/call> [hereinafter *Call for BDS*].

11. *Id.*

12. *Id.*

13. *What is BDS?*, *supra* note 6.

14. *Id.*

15. *Know What to Boycott*, BDS, <https://bdsmovement.net/get-involved/what-to-boycott> (last updated Feb. 9, 2020).

Israeli institutions, and foreign institutions complicit in Israel's occupation and violence against Palestinians, is essential because of the intricate connection between the institutions and the state's actions.<sup>16</sup> For example, during the State of Israel's offensive on Gaza in 2014, which killed 2,314 Palestinians, Israeli academic institutions issued official statements declaring support for the massacre and offered the faculty and students who were reserve soldiers that were involved in the assault in Gaza some benefits and privileges to "show appreciation for their contribution to the state's security."<sup>17</sup>

The third way of placing pressure on Israel is through the application of sanctions.<sup>18</sup> The call for sanctions includes "ending military trade, free-trade agreements and expelling Israel from international forums such as the U.N. and [the international soccer organization] FIFA."<sup>19</sup> The BDS movement advocates for these non-violent but punitive measures to be employed until "Israel meets its obligation to recognize the Palestinian people's inalienable right to self-determination and fully complies with international law."<sup>20</sup> This call comes against the backdrop of enforced statelessness for Palestinians all over the world,<sup>21</sup> and Palestinians living in Gaza and the West Bank being forced to live under siege, blockade,<sup>22</sup> and military occupation<sup>23</sup> while a Jewish individual from any country who was "born of a Jewish mother or has become converted to Judaism" is automatically entitled to Israeli citizenship and all the rights and privileges that entails.<sup>24</sup>

The processes of the BDS movement are heavily inspired by the South African antiapartheid resistance based on the welcoming international response that South African antiapartheid activists

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16. See OMAR BARGHOUTI, *BOYCOTT, DIVESTMENT & SANCTIONS: GLOBALIZED PALESTINIAN RESISTANCE TO ISRAEL'S SETTLER COLONIALISM AND APARTHEID* 27 (Inst. for Palestine Stud. 2020).

17. *Id.* at 28.

18. *Id.*

19. *Id.*

20. *Call for BDS, supra* note 10.

21. See INST. ON STATELESSNESS & INCLUSION, *THE WORLD'S STATELESS* 127–32 (2014), <https://files.institutesi.org/worldsstateless.pdf>.

22. Press Briefing From Stephane Dujarric, Spokesman for the Secretary-General, U.N. OCHA: Fifteen Years of the Blockade of the Gaza Strip, (June 21 2022), <https://www.ochaopt.org/content/fifteen-years-blockade-gaza-strip>.

23. See Human Rights Watch, *Separate And Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories*, 4, 11, 66 (2010), [https://www.hrw.org/sites/default/files/reports/iopt1210webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/iopt1210webwcover_0.pdf); Noura Erakat, *JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE* 211 (2019) (noting a 200% increase in settler population since 1993).

24. § 4B, Law of Return, 5730–1970, 24 LSI 28 (1969–70) (Isr.); see also *Basic Laws*, THE KNESSET, <https://m.knesset.gov.il/EN/activity/Pages/BasicLaws.aspx>.

experienced.<sup>25</sup> One of the main goals of the movement is to enforce international law through the 2004 advisory opinion from the International Court of Justice (ICJ) concerning the legality of the construction of Israel's separation wall in the West Bank. The vehement calls for the enforcement of this opinion take after the international response against the South African apartheid regime once the ICJ issued a similar advisory opinion in 1971.<sup>26</sup> In 1971 and 2004, the United Nations requested an advisory opinion on the actions of illegally occupying forces, South Africa and Israel respectively, and the legal consequences of their actions.<sup>27</sup> In 1971, the ICJ's advisory opinion specifically pertained to the continued presence of South Africa in Namibia after the termination of the Mandate for South West Africa, which was deemed illegal; and similarly, in 2004, the ICJ issued an almost-unanimous decision on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.<sup>28</sup> In its advisory opinion in 1971, the ICJ found that South Africa was under an obligation to withdraw its administration in Namibia immediately and called on members of the United Nations to "recognize the illegality of South Africa's presence in Namibia" and "to refrain from any acts implying recognition of the legality of, or lending support or assistance to, such presence and administration."<sup>29</sup> After the issuance of this decision, the United Nations Security Council imposed a mandatory arms embargo and sanctions against South Africa.<sup>30</sup>

In 2004, the ICJ issued its advisory opinion concluding that Israel's construction of the wall contravened the Hague Regulations of 1907 and the Fourth Geneva Convention, as well as certain provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention

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25. OMAR BARGHOUTI, *BOYCOTT, DIVESTMENT, SANCTIONS: THE GLOBAL STRUGGLE FOR PALESTINIAN RIGHTS* 49 (Haymarket Books 2011).

26. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Reports 16 (June 21).

27. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16 (June 21).

28. Consequences of Construction of Wall, 2004 I.C.J. at 201; *see also* Consequences for States of Continued Presence of South Africa in Namibia, 1971 I.C.J. at 58.

29. Consequences for States of Continued Presence of South Africa in Namibia, 1971 I.C.J. at 54, 58.

30. S.C. Res. 418, ¶ 2 (Nov. 4, 1977).

on the Rights of the Child.<sup>31</sup> This advisory opinion, similar to the one in 1971, also indicated that all countries were obligated not to recognize the illegal situation resulting from the construction of the wall and to avoid providing any aid or assistance in maintaining the wall,<sup>32</sup> effectively calling for divestment from the construction and maintenance of Israel's illegal wall and settlements. The BDS movement was founded a year after this advisory opinion was issued to compel meaningful international action in accordance with the decision. While no body of the United Nations has formally imposed embargoes or sanctions on Israel, the United Nations Office of the High Commissioner for Human Rights (OHCHR) in February 2020, issued a report on businesses involved in activities relating to Israel's illegal settlements in the West Bank, effectively identifying 112 businesses implicated in facilitating the creation, maintenance, and expansion of illegal Israeli settlements.<sup>33</sup> While OHCHR neither calls for any specific action to be taken against the identified businesses nor provides a legal conclusion regarding their activity, the publication of this list is a significant step toward supporting BDS and avoiding any impunity for companies involved in Israel's crimes against Palestinians.

Recognizing the essential role that the U.N. and ICJ played in ending apartheid in South Africa, the steps taken by each organization to hold Israel accountable for violating Palestinian rights are welcome supports to BDS's grassroots and civil society efforts. As the ICJ advisory opinion and OHCHR's report bring attention to a few of Israel's many violations of international law and encourage the international community to exercise their obligations under the Fourth Geneva Convention to ensure compliance by Israel with international humanitarian law, the goal of the BDS movement is to bring these calls into force, especially the opinion regarding the illegality of the wall's construction.<sup>34</sup> The irony of recent anti-BDS actions is that BDS seeks to do what the United Nations and the ICJ have done in calling on the international

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31. Consequences of Construction of Wall, 2004 I.C.J. at 139.

32. *Id.* at 202.

33. Database of all bus. enters. involved in the activities detailed in paragraph 96 of the rep. of the indep. int'l fact-finding mission to investigate the implications of the Israeli settlements on the civ., pol., econ., soc., and cultural arts. of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, Rep. of the U.N. High Comm'r for Hum. Rts. on Its Thirty-Seventh Session, U.N. Doc. A/HRC/37/39, ¶ 6 (2018); Palestinian BDS Nat'l Comm., *Release of long-delayed U.N. Settlement Database Significant Step Towards Holding Israel Accountable*, BDS MOVEMENT (Feb. 12, 2020), <https://bdsmovement.net/news/release-long-delayed-un-settlement-database-significant-step-towards-holding-israel-accountable>.

34. *Call for BDS*, *supra* note 10.

community and individuals to boycott and divest from Israel and enforce international law while maintaining a strict antidiscrimination foundation for any and all BDS activities.<sup>35</sup>

B. *International Human Rights Framework*

Criminal and civil statutes prohibiting participation in the BDS movement have either been passed or introduced in the United States, France and other European countries, and Israel.<sup>36</sup> At the same time, all of these countries are signatories of and have ratified the ICCPR.<sup>37</sup> The ICCPR, one of the treaties that makes up the International Bill of Rights alongside the Universal Declaration of Human Rights and the International Covenant on Social, Cultural, and Economic Rights,<sup>38</sup> is considered a touchstone of the freedoms upon which the United Nations is based.<sup>39</sup> In 1946, in the first session of the United Nations General Assembly, it was established that freedom of expression is “a fundamental human right. . . . The touchstone of all the freedoms to which the United Nations is consecrated.”<sup>40</sup> Article 19 of the ICCPR specifically protects every individual’s right to freedom of speech and expression, which includes the right to participate in political movements like BDS.<sup>41</sup> The exact text of Article 19 states:

1. Everyone shall have the right to hold opinions without interference.

35. *Id.*

36. Israel Anti-Boycott Act, H.R.5595, 116th Cong. (2020); Ali Abunimah, *EU Recognizes Right to Boycott Israel*, ELECTRONIC INTIFADA (Oct. 28, 2016), <https://electronicintifada.net/blogs/ali-abunimah/eu-recognizes-right-boycott-israel>; Ali Abunimah, *France Now More Repressive of Boycott Calls Than Israel*, ELECTRONIC INTIFADA (Nov. 4, 2015), <https://electronicintifada.net/blogs/ali-abunimah/france-now-more-repressive-boycott-calls-israel>; Ali Abunimah, *Ten Things to Know About Anti-Boycott Legislation*, PALESTINE LEGAL, <https://palestinelegal.org/news/2016/6/3/what-to-know-about-anti-bds-legislation> (last updated July 14, 2020).

37. U.N. OHCHR, *Status of Ratification Interactive Dashboard: ICCPR*, <https://indicators.ohchr.org/> (last updated 2022).

38. G.A. Res. 217 (III) A, Universal Declaration of Human Rights: Fact Sheet No. 2 (Dec. 10, 1948), <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>; see generally International Covenant on Economic, Social, and Cultural Rights art. 15, Dec. 16, 1966, 993 U.N.T.S. 3; see also G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

39. See Michael O’Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No. 34*, 12 HUM. RTS. L. REV. 627, 629 (2012).

40. *Id.*

41. ICCPR, *supra* note 5.



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2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (order public), or of public health or morals.<sup>42</sup>

The ability to express support for, or opposition to, BDS falls within the protections of the ICCPR both as a form of freedom to hold an opinion and as a form of expression in a means beyond just speech.<sup>43</sup> Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression David Kaye highlights the importance of boycott as a form of political speech, of which Article 19 is “especially protective”—in a letter to the United States government expressing concern over a proposed law, “S.1—Strengthening America’s Security in the Middle East Act of 2019” (S.1) and specifically the provision titled “Title IV—Combating BDS Act of 2019” (Title IV).<sup>44</sup> Special Rapporteur Kaye indicates that the human rights enumerated in the ICCPR, specifically Article 19, protects the right of every person to hold opinions without interference, and “to seek, receive, and impart information and ideas of all kinds, regardless of frontiers and through any medium.”<sup>45</sup> The fact that BDS is a political movement that utilizes avenues other than speech does not disqualify it from the protection of the ICCPR. The right to freedom of opinion and expression that is enshrined in Article 19 of the ICCPR is a fundamental right

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42. *Id.*

43. *Id.*; see EUR. PARL. DOC. (SEC E-005122) (2016) (answer given by Vice-President Mogherini on behalf of the Commission) [hereinafter EUR. PARL. DOC.]; David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), Letter dated Feb. 14, 2019 from the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression addressed to the President of the United States, U.N. Doc. OL USA 2/2019, 3 (Feb. 14, 2019) [hereinafter Kaye].

44. Kaye, *supra* note 43.

45. *Id.*

that is essential for every individual and a “foundation stone for every free and democratic society.”<sup>46</sup>

This comparison of these three countries comes not only as a result of the laws they have each proposed or enacted, but also due to their alleged robust protections of liberal democracy, including the right to freedom of speech and expression.<sup>47</sup> Spurred by the recent ruling of the European Court of Human Rights in *Baldassi and Others v. France* and its similarities to the principles articulated by the Supreme Court of the United States in *National Association for the Advancement of Colored People v. Claiborne Hardware Company* in 1982 that “a nonviolent, politically motivated boycott” is protected speech,<sup>48</sup> this comparison assesses how well each state’s domestic practices comport with their obligations under international law. Interestingly, of the three states, the United States is the sole country with domestic courts that have addressed Article 19 specifically.<sup>49</sup> In 2002, the United States District Court for the Southern District of New York looked into the requirements of Article 19 in particular in *Tachiona v. Mugabe*.<sup>50</sup> The judge in this case in laying out the analysis of Article 19 extrapolated from the treaty that “freedoms of thought, conscience and religion, and the related freedoms of opinion and expression may be . . . vested with a higher grade of protection.”<sup>51</sup> Taking this perspective, the district court judge combined the overlapping rights of the ICCPR and the United States Constitution to award punitive and compensatory damages in this case in favor of plaintiffs, citizens of Zimbabwe, against Zimbabwe’s ruling party at the time under the Alien Tort Claims Act.<sup>52</sup>

This Note stems from the fact that the United States, France, and Israel all reflect Article 19 rights in their domestic laws but, at the same time, have rarely addressed Article 19 and their international obligations, and they have taken steps to silence the expression of any BDS

46. Hum. Rts. Comm., General Comment No. 34, Article 19: Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

47. Kenneth Bollen, *Liberal Democracy: Validity and Method Factors in Cross-National Measures*, 37 AM. J. POL. SCI. 1207, 1209, 1227 (1993).

48. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982); see Brief of Amici Curiae First Amendment Scholars in Support of Plaintiffs-Appellees at 12–13, *Jordahl v. Brnovich*, 789 F. App’x 589 (9th Cir. 2020) (No. 18-16896); *Baldassi and Others v. France*, App. No. 15271/16 (June. 11, 2020), [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-202756%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-202756%22]).

49. See generally *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002).

50. *Id.* at 428–431.

51. *Id.* at 429.

52. *Id.* at 441.

activities.<sup>53</sup> Thus, the question this Note seeks to answer is whether the United States, France, and Israel are abiding by their obligations under international law. This inquiry is relevant because once a country signs the ICCPR, it is declaring its intent to be legally bound to the terms of the treaty. However, only when the country has ratified the treaty—or acceded in the case of a country without a prior signature—will the terms have a binding commitment on the country.<sup>54</sup> The binding nature of a ratified treaty means that the consenting country must ensure that its domestic practices are compatible with and protect the rights specified in the ICCPR.<sup>55</sup> Concerning Article 19 of the ICCPR in particular, none of the countries subject to review in this Note have issued reservations,<sup>56</sup> and so it is expected that each of them upholds the protections of freedom of speech, expression, and opinion as specified in the treaty.

## II. INTERNATIONAL LEGISLATIVE RESPONSES TO THE BDS MOVEMENT

The increasing popularity and rapid growth of the BDS movement around the world<sup>57</sup> is viewed as a threat by Israel and Israel advocacy groups. It is primarily the result of the work of these groups that anti-BDS legislation has come about.<sup>58</sup> The variety of international approaches to anti-BDS legislation is noteworthy. In the United States, state and federal legislation, and presidential and gubernatorial executive orders, have taken action against BDS but do not target individuals who participate in the movement.<sup>59</sup> In the European Union (EU), it has been made clear that the official policy is not to support the

53. See U.S. CONST. amend. I; 1958 CONST. art. IV (Fr.); Basic Law: Human Dignity and Liberty [Constitution], 5752 – 1992 § 7(d) (Isr.). But see Israel Anti-Boycott Act, H.R. 5595, 116th Cong. (2020); Combating BDS Act, S. 170, 115th Cong. (1st Sess. 2017); Law for Prevention of Damage to the State of Israel through Boycott, 5771-2011, S.H. 2304 1 (Isr.); Abunimah, *Ten Things to Know About Anti-Boycott Legislation*, *supra* note 36.

54. Jeff Howard, *Article 19: Freedom of Expression Anchored in International Law*, FREE SPEECH DEBATE (Feb. 10, 2012), <https://freespeechdebate.com/discuss/article-19-freedom-of-expression-anchored-in-international-law/>.

55. *Id.*

56. U.N. OHCHR, *Status of Ratification Interactive Dashboard: ICCPR*, <https://indicators.ohchr.org/> (last updated 2022).

57. The call for BDS is being taken up on college campuses, by churches, and even large foundations and charitable funds, like the Gates Foundation. See CCR & PalLegal Brief, *supra* note 1, at 13–15.

58. Jewish News Syndicate, *As BDS Opponents Move from Campuses to State Capitols, California is Up Next*, JEWISH NEWS SYNDICATE (Apr. 13, 2016), <https://www.jns.org/as-bds-opponents-move-from-campus-to-state-capitols-california-is-up-next/>.

59. Abunimah, *Ten Things to Know About Anti-Boycott Legislation*, *supra* note 36.

boycott, but the EU at least requires that all products made in illegal Israeli settlements be labeled as such to enter EU territory.<sup>60</sup> In contrast to the United States, although the EU does not endorse the boycott, it has affirmed the right of its citizens to participate in such a political movement on multiple occasions.<sup>61</sup> The EU has validated the fact that a boycott is an extension of speech and expression, easily including this movement as one entitled to the protection of the ICCPR, the European Convention on Human Rights, and the European Charter of Fundamental Rights.<sup>62</sup> Finally, in a very different style, Israel has passed multiple laws that restrict participation in any form of boycott against Israel or Israeli institutions,<sup>63</sup> and further, that also restricted entry into the State of Israel for anyone who publicly participates in or supports a boycott.<sup>64</sup>

#### A. *United States*

Over the past three years, thirty states have enacted anti-BDS laws, a handful of state governors have issued anti-BDS executive orders, and in twelve other states, anti-BDS legislation has been introduced or is currently pending.<sup>65</sup> In Congress, the Senate and the House of Representatives have each introduced and passed non-binding resolutions opposing any BDS activity, which they similarly characterize as “delegitimizing the [S]tate of Israel.”<sup>66</sup> In the House of Representatives, an amendment to the Export Control Reform Act (ECRA) of 2018 was introduced to prohibit specified entities, including individuals, from taking action to boycott Israel.<sup>67</sup> This Act includes provisions to punish violators with severe civil and criminal monetary penalties (ranging

60. EUR. PARL. DOC., *supra* note 43; Bernard Avishai, *The EU vs. B.D.S.: The Politics of Israel Sanctions*, NEW YORKER (Jan. 22, 2016), <https://www.newyorker.com/news/news-desk/the-e-u-vs-b-d-s-the-politics-of-israel-sanctions>.

61. EU Charter of Fundamental Rights, art. 10-12, 2016 O.J. (C 202) 395; ICCPR, *supra* note 5; EUR. PARL. DOC., *supra* note 43; Baldassi and Others v. France, App. No. 15271/16 (June. 11, 2020), [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-202756%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-202756%22]).

62. ICCPR, *supra* note 5; EU Charter of Fundamental Rights, *supra* note 61; EUR. PARL. DOC., *supra* note 43.

63. *See* Law for Prevention of Damage to the State of Israel through Boycott, 5771-2011, S.H. 2304 I (Isr.).

64. Entry into Israel Law, 5763-2003, SH 1901 544 (Isr.).

65. *Anti-Boycott Legislation Around the Country*, PALESTINE LEGAL, <https://palestinelegal.org/righttoboycott/> (last updated Aug. 12, 2022).

66. H.R. Res. 246, 116th Cong. (2019); S. Res. 120, 116th Cong. (2019); *Federal Legislation*, PALESTINE LEGAL, <https://palestinelegal.org/federal> (last updated Aug. 12, 2022).

67. Israel Anti-Boycott Act, H.R. 5595, 116th Cong. (2020); *Federal Legislation*, *supra* note 66.

from \$300,000 to \$1 million), and originally included the possibility of prison time.<sup>68</sup> In addition to this amendment to ECRA, the House of Representatives passed House Resolution No. 246, which continues to mischaracterize the BDS movement and its goals, and demonizes supporters of Palestinian rights.<sup>69</sup>

The Senate has also taken additional measures to introduce more legislation to punish any participation in BDS. In 2019, the “Strengthening America’s Security in the Middle East Act” was introduced in the Senate’s Banking, Housing, and Urban Affairs Committee, which includes a provision titled “Combating BDS Act of 2019.”<sup>70</sup> The purpose of this provision is to “provide for non-preemption of measures by State and local governments to divest from entities that engage in commerce-related or investment-related boycott, divestment, or sanctions activities targeting Israel, and for other purposes.”<sup>71</sup> The proposed Act would authorize state legislation that prohibits the state from contracting with any party that engages in boycott, divestment, or sanctions activity targeting Israel.<sup>72</sup>

Although neither federal nor state legislation explicitly takes away the ability of an individual to call for or participate in BDS, individual state laws do target BDS activists with the threat of blacklists, revocation of government contracts, and pension fund divestment.<sup>73</sup> Enshrined in the language of these bills, acts, and resolutions is the call to action for the government of the United States to use its “voice, vote, and influence” in the international community to oppose the boycott movement,<sup>74</sup> specifically, to protect Israel, considering the strong and strategic alliance the United States maintains with Israel. After amending the ECRA, this iteration of the Senate’s proposed Anti-Boycott Act is meant to restrict discriminatory activity and oppose any restrictive trade practices specifically imposed on Israel by BDS participants.<sup>75</sup>

Similar iterations of this law have been passed in state legislatures in various forms: some bills call for state pension funds to divest from any organizations involved in BDS while others completely restrict any state

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68. *Anti-Boycott Legislation Around the Country*, *supra* note 65.

69. H.R. Res. 246; BARGHOUTI, *supra* note 16, at 32.

70. S. 170., 115th Cong. (1st Sess. 2017).

71. *Id.*

72. *Id.*; *Anti-Boycott Legislation Around the Country*, *supra* note 65.

73. Abunimah, *Ten Things to Know About Anti-Boycott Legislation*, *supra* note 36.

74. Israel Anti-Boycott Act, H.R. 5595, 116th Cong. (2020).

75. *Id.*

contracts with any entity engaged in boycotting Israel.<sup>76</sup> Ultimately, what all forms of anti-BDS laws have in common is that they result in individuals and organizations losing benefits or being blacklisted for participating in a political movement.<sup>77</sup> For example, Pennsylvania's anti-BDS law prohibits universities from endorsing BDS lest they lose state funding.<sup>78</sup> In New York, United Methodist and Presbyterian churches that are eligible to receive state funding for community support programs, such as food pantries and homeless shelters, may have their state funding revoked because they supported a boycott of companies operating in illegal Israeli settlements.<sup>79</sup> And in Texas, a speech pathologist lost her job after refusing to sign an oath vowing not to engage in a boycott of Israel, as required in Texas's iteration of anti-BDS legislation.<sup>80</sup> While these laws do not plainly suppress freedom of speech, they do condition government benefits and funding on the surrender of a constitutional right.<sup>81</sup>

The BDS movement defines itself as “an inclusive, anti-racist human rights movement that is opposed on principle to all forms of discrimination, including anti-Semitism and Islamophobia” which targets Israel as a state and companies that are specifically complicit in violations of Palestinian rights by operating within Israel's illegal settlement enterprise.<sup>82</sup> The movement works to identify companies to boycott in order to exert economic influence on the Israeli government as a sovereign entity and its economy and avoids targeting any individuals based on their religion or national origin.<sup>83</sup> Furthermore, the call to boycott is intended for products that originate in Israel, which are not necessarily all produced by Israeli companies, and in fact, include many foreign

76. *Types of Legislation*, PALESTINE LEGAL, <https://legislation.palestinelegal.org/types-of-legislation/#anti-boycott-state-contracts>.

77. Note, *Boycotting a Boycott: A First Amendment Analysis of Nationwide Anti-Boycott Legislation*, 70 RUTGERS U. L. REV. 1301, 1303–04 (2018) [hereinafter *Boycotting a Boycott*].

78. H.R. 1018, 199th Gen. Assemb., Reg. Sess. (Pa. 2015) (“[P]rohibiting funding to an institution of higher education that engages in a boycott against or divestment from Israel.”).

79. See Laurie Goodstein, *Presbyterians Vote to Divest Holdings to Pressure Israel*, N.Y. TIMES (June 20, 2014), <https://www.nytimes.com/2014/06/21/us/presbyterians-debating-israeli-occupation-vote-to-divest-holdings.html>; David Wildman, *Anti-BDS Legislation Violates Free Speech*, NAT'L CATH. REP. (Apr. 21, 2016), <https://www.ncronline.org/blogs/ncr-today/anti-bds-legislation-violates-free-speech>.

80. Glenn Greenwald, *A Texas Elementary School Speech Pathologist Refused to Sign a Pro-Israel Oath, Now Mandatory in Many States — so She Lost Her Job*, THE INTERCEPT (Dec. 17, 2018, 6:58 AM), <https://theintercept.com/2018/12/17/israel-texas-anti-bds-law/>.

81. *Boycotting a Boycott*, *supra* note 77, at 1325.

82. *Call for BDS*, *supra* note 10.

83. *Know What to Boycott*, *supra* note 15.

companies that have some operations in Israel<sup>84</sup>—demonstrated in detail by the United Nations’ list of companies operating in and supporting Israeli settlements.<sup>85</sup>

While it is possible that certain people may co-opt the BDS movement to engage in anti-Semitism, because BDS works to apply concerted pressure against the Israeli government in response to state violence inflicted on Palestinians while consistently and categorically rejecting all forms of racism, “including anti-Jewish racism,” the movement as a whole cannot by default be considered anti-Semitic or discriminatory.<sup>86</sup> The BDS movement and committee, and its companion the Palestinian Campaign for the Academic and Cultural Boycott of Israel, maintain the importance of boycotting and divesting from institutions, rather than individuals, noting basic precepts of international law and human rights that no individual person should be the target of a boycott based on their identity.<sup>87</sup> This departs from the South African academic and cultural boycott tradition, which was a “blanket” boycott that targeted everyone and everything South African.<sup>88</sup>

For a law to overcome the robust freedom of expression protections of the ICCPR, much less any domestic First Amendment protections, there must be a compelling national security or antidiscrimination justification,<sup>89</sup> which is only superficially alleged in the texts of the proposed bills and resolutions.<sup>90</sup> Behind the texts of these proposed laws is the legislative intent to curtail political speech directed at Israel<sup>91</sup> rather

84. *Id.*; Andreina de Leo, *Baldassi and Others v. France: Criminal Convictions of BDS Activists Violate Freedom of Expression under the European Convention on Human Rights*, OPINIO JURIS (July 16, 2020), <http://opiniojuris.org/2020/06/16/baldassi-and-others-v-france-criminal-convictions-of-bds-activists-violate-freedom-of-expression-under-the-european-convention-on-human-rights/>.

85. U.N. High Comm’r for Hum. Rts. *supra* note 33, at ¶¶ 3, 6.

86. Palestinian BDS National Committee, *The Peaceful BDS Movement Will Prevail Over the Far Right Trump-Netanyahu Alliance*, BDS (Nov. 19, 2020), <https://bdsmovement.net/news/peaceful-bds-movement-will-prevail-over-far-right-trump-netanyahu-alliance>.

87. BARGHOUTI, *supra* note 16, at 21; Palestinian Campaign for the Academic and Cultural Boycott of Israel, *PACBI Guidelines for the International Cultural Boycott of Israel*, BDS (July 16, 2014), <https://bdsmovement.net/pacbi/cultural-boycott-guidelines>.

88. BARGHOUTI, *supra* note 16, at 21.

89. ICCPR, *supra* note 5; U.N. Hum. Rts. Comm., *Ballantyne et al. v. Canada*, ¶ 11.4, U.N. Doc. CCPR/C/47/D/359/1989 & 385/1989/Rev.1 (1993); *see also Wielding Antidiscrimination Law to Suppress the Movement for Palestinian Rights*, 133 HARV. L. REV. 1360, 1369 (Feb. 10, 2020).

90. Israel Anti-Boycott Act, H.R. 5595, 116th Cong. (2020); H.R. Res. 246; S. Res. 120; *Federal Legislation*, *supra* note 66.

91. Press Release, U.S. Senator Ben Cardin, Cardin, Portman Amend Isr. Anti-Boycott Act (Mar. 3, 2018) (on file with author) (quoting Senate Banking Committee Chairman Crapo), <https://www.cardin.senate.gov/newsroom/press/release/cardin-portman-amend-israel-anti-boycott-act>.

than an intent to genuinely combat anti-Semitism. In the few cases that have been heard challenging state anti-BDS laws in the United States, under the strict scrutiny analysis, the enforcement of restrictions has been blocked by preliminary injunction by federal judges.<sup>92</sup> However, state legislatures have responded by amending the anti-BDS laws to restrict the pool of injured individuals who can challenge the laws.<sup>93</sup> As written, these proposed and passed anti-BDS laws specifically prohibit boycotting Israel despite the range of boycotts practiced in the United States<sup>94</sup> which, as the court reviewing Texas' anti-BDS law said, "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."<sup>95</sup>

## B. *France and the European Union*

### 1. France

In France, anti-BDS restrictions are the most severe out of all the European anti-BDS legislation. A combination of the Press Law of 1881 and the so-called Lellouche Law create effective tools for the French government to combat discrimination, and especially discrimination based on "national origin."<sup>96</sup> These laws have been used to punish BDS activists based on France's interpretation of the BDS movement and its objectives as inciting discrimination.<sup>97</sup> The Lellouche Law, named after the Jewish parliamentarian who introduced it, is a law that enhances penalties for crimes by establishing "racism, xenophobia or anti-

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92. *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1043 (D. Ariz. 2018); *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1027 (D. Kan. 2018).

93. *Jordahl*, 336 F. Supp. 3d. at 1043; *Koontz*, 283 F. Supp. 3d at 1014.

94. *E.g.*, Alistair, *Blog: Should We Boycott Chinese Goods?*, FREE TIBET (Dec. 4, 2015) (on file with author), <https://www.freetibet.org/news-media/na/blog-should-we-boycott-chinese-goods> (pro-Tibet boycott of Chinese goods); *Sever Ties with the Saudi Regime*, CODEPINK, <https://www.codepink.org/boycottsaudi> (boycott of Saudi Arabia) (last updated May 2020).

95. *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 749 (W.D. Tex. 2019) (alteration in original) (quoting *Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 U.S. 2361, 2376 (2018)).

96. *Loi du 29 juillet 1881 sur la liberté de la presse* [Law of 29 July 1881 on Freedom of the Press], *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 29, 1881 (updated as of July 8, 2014); Benjamin Dodman, *France's Criminalization of Israel Boycott Sparks Free-Speech Debate*, FRANCE 24 (Jan. 21, 2016, 8:27 AM), <https://www.france24.com/en/20160120-france-boycott-israel-bds-law-free-speech-antisemitism>.

97. Dodman, *supra* note 96.



Semitism as a new aggravating circumstance.”<sup>98</sup> Originally, the Lellouche Law was designed to combat sectarian tendencies in France, but it has primarily been used to convict pro-Palestinian activists of racial hatred.<sup>99</sup> In fact, since its introduction, approximately twenty pro-Palestinian and BDS activists have been convicted under the Lellouche Law.<sup>100</sup> Most recently, in 2013, a group of activists in France was arrested and convicted of incitement to discrimination for participating in BDS.<sup>101</sup> This case was submitted to the European Court of Human Rights for review, after exhausting France’s domestic courts to no avail.<sup>102</sup>

The appeal to the European Court of Human Rights assessed whether the French law and convictions were justified under Article 10 (freedom of expression) of the European Convention on Human Rights.<sup>103</sup> In a similar analysis to the United Nations Human Rights Committee test, discussed below, the European Court applied a three-part inquiry to the French law, asking: (i) is the interference in freedom of expression required by law?; (ii) does the interference in freedom of expression pursue a legitimate interest?; and (iii) is the interference in freedom of expression necessary in a democratic society?<sup>104</sup> Ultimately, the ECtHR found that the restriction on BDS is not necessary to a democratic society and indeed violated Article 10’s protection of freedom of expression.<sup>105</sup> The ECtHR noted that because the nature of a boycott, and BDS in particular, is political, it is in the “nature of political speech to be controversial and often virulent.”<sup>106</sup> Simply the fact that

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98. Comm. on the Elimination of Racial Discrimination, Rep. Submitted by States Parties Under Art. 9 of the Convention, U.N. Doc. CERD/C/430/Add.4, at 35–6 (2004); Erik Bleich, *Hate Crime Policy in Western Europe: Responding to Racist Violence in Britain, Germany, and France*, 51 AM. BEHAV. SCIENTIST 149, 158 (2007).

99. See Dodman, *supra* note 96.

100. *French Courts Treat BDS as a Hate Crime*, LOUIS D. BRANDEIS CENTER FOR HUMAN RIGHTS UNDER LAW, <https://brandeiscenter.com/french-courts-treat-bds-as-a-hate-crime/>; JTA, *BDS a Hate Crime? In France, Legal Vigilance Punishes anti-Israel Activists*, HAARETZ (Feb. 15, 2014), <https://www.haaretz.com/jewish/the-french-law-that-battles-bds-1.5322519>; see also Willem v. France, App. No. 10883/05, Eur. Ct. H.R. (July 16, 2009).

101. Baldassi and Others v. France, App. No. 15271/16, ¶ 1 (June. 11, 2020), [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-202756%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-202756%22]}).

102. *Id.* ¶ 23.

103. *Id.* ¶ 58.

104. *Id.*

105. *Id.* ¶¶ 78, 81.

106. *Id.* ¶ 79.

this speech is controversial does not diminish the public interest in the speech, nor does it constitute racial hatred or discrimination.<sup>107</sup>

## 2. European Union

While the United States sees more of a uniform wave of anti-BDS legislation being passed, across the European continent there have been varying responses to the BDS movement, with some member states vehemently opposing the boycott while others respond with renewed dedication to protecting such a political movement.<sup>108</sup> In countries like France, Germany, and Hungary, the strongest BDS restrictions have emerged.<sup>109</sup> Nonetheless, in France and Germany, as well as in the United Kingdom, the anti-BDS regulations have been challenged.<sup>110</sup> These domestic laws contrast with the European Union Charter and the European Convention on Human Rights, which both include articles protecting freedom of expression.<sup>111</sup> EU Foreign Policy Chief Minister Federica Mogherini affirmed the application of these documents to EU member states, that “the EU stands firm in protecting freedom of expression and freedom of association in line with the Charter of Fundamental Rights of the European Union, which is applicable on EU member states’ territory, including with regard to BDS actions carried out on this territory.”<sup>112</sup>

Following Special Rapporteur Kaye’s lead in sending a letter to the United States regarding the emerging anti-BDS restrictions, five United Nations special rapporteurs, including David Kaye, sent a letter to the German government expressing concern about a 2019 German law that was passed which condemned the BDS movement as anti-Semitic.<sup>113</sup> The German parliament went so far as to accuse the movement and its followers of utilizing “patterns and methods” used by the

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107. *Id.*

108. Abunimah, *EU Recognizes Right to Boycott Israel*, *supra* note 36.

109. *Id.*

110. *Baldassi and Others v. France*, App. No. 15271/16, Judgment, § 81 (June 11, 2020), <https://hudoc.echr.coe.int/eng-press?i=003-6718555-8953654>; R (Palestine Solidarity Campaign Ltd. and another) Sec’y of State for Hous., Cmty. and Loc. Gov’t [2020] UKSC 16 (appeal taken from UK); Adri Nieuwhof, *Human Rights Defenders Sue German Parliament Over Anti-BDS Resolution*, ELECTRONIC INTIFADA (Oct. 5, 2020), <https://electronicintifada.net/blogs/adri-nieuwhof/human-rights-defenders-sue-german-parliament-over-anti-bds-resolution>.

111. ICCPR, *supra* note 5.

112. EUR. PARL. DOC., *supra* note 43.

113. *U.N. Experts Publish Letter Criticizing German Anti-BDS Law*, MIDDLE EAST EYE (Jan. 17, 2020, 9:18 AM), <https://www.middleeasteye.net/news/un-special-rapporteurs-probe-germanys-anti-bds-law-limiting-freedom-expression> [hereinafter *U.N. Experts Publish*].

Nazis during the Holocaust.<sup>114</sup> The U.N. rapporteurs sent their letter to the German government questioning the law and clarifying that indeed it is not anti-Semitic to criticize the government of Israel.<sup>115</sup> This German law would unduly restrict a plethora of rights, including the rights to freedom of opinion and expression, peaceful assembly, and association, but only concerning Palestinian civil society and pro-Palestinian allies calling for the enforcement of international law.<sup>116</sup>

### C. Israel

In 2011, Israel adopted its Law for Prevention of Damage to the State of Israel through Boycott (Israel Anti-Boycott Act) to restrict the public practice of boycotting the State of Israel or any institutions related to it.<sup>117</sup> The law imposes civil damages on any person who calls for a boycott against the State of Israel.<sup>118</sup> Even after a challenge of the law to the Israeli Supreme Court, its substantive measures were upheld.<sup>119</sup> This law has had severe backlash and faced criticism from civil society and rights groups in Israel.<sup>120</sup> The United Nations Human Rights Committee itself has included concerns about the law in its periodic report, citing the “chilling effect” of the Israel Anti-Boycott Law.<sup>121</sup> The United Nations Human Rights Committee requires countries ensure the ability of individuals to enjoy their right to freedom of expression and association.<sup>122</sup>

Along similar lines, Israel has also amended its Entry into Israel Law (Entry Law) to maintain additional restrictions related to who may

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114. *Id.*

115. *Id.*

116. *U.N. Experts Publish, supra* note 113.

117. Law for Prevention of Damage to the State of Israel through Boycott, 5771-2011, S.H. 2304 1 (Isr.)

118. *Id.*

119. The Israeli Supreme Court unanimously voted to uphold the major provisions of the law, only striking the portion of the legislation that allowed recovery of monetary compensation even if no damages were proven. *See* HCJ 5239/11 Avneri v. The Knesset, PD (2015) (Isr.); Yonah J. Bob, *High Court Upholds Part of Anti-Boycott Law, Strikes Part and Splits On ‘1967 Israel’*, JERUSALEM POST (Apr. 15, 2015), <https://www.jpost.com/Israel-News/Politics-And-Diplomacy/High-Court-rules-on-boycott-law-398206>.

120. Yolande Knell, *Israeli Boycott Ban to be Challenged by Rights Groups*, BBC NEWS (July 14, 2011), <https://www.bbc.com/news/world-middle-east-14157490>.

121. Hum. Rts. Comm., Concluding Observations on the Fourth Periodic Rep. of Israel, U.N. Doc. CCPR/C/ISR/4 (2014) [hereinafter Concluding Observations on the Fourth Periodic Rep. of Israel].

122. *Id.*

enter the territory of the State of Israel.<sup>123</sup> This 2017 amendment refuses entry to non-citizen individuals who are or have been publicly linked to a call for a boycott of Israel.<sup>124</sup> The Israeli Ministry of Interior wielded this law against Lara Alqasem in 2018.<sup>125</sup> After being approved for a visa to study her M.A. at Hebrew University, the Israeli government detained and refused her entry upon her arrival.<sup>126</sup> Using the Entry Law as their justification, the government claimed that given Alqasem's involvement in her Students for Justice in Palestine chapter during her undergraduate career and its advocacy for BDS, Lara Alqasem's presence in Israel would injure the Israeli state.<sup>127</sup> The Entry Law goes beyond restricting actual entry into the state: it has also been used to expel human rights researcher Omar Shakir in 2019, after the amendment was passed in 2017, citing the fact that his advocacy with Human Rights Watch violated the clause of the Entry Law that restricts any boycott of Israel or its settlements in the West Bank.<sup>128</sup> Neither Omar Shakir nor Human Rights Watch has called for a boycott of Israel, but in a broad reading of the Entry Law, the Israeli Supreme Court found that Human Rights Watch's calls to urge businesses to close operations in illegal settlements in the West Bank and avoid complicity in international human rights abuses were grounds for revocation of Shakir's work visa and immediate deportation.<sup>129</sup>

The 2017 amendment to the Entry Law is expansive and more restrictive than it seems. The amendment, known as Amendment 28, simply states that any non-Israeli who has ever publicly called for a boycott of Israel or its settlements or is affiliated with an organization that makes such a call is banned from entering and, with the Omar Shakir precedent, remaining in, Israel.<sup>130</sup> The fact that no damage to the state occurs is immaterial to the decision of allowing the person who has ever previously called, or currently calls, for a boycott of Israel.<sup>131</sup>

123. Entry into Israel Law, 5763-2003, SH 1901 544 (Isr.).

124. Amendment No. 28 to the Entry into Israel Law, 5712-1952, SH 1901 544 (Isr.).

125. *American Student Challenges Israeli Entry Ban in Court*, FRANCE 24 (Nov. 10, 2018), <https://www.france24.com/en/20181011-israel-american-student-alqasem-bds>.

126. *Id.*

127. *Id.*; Joshua Pex, *Lara Alqasem—Entry of BDS Activists and Boycott Promoters into Israel*, COHEN, DECKER, PEX, AND BROSH, <https://lawoffice.org.il/en/lara-alqasem-entry-of-bds-activists/> (last updated Dec. 13, 2021).

128. Human Rights Watch, *Israel Expels Human Rights Watch Director Today* (Nov. 25, 2019, 5:00 AM), <https://www.hrw.org/news/2019/11/25/israel-expels-human-rights-watch-director-today>.

129. *Id.*

130. Amendment No. 28 to the Entry into Israel Law, 5712-1952, SH 1901 544 (Isr.).

131. Yuval Livnat, *Ideological Exclusion of Foreigners in Israel and in the United States*, 26 BUFF. HUM. RTS. L. REV. 81, 140 (2019).

Requiring an individual who is attempting to enter Israel to prove that they no longer support boycott activities and will not promote them while in Israel is an obvious violation of the widely known international human right to freedom of expression.<sup>132</sup> Such sweeping restrictions on the political and ideological freedom of individuals—citizens and non-citizens alike—to the extent that it restricts freedom of movement without a legitimate purpose under the ICCPR are questionable at best and, per the recommendation of the United Nations Human Rights Committee, should be revoked.<sup>133</sup>

While Israel has used legislation to claim that travel bans and expulsions are in the interest of national security, since 2016, Israel has imposed a travel ban on Omar Barghouti, the co-founder of the BDS movement, which has restricted his movement outside of Akka, in present-day Israel.<sup>134</sup> Barghouti's status as the co-founder of the BDS movement results in invitations to speak around the world, at college campuses, bookstores, places of worship, etc.,<sup>135</sup> causing the mainstream popularity of BDS, which Israel sees as a threat to be repressed.<sup>136</sup> In 2016, when Barghouti's travel document was first denied renewal, Israel's Interior Minister Aryeh Deri had explicitly threatened to revoke Barghouti's permanent residency based on the fact that "he is using his resident status to travel all over the world in order to operate against Israel in the most serious manner."<sup>137</sup> As recently as 2019, Barghouti faced a travel ban again as he was preparing to depart from Ben Gurion Airport (located in the Israeli city of Tel-Aviv), but this time he was additionally restricted by the United States.<sup>138</sup> The U.S. consulate informed Omar Barghouti that he was now specifically banned from entering the United States even after Israel temporarily lifted its *de facto* travel ban after pressure from

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132. See Concluding Observations on the Fourth Periodic Rep. of Israel, *supra* note 121; Howard, *supra* note 54.

133. See Concluding Observations on the Fourth Periodic Rep. of Israel, *supra* note 121.

134. Ali Abunimah, *Israel Imposes Travel Ban on BDS Co-Founder Omar Barghouti*, ELECTRONIC INTIFADA (May 10, 2016), <https://electronicintifada.net/blogs/ali-abunimah/israel-imposes-travel-ban-bds-co-founder-omar-barghouti>.

135. Omar Barghouti, *I Co-Founded the BDS Movement. Why Was I Denied Entry to the US?*, THE GUARDIAN (Apr. 19, 2019), <https://www.theguardian.com/commentisfree/2019/apr/16/bds-movement-omar-barghouti-denied-entry>.

136. *Id.*

137. Abunimah, *supra* note 134.

138. Barghouti, *supra* note 135.

Amnesty International.<sup>139</sup> Explicit threats and targeting of the co-founder of the BDS movement—among other activists, ordinary citizens, and even U.S. Congresswomen Rashida Tlaib and Ilhan Omar<sup>140</sup>—for years are obvious and desperate attempts by Israel, in contravention of international law, to silence human rights defenders who are protected by and work to enforce international law.<sup>141</sup>

### III. APPLICATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

As stated above, once a country has ratified the ICCPR (or a treaty in general), the terms of the treaty become binding on a country absent a reservation. The binding nature of an international treaty creates an obligation on the ratifying country to ensure that its domestic political and legal systems protect the rights specified in the ICCPR.<sup>142</sup> The United Nations Human Rights Committee (UNHRC), the body tasked with interpreting and clarifying the ICCPR, expressed in a general comment the nature of the general legal obligation imposed on state parties to the Covenant.<sup>143</sup> The comment contends that “all branches of government (executive, legislative, and judicial), and other public or governmental authorities, at whatever level—national, regional, or local—are in a position to engage the responsibility of the [ratifying country].”<sup>144</sup> This imposes the obligation that duties created by treaties “must be honored in good faith and domestic laws cannot be invoked to justify their violation.”<sup>145</sup> And although this affirmative domestic and international obligation on a country is rarely, if ever, enforced, it is still present in all countries—including the United States, France, and Israel.

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139. *Id.*; Amnesty International, Public Statement, *Israel: End the Arbitrary Travel Ban on Human Rights Defender Omar Barghouti* (Feb. 7, 2019), <https://www.amnesty.org/download/Documents/MDE1598112019ENGLISH.PDF>.

140. Niraj Chokshi, *The Anti-Boycott Law Israel Used to Bar Both Omar and Tlaib*, N.Y. TIMES (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/world/middleeast/bds-israel-boycott.html>.

141. *See generally* Barghouti, *supra* note 135; Hannah Allam, *U.S. Denies Entry to Leader of Movement to Boycott Israel*, NPR (Apr. 11, 2019), <https://www.npr.org/2019/04/11/712189791/u-s-denies-entry-to-leader-of-movement-to-boycott-israel>.

142. Howard, *supra* note 54.

143. Hum. Rts. Comm., *General comment no. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.1326 (Mar. 29, 2004).

144. *Id.*

145. *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 125 (Sept. 26, 2006); *see also* Vienna Convention on the Law of Treaties art. 27, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 339.

## CIVIL RIGHTS? BUT NOT FOR YOU

Under Article 19 of the ICCPR, any law restricting freedom of speech must be necessary (a) to respect the rights or reputations of others, or (b) for the protection of national security or of public order, or of public health or morals.<sup>146</sup> Given that BDS is a political movement that takes nonviolent action aimed at Israel, these exceptions are unlikely to apply to the laws prohibiting participation in the movement. The UNHRC has built on these restrictions to create a three-part test to determine whether a law restricting speech or expression is indeed justifiable.<sup>147</sup> When faced with a domestic law that restricts speech or expression in some way, the UNHRC assesses whether it is a violation of Article 19 using this inquiry: (i) whether the interference is provided for by law; (ii) whether the interference addressed one of the legitimate aims enumerated in paragraphs 3(a) and 3(b) of Article 19; and (iii) whether the legal interference was necessary to achieve this legitimate purpose.<sup>148</sup>

### A. *Does a Violation of the International Covenant on Civil and Political Rights Exist?*

As previously mentioned, a ratified treaty is binding and therefore should be enforced by the adoption of its terms into the ratifying country's domestic law. Although the United States, France, and Israel have their own iterations of domestic laws to protect freedom of speech and expression, and the European Union Charter has articles to protect the right to freely associate with and espouse political speech and opinions, including in the form of a boycott, still the obligation to adhere to international law is necessary to ensure overall protection of human rights across all countries. The reason international law was formally established and enshrined in international governmental organizations was to ensure that state sovereignty does not insulate a country to the point of excess, as in the case of Germany during the Holocaust.<sup>149</sup> Thus, it is perhaps doubly important that international law is adopted into domestic schemes and more stringently protected in democratic societies that boast strong protections for civil and political rights and the open exchange of ideas.

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146. ICCPR, *supra* note 5.

147. U.N. Hum. Rts. Comm., *Ballantyne et al. v. Canada*, ¶ 11.4, U.N. Doc CCPR/C/47/D/359/1989 & 385/1989/Rev.1 (1993).

148. *Id.*

149. *History of the Declaration*, UNITED NATIONS, <https://www.un.org/en/about-us/udhr/history-of-the-declaration> (last updated Sept. 9, 2021).

To determine whether any law restricting freedom of expression is indeed a violation of international law, the UNHRC's application of Article 19(3) of the ICCPR's three-part test is essential. This analysis takes place if the relevant legislation is brought before the Committee under Article 1 of the Optional Protocol to the ICCPR.<sup>150</sup> Although the UNHRC is not an official international court with the power to bind states with its decisions, its interpretation of the ICCPR (per its authorization from the U.N. as set up in Part IV of the Covenant<sup>151</sup>) is helpful to determine what a violation of binding international law looks like. The UNHRC itself articulated the test to determine whether Article 19 has been violated when it received the communication from plaintiffs in *Ballantyne et al.* In the 1989 case of *Ballantyne et al. v. Canada*, plaintiffs John Ballantyne, Elizabeth Davidson, and Gordon McIntyre submitted their communication to the UNHRC alleging a violation of Article 19 of the ICCPR.<sup>152</sup> The communication detailed their complaint regarding a bill enacted by the Provincial Government of Quebec known as the Charter of the French Language.<sup>153</sup> The bill states that only French may be used in public billposting and commercial advertising outdoors.<sup>154</sup> The plaintiffs all owned and operated businesses that would be restricted from posting signage in English to indicate the services they provided with the implementation of the Charter of the French Language Bill.<sup>155</sup>

Upon consideration of the merits of the case, the UNHRC assessed (i) whether the interference is provided for by law; (ii) whether the interference addressed one of the legitimate aims enumerated in paragraphs 3(a) and 3(b) of Article 19; and (iii) whether the legal interference was necessary to achieve this legitimate purpose.<sup>156</sup> The Committee determined that, indeed, the restrictions on the outdoor advertisements were provided for by law, but that they were not necessary to maintain respect for the rights of others.<sup>157</sup> The right in question was the right for a group, the francophone minority in Canada, to use

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150. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

151. ICCPR, *supra* note 5, art. 28.

152. U.N. Hum. Rts. Comm., *Ballantyne et al. v. Canada*, ¶ 1 U.N. Doc CCPR/C/47/D/359/1989 & 385/1989/Rev.1 (1993).

153. *Id.* ¶ 2.2.

154. *Id.*

155. *Id.* ¶ 2.3.

156. *Id.* ¶ 11.4.

157. *Id.*



their own language.<sup>158</sup> It was evident to the Committee that this right would not be jeopardized by commercial advertising in a language other than French.<sup>159</sup> The restriction of Article 19's freedom of expression must be the narrowest possible restriction, and must comply with the strict requirements of Article 19, paragraph 3 of the ICCPR.<sup>160</sup> Ultimately, the Canadian law was proven unnecessary to protect the rights of the francophone minority, as it would not jeopardize public order or impinge on the dignity or rights of the francophone population to allow advertising in English.<sup>161</sup> Thus, the Committee came to the conclusion that this Canadian law was a violation of Article 19, paragraph 2 of the ICCPR.<sup>162</sup>

This test was then applied again and again in the wake of the Ballantyne decision as plaintiffs continued to submit their complaints to the Human Rights Council.<sup>163</sup> Almost immediately after the submission of the Ballantyne communication, the UNHRC received another communication regarding an alleged violation of Article 19 of the ICCPR from citizens of Togo.<sup>164</sup> In *Aduayom et al. v. Togo*, a group of authors were arrested and suspended from their public employment for political offenses such as possession of pamphlets and other documents critical of Togo's government.<sup>165</sup> The UNHRC, utilizing a condensed version of the now-established three-part Article 19 test, found that the Togolese government did violate the ICCPR.<sup>166</sup> Soon after, the Human Rights Committee in *Faurisson v. France*, applying the three-part test, decided in favor of the state.<sup>167</sup> Here, Mr. Faurisson was a professor at public universities in France until he was removed from his position for making statements denying the Holocaust.<sup>168</sup> His attempt

158. *Id.*

159. *Id.*

160. Hum. Rts. Comm., *supra* note 46, at 7; Kaye, *supra* note 43.

161. U.N. Hum. Rts. Comm., *Ballantyne et al. v. Canada*, ¶ 11.4, U.N. Doc. CCPR/C/47/D/359/1989 & 385/1989/Rev.1 (1993).

162. *Id.* ¶ 12.

163. *See* U.N. Hum. Rts. Comm., *Ross v. Canada*, U.N. Doc. CCPR/C/70/D/736/1997 (2000); U.N. Hum. Rts. Comm., *Faurisson v. France*, U.N. Doc. CCPR/C/58/D/550/1993 (1996); U.N. Hum. Rts. Comm., *Aduayom et al. v. Togo*, U.N. Doc. CCPR/C/51/D/422/1990, 423/1990, and 424/1990 (1996).

164. U.N. Hum. Rts. Comm., *Aduayom et al. v. Togo*, ¶¶ 2.1–2.5, U.N. Doc. CCPR/C/51/D/422/1990, 423/1990, and 424/1990 (1996).

165. *Id.* ¶¶ 2.1–2.3.

166. *Id.* ¶ 7.4.

167. U.N. Hum. Rts. Comm., *Faurisson v. France*, U.N. Doc. CCPR/C/58/D/550/1993 (1996).

168. *Id.* ¶¶ 2.1–2.5.

to challenge the removal using Article 19's protection of freedom of expression was swiftly met with resistance by the Council.<sup>169</sup> It was clear to the Council that this restriction met their standards and did not violate any of the prongs of the test: (i) it was provided by law by the Gayssot Act; (ii) the purpose fit with the purposes provided for by the ICCPR—it served to protect the dignity of a group of individuals by condemning anti-Semitic statements; and finally, (iii) this restriction was necessary.<sup>170</sup>

The standard provided by the UNHRC in *Ballantyne* is a logical three-step process to ensure that anything short of a call to violence, hatred, or intolerance is freely expressed, regardless of whether one agrees with the content of the speech.<sup>171</sup> The three questions asked by the UNHRC, guided by paragraph 3 in Article 19 of the ICCPR, begin with the question of whether the restriction is provided for by law.<sup>172</sup> Historically, the UNHRC has provided more in-depth analyses of the second and third questions, without delving into the importance of the first question to begin the proceeding. However, this first question is essential because, without a provision in a statute or some other form of binding legislation, there is no enforcement of the law and therefore no restriction of the right to free speech. This portion of the test is important to ensure that an individual has standing and that the court itself has jurisdiction over the complaint. Ultimately, any challenged law must cumulatively meet all the conditions created by the Human Rights Committee in the *Ballantyne* decision.<sup>173</sup> As demonstrated by the cases and communications submitted to the UNHRC, freedom of speech and expression are cornerstones of internationally recognized rights, and thus not subject to restriction except in heinous cases. The UNHRC recognized that every society must allow its citizens to seek out and inform themselves about politics and power, and criticisms and alternatives to such things, without fear of interference or retaliation.<sup>174</sup>

169. *Id.* ¶ 10.

170. *Id.* ¶¶ 9.5–9.7.

171. U.N. Hum. Rts. Comm., *Ballantyne et al. v. Canada*, ¶ 11.4, U.N. Doc. CCPR/C/47/D/359/1989 & 385/1989/Rev.1 (1993).

172. ICCPR, *supra* note 5.

173. U.N. Hum. Rts. Comm., *Ballantyne et al. v. Canada*, ¶ 11.4, U.N. Doc. CCPR/C/47/D/359/1989 & 385/1989/Rev.1 (1993); *see also* U.N. Hum. Rts. Comm., *Ross v. Canada*, ¶ 11.5, U.N. Doc. CCPR/C/70/D/736/1997 (2000) (UNHRC found no violation of Article 19 based on a state action that condemned anti-semitic remarks, attesting that the interference satisfies the three-part test: it was provided for by law and did not go further than necessary to achieve a purpose articulated in the ICCPR).

174. U.N. Hum. Rts. Comm., *Aduayom et al. v. Togo*, ¶ 7.4., U.N. Doc. CCPR/C/51/D/422/1990, 423/1990, and 424/1990 (1996).

While the United States and Israel are not parties to the Optional Protocol of the ICCPR—which would allow their citizens to submit communications to the UNHRC for review of any legislation contrary to the obligations under the ICCPR—and France is,<sup>175</sup> this Note will still apply the three-part test from *Ballantyne* to all three countries' proposed or enacted legislation uniformly to determine whether any violations of the ICCPR exist.

1. Do the Proposed United States Anti-BDS Laws Pass Under *Ballantyne*?

While no U.S. anti-BDS law explicitly takes away one's right to call for BDS, constitutional and international law concerns are centered on the right to free speech and free political association. The principal concerns about American anti-BDS laws are centered on the ability to participate in political boycotts without fear of reprisal, especially in the form of revocation of government benefits.<sup>176</sup> Although the United States has neither signed nor ratified the Optional Protocol to the ICCPR, and as a result, U.S. citizens cannot communicate to the Human Rights Committee any alleged violations, as a country party to the Covenant itself, the *Ballantyne* analysis can still apply to the anti-BDS legislation.<sup>177</sup>

First, the interference with the right to freedom of expression in Article 19 is provided for by law.<sup>178</sup> Second, the legitimate rights referenced in paragraphs 3(a) and 3(b) of Article 19 are respect of others and the “protection of national security or of public order, or of public health or morals.”<sup>179</sup> These are legitimate aims to be pursued by the law, and federal legislation, as well as many states, have relied on an antidiscrimination justification to defend anti-BDS laws against First

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175. U.N. High Comm'r for Hum. Rts., *Status of Ratification Interactive Dashboard: Optional Protocol to the International Covenant on Civil and Political Rights*, <https://indicators.ohchr.org/> (last updated 2022).

176. CCR & PalLegal Brief, *supra* note 1, at 10.

177. While the United States will never be subject to an adjudicative process that applies the *Ballantyne* test to its laws unless it ratifies the First Optional Protocol to the ICCPR, the UNHRC's clarifications and views on the ICCPR do not create a new obligation on states, rather they explain the already-existing obligation under the treaty. See Andrew M. Robinson, *Would International Adjudication Enhance Contextual Theories of Justice? Reflections on the UN Human Rights Committee, Lovelace, Ballantyne, and Waldman*, 39 CAN. J. POL. SCI. 271, 280 (2006); Hum. Rts. Comm., *supra* note 46.

178. *Federal Legislation*, *supra* note 66.

179. ICCPR, *supra* note 5.

Amendment challenges.<sup>180</sup> It is noteworthy that this justification is backed by a changing definition of anti-Semitism in the United States to include demonizing or delegitimizing the State of Israel.<sup>181</sup>

However, these anti-BDS laws would likely fail in this inquiry under the third element of the *Ballantyne* analysis. While the goal of eliminating discrimination is legitimate under international law, and specifically within the ICCPR, targeting a political movement that has no discriminatory intent is not necessary to achieve this goal. For any restriction enshrined in law, necessity still requires that the right in itself is never violated.<sup>182</sup> Certainly seeking to insulate the government or state of Israel from criticism would be an illegitimate goal.<sup>183</sup> To eliminate personal and academic freedom of expression in contravention of international law,<sup>184</sup> practically exclusively for BDS activists, continues to muzzle broad advocacy of democratic tenets and human rights abroad for Palestinians, and domestically for individuals of conscience involved in the movement.<sup>185</sup> It is consistently emphasized in the foundation of the BDS movement, by the BDS National Committee (BNC) that there is no toleration of “act[ions] or discourse which adopts or promotes . . . anti-Semitism.”<sup>186</sup>

The ICCPR mandates that any restriction on speech or expression must be narrow and meet the stringent conditions outlined in the Covenant and the UNHRC’s interpretation of it.<sup>187</sup> In a letter from U.N. Special Rapporteur Kaye, he reiterates the duty of the United States under international law, as a ratifying party of the ICCPR, to maintain every person’s ability to hold opinions “without interference and to seek, receive, and impart information and ideas of all kinds,

180. See generally H.R. 5595; S. Res. 120, 116th Cong. (2019); H.R. Res. 246, 116th Cong. (2019); S. 170, 115th Cong. (1st Sess. 2017); *Federal Legislation*, *supra* note 66.

181. Defining Anti-Semitism, U.S. DEP’T OF STATE (June 8, 2010); Exec. Order No. 13899, 84 Fed. Reg. 241 (Dec. 16, 2019).

182. Hum. Rts. Comm., *supra* note 46, at 5.

183. Javier El-Hage & Celine Assaf Boustani, *Incitement and Defamation in Saudi Arabia: The Case of Human Rights Lawyer Waleed Abu Al-Khair*, 24 ILSA J. INT’L & COMP. L. 369, 393 (2018).

184. ICCPR, *supra* note 5; Comm. on Econ., Soc., and Cultural Rts., Rep. on the Twentieth and Twenty-First Sessions, U.N. Doc. E/2000/22, E/C.12/1999/11, at 121 (2000).

185. Hum. Rts. Comm., *supra* note 46, at 6.

186. Palestinian BDS Nat’l Comm., *Racism, and Racial Discrimination are the Antithesis of Freedom, Justice & Equality*, BDS (Mar. 7, 2017), <https://bdsmovement.net/news/%E2%80%9Cracism-and-racial-discrimination-are-antithesis-freedom-justice-equality%E2%80%9D>.

187. Hum. Rts. Comm., *supra* note 46, at 8; *US: States Use Anti-Boycott Laws to Punish Responsible Businesses*, HUM. RTS. WATCH (Apr. 23, 2019), <https://www.hrw.org/news/2019/04/23/us-states-use-anti-boycott-laws-punish-responsible-businesses#>.

regardless of frontiers and through any medium.”<sup>188</sup> He additionally clarifies the requirement of necessity, and states that “necessity . . . implies an assessment of the proportionality of the restriction, with the aim of ensuring restrictions ‘target a specific objective and do not unduly intrude upon the rights of targeted persons.’”<sup>189</sup> The nature of political speech and dissent is controversial but has always been protected by both the United States Constitution and international human rights law, and must continue to be.

## 2. Does France’s Anti-BDS Law Pass Under *Ballantyne*?

While the EU is not itself strictly bound by a signature or ratification of the ICCPR, all EU member states are party to the majority of the “core” human rights treaties, including the ICCPR.<sup>190</sup> This means that EU member states’ laws, like the recently challenged French law that restricts freedom of speech, are subject to review and a determination of whether these laws meet the strict justifications embodied in Article 19. At the same time, France is a party to the Optional Protocol to the ICCPR,<sup>191</sup> meaning its citizens have the right to communicate the laws in question to the U.N. Human Rights Committee for review. Should such a referral happen, the *Ballantyne* test would apply, assessing (i) whether the interference is provided for by law; (ii) whether the interference addressed one of the legitimate aims enumerated in paragraphs 3(a) and (b) of Article 19; and (iii) whether the legal interference was necessary to achieve this legitimate purpose.<sup>192</sup>

First, it is clear that the interference is provided for by law, but unlike in the United States and Israel, the French legislature has not created new laws to specifically combat BDS.<sup>193</sup> Rather, as stated earlier, France has manipulated existing laws to target and punish BDS activists.<sup>194</sup>

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188. Kaye, *supra* note 43.

189. *Id.*

190. Off. of U.N. High Comm’r for Hum. Rts., The European Union and International Human Rights Law 7, [https://europe.ohchr.org/Documents/Publications/EU\\_and\\_International\\_Law.pdf](https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf) (last visited Apr. 24, 2022).

191. Off. of U.N. High Comm’r for Hum. Rts., *Status of Ratification Interactive Dashboard: Optional Protocol to the International Covenant on Civil and Political Rights*, <https://indicators.ohchr.org/> (last updated 2022).

192. U.N. Hum. Rts. Comm., *Ballantyne et al. v. Canada*, ¶ 11.4, U.N. Doc CCPR/C/47/D/359/1989 & 385/1989/Rev.1 (1993).

193. Loi du 29 juillet 1881 sur la liberté de la presse [Law of 29 July 1881 on Freedom of the Press], Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 29, 1881 (updated as of July 8, 2014); Dodman, *supra* note 96.

194. Dodman, *supra* note 96.

Second, the restrictions in these laws do serve a legitimate aim as enumerated in Article 19 of the ICCPR: they are intended to combat discrimination and racism, effectively maintaining the “respect of the rights or reputations of others.”<sup>195</sup> As for the third prong, it is unconvincing that such a restriction on any participation in BDS is necessary to achieve this purpose. It is essential to reiterate and emphasize that the intent and practices of the BDS movement are anti-racist and do not target individuals, but rather companies that operate in Israel and the Israeli government itself.<sup>196</sup> Thus, it is dubious that targeting this movement in particular is necessary to French society, especially when BDS actions fall within the model of international political speech and expression that has historically been protected by the ICCPR and endorsed by the United Nations.<sup>197</sup>

Should any French citizen communicate with the UNHRC, the Committee would have a compelling standard to follow from the European Court of Human Rights.<sup>198</sup> In July 2020, the ECtHR conducted its analysis of France’s anti-discrimination law when it accepted review of the case of *Baldassi and Others v. France*.<sup>199</sup> In 2009 and 2010, members of the “Palestine 68 Collective” took part in an action inside a supermarket where they placed products of Israeli origin—labeled per the Court of Justice of the European Union’s ruling<sup>200</sup>—in a cart, and called for a boycott.<sup>201</sup> In 2013, the group was convicted of incitement to discrimination.<sup>202</sup> Upon appeal, once the case reached the European Court of Human Rights, the court assessed whether the criminal conviction of the activists and the resulting restriction on their freedom of speech was justified under Article 10 of the

195. Law of 29 July 1881 on Freedom of the Press; ICCPR, *supra* note 5; Dodman, *supra* note 96.

196. *What is BDS?*, *supra* note 6; *Know What to Boycott*, *supra* note 15.

197. *See generally South Africa’s Academic and Cultural Boycott*, S. Afr. Hist. Online (Aug. 27, 2019), <https://www.sahistory.org.za/article/south-africas-academic-and-cultural-boycott>; BARGHOUTI, *supra* note 25, at 74–76, 188.

198. *See Baldassi and Others v. France*, App. No. 15271/16, Judgment, § 81 (June 11, 2020), <https://hudoc.echr.coe.int/eng-press?i=003-6718555-8953654>.

199. *Id.*

200. Court of Justice of the European Union Press Release No. 140/19, Foodstuffs originating in the territories occupied by the State of Israel must bear the indication of their territory of origin, accompanied, where those foodstuffs come from an Israeli settlement within that territory, by the indication of that provenance (Nov. 12, 2019), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-11/cp190140en.pdf>.

201. *See Baldassi and Others v. France*, App. No. 15271/16, Judgment, § 81 (June 11, 2020), <https://hudoc.echr.coe.int/eng-press?i=003-6718555-8953654>.

202. *Id.*

European Convention on Human Rights.<sup>203</sup> The Court made their decision based on three factors: (i) whether the interference is prescribed by law; (ii) does that interference pursue a legitimate interest; and (iii) is the interference necessary in a democratic society to achieve said legitimate interest.<sup>204</sup>

Concerning the first factor, evidently, the restriction was enshrined in law.<sup>205</sup> Secondly, the Court determined that this law was in pursuit of a legitimate interest, which is to protect the commercial rights of the producers and suppliers of products coming from Israel from discrimination.<sup>206</sup> However, ultimately, the Court found the law to be a violation of the freedom of expression protections in Article 10 of the European Convention on Human Rights because the criminalization of participation in BDS was not a necessary solution in a democratic society.<sup>207</sup> The Court noted that freedom of expression applies to information and ideas that can offend, shock, or disturb, given the nature of political expression.<sup>208</sup> It also noted, in a similar fashion to Special Rapporteur Kaye, that necessity would imply pressing social need, which has not been proven by France.<sup>209</sup> This is the second court of the EU to affirm that BDS is a legitimate political movement whose participants deserve the protections of international, and regional, law.<sup>210</sup> Clearly, the EU as a regional body maintains the right of individuals to participate in the BDS movement, acknowledging that it is protected political speech and expression, and expects its member states to do so as well.<sup>211</sup>

The July 2020 decision in *Baldassi and Others v. France* is specifically binding on France, and the expectation is that the French legislature will now fully comply with the European Court of Human Rights' ruling and amend the law per the Court's suggestions. Unfortunately, France has blatantly refused to comply with the ECtHR's decision in *Baldassi*

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203. *Id.*

204. *See* *Baldassi and Others v. France*, App. No. 15271/16, Judgment, § 81 (June 11, 2020), <https://hudoc.echr.coe.int/eng-press?i=003-6718555-8953654>.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *See id.*; *Organisation juive européenne v. Ministre de L'Économie et des Finances*, Case C-363/18 (Nov. 12, 2019).

211. *See* *Baldassi and Others v. France*, App. No. 15271/16, Judgment, § 81 (June 11, 2020), <https://hudoc.echr.coe.int/eng-press?i=003-6718555-8953654>; *Organisation juive européenne*, Case C-363/18; EUR. PARL. DOC., *supra* note 43.

and Others.<sup>212</sup> The European court's ruling should have compelled the French government to retract its instructions to prosecutors to pursue supporters of the BDS movement,<sup>213</sup> yet as of October 2020, the French Ministry of Justice sent a new dispatch to prosecutors calling for "the repression of discriminatory calls for a boycott of Israeli products."<sup>214</sup> While the Court's decision specifically references France, the decision of the ECtHR is also binding precedent in the entire jurisdiction, thus creating the expectation that its decisions, unless appealed, are to be enforced within the EU and especially against the offending state.<sup>215</sup>

The jurisdiction of the European Court of Human Rights is over complaints submitted by individuals and countries concerning violations of the European Convention on Human Rights by a party to the Convention.<sup>216</sup> As of 2020, forty-seven countries have ratified the Convention,<sup>217</sup> meaning that these forty-seven countries are not only bound by their ratification of the ICCPR,<sup>218</sup> but also by the jurisdiction of the European Court of Human Rights and its decision in *Baldassi* to protect the right to freedom of expression for individuals participating in BDS.<sup>219</sup>

The EU as a regional entity cannot sign, ratify, or accede to the ICCPR because human rights treaties are traditionally open only to countries, and the EU itself is considered to be lacking the competence to be a party to such agreements.<sup>220</sup> This inability to join international

212. Ali Abunimah, *France Defies European Court Ruling Upholding Right to Boycott Israel*, ELECTRONIC INTIFADA (Nov. 17, 2020), <https://electronicintifada.net/blogs/ali-abunimah/france-defies-european-court-ruling-upholding-right-boycott-israel> [hereinafter Abunimah, *France Defies*].

213. Nicolas Boeglin & Ghislain, *Call for a Boycott of Israeli Products: When the French Ministry of Justice Refuses to Distinguish Between Products and Men*, AURDIP (Nov. 14, 2020), <https://www.aurdip.org/call-for-a-boycott-of-israeli.html?lang=fr>.

214. Ministère de la Justice, *Dépêche relative à la répression des appels discriminatoires au boycott des produits israéliens*, DP 2020/0065/A4BIS, Oct. 20, 2020; Boeglin and Poissonnier, *supra* note 213.

215. *Baldassi and Others v. France*, GLOBAL FREEDOM OF EXPRESSION COLUMBIA UNIVERSITY, <https://globalfreedomofexpression.columbia.edu/cases/baldassi-others-v-france/> (last updated Jun. 7, 2021) [hereinafter *Baldassi and Others v. France*].

216. *European Court of Human Rights*, INTERNATIONAL JUSTICE RESOURCE CENTER, <https://ijrcenter.org/european-court-of-human-rights/#Jurisdiction> (last updated 2022).

217. *Chart of signatures and ratifications of Treaty 005*, COUNCIL OF EUROPE (Apr. 4, 2022), <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>.

218. *Status of Ratification Interactive Dashboard*, Off. of U.N. High Comm'r for Hum. Rts., <https://indicators.ohchr.org>.

219. *Baldassi and Others v. France*, App. No. 15271/16, Judgment, § 81 (June 11, 2020), <https://hudoc.echr.coe.int/eng-press?i=003-6718555-8953654>; *Baldassi and Others v. France*, *supra* note 215.

220. The European Union and International Human Rights Law, *supra* note 190, at 22.



human rights treaties has been circumvented by the EU's ability to create and join its regional treaties and conventions relating to human rights, like the European Convention on Human Rights.<sup>221</sup> This means that the rights protected by a treaty like the ICCPR are still found in the EU given the focus of the European Convention on Human Rights and the European Charter is largely civil and political rights that are almost identical to many United Nations treaties.<sup>222</sup> Even without this overlap of treaty provisions, the EU as a whole is bound by the terms of the ICCPR because this treaty and the broad range of human rights within it have become customary international law.<sup>223</sup> This is to say that the obligations and rights of the ICCPR have gained such a standing in the overwhelming majority of countries' general practices that they have become accepted as customary law to be followed and enforced.<sup>224</sup> As a core international treaty that makes up part of the International Bill of Human Rights,<sup>225</sup> the ICCPR has become a standard for the civil and political rights that have become fundamental norms that must be respected and protected, alongside the International Covenant on Economic, Social, and Cultural Rights and the Universal Declaration of Human Rights.<sup>226</sup>

### 3. Do Israel's Anti-BDS Laws Pass Under *Ballantyne*?

The State of Israel has two laws that strictly limit both citizens and non-citizens from participating in the BDS movement. Unlike the United States, Israeli law actively prevents a call for an economic, academic, or cultural boycott against a person or entity based on their "affinity with the State of Israel" under threat of civil damages.<sup>227</sup> Similar

221. *Id.*

222. *Id.*; EU Charter of Fundamental Rights, art. 52, 2016 O.J. (C 202) 39; ICCPR., *supra* note 5.

223. The European Union and International Human Rights Law, *supra* note 190.

224. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, 3 Bevans 1179; Abdullahi v. Pfizer, Inc., 562 F.3d 163, 180 (2d. Cir. 2009); Anne Lowe, *Customary International Law and International Human Rights Law: A Proposal For the Expansion of The Alien Tort Statute*, 23 IND. INT'L & COMP. L. REV. 523, 533, 535 (2013).

225. *The Foundation of International Human Rights Law*, UNITED NATIONS, <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html>.

226. *International Human Rights Law*, OFF. OF U.N. HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>; *Freedom of Opinion and Expression—International Standards*, OFF. OF U.N. HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Standards.aspx>.

227. Law for Prevention of Damage to the State of Israel through Boycott, 5771-2011, S.H. 2304 1 (Isr.); *The Anti-Boycott Law: Questions and Answers*, THE ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL (July 17, 2011), <https://law.acri.org.il/en/2011/07/17/the-anti-boycott-law-questions-and-answers/>.

to the U.S. laws, the Israel Anti-Boycott Law also revokes benefits, such as tax exemptions or government contracts, from individuals or organizations who participate in or advocate for a boycott of Israel.<sup>228</sup> Taking the restriction on freedom of expression a step further, Israel's amendment to the Entry Law also eliminates the ability to participate in BDS for anyone seeking entry into Israel and territory that Israel controls.<sup>229</sup> Thus begins the UNHRC analysis of whether Israel is in violation of the ICCPR. Firstly, the restriction is definitively provided for by law, both the Israel Anti-Boycott Act and Amendment 28 to the Entry Law explicitly restrict any participation in the BDS movement, and specifically the boycott aspect.<sup>230</sup> Secondly, on the question of whether the restrictions address one of the aims enumerated in paragraph 3(a) or 3(b) of Article 19, it is likely that the background and intent of both laws would not serve either of these aims.<sup>231</sup> This is because these prohibitions on a boycott seek to prevent "economic, cultural or academic damage."<sup>232</sup> Aiming to prevent economic, cultural, or academic damage is not a permissible motivation under the ICCPR, as the exceptions specifically exempt the goals to national security, public order, or the respect of the rights of others.<sup>233</sup> Nowhere in the texts of either legislation is there a legitimate purpose recognized by the ICCPR.<sup>234</sup>

For the sake of a complete inquiry, assuming the UNHRC finds the aims of both laws legitimate, the most critical analysis of the *Ballantyne* test is whether the laws in question are necessary to achieve those aims.<sup>235</sup> If the laws do not fail under the second prong of the *Ballantyne* test, surely they fail the necessity analysis. The Israel Anti-Boycott Law is not necessary because it completely restricts, indeed almost eliminates, the right to freedom of expression, which makes the harm to freedom of expression outweigh the benefits from the restriction. In the interest of preventing economic, academic, and cultural damage, Israel can take other measures to support institutions and entities they fear will be

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228. Law for Prevention of Damage to the State of Israel through Boycott, 5771-2011.

229. Amendment No. 28 to the Entry into Israel Law, 5712-1952, SH 1901 544 (Isr.).

230. *Id.*; Law for Prevention of Damage to the State of Israel through Boycott, 5771-2011.

231. ICCPR, *supra* note 5.

232. Law for Prevention of Damage to the State of Israel through Boycott, 5771-2011; Amendment No. 28 to the Entry into Israel Law, 5712-1952, SH 1901 544 (Isr.).

233. ICCPR, *supra* note 5.

234. Law for Prevention of Damage to the State of Israel through Boycott, 5771-2011.

235. U.N. Hum. Rts. Comm., *Ballantyne et al. v. Canada*, ¶ 11.4, U.N. Doc CCPR/C/47/D/359/1989 & 385/1989/Rev.1 (1993).

injured.<sup>236</sup> For example, the government might provide grants, organize awareness campaigns, or encourage other forms of monetary support to any potentially impacted businesses and cultural organizations. To reiterate, a restriction operating in the interest of either legitimate aim must still maintain the right to freedom of expression itself.<sup>237</sup> As enacted, both the Israel Anti-Boycott Law and the Entry Law violate the right to freedom of expression entirely, which is prohibited under the ICCPR.<sup>238</sup> Looking specifically at the amended Entry Law, expelling and detaining individuals, who are non-Israeli citizens for their participation in a political movement does not seem necessary to protect the economic, academic and culture rights of Israeli individuals, businesses, and other entities.<sup>239</sup>

As Special Rapporteur Kaye writes, restrictions on expression must be the least intrusive instrument to achieve the desired result, with the ensuing interference being narrow and precise enough to create a “direct . . . connection between the expression and the threat.”<sup>240</sup> To impose economic penalties and go so far as to silence individuals by detaining and/or deporting them cannot meet the necessity requirement because it is an extremely broad brushstroke of interference without sufficient justification. The protection Israel is seeking may be achieved in other ways that do not preclude the freedom of expression of those engaged in pro-Palestinian activism.<sup>241</sup> Asking individuals and entities to avoid participating in specific political expression or else face a significant economic penalty, at minimum, severely chills political expression as it concerns one specific political boycott movement.

#### IV. LEGAL ANALYSIS

While individual federal district judges in the United States have upheld domestic and international protections of freedom of speech, state legislatures, both houses of Congress, and the executive branch have all introduced and maintained variations of anti-BDS legislation and multiple Executive Orders on “Combating Antisemitism” that erroneously conflate anti-Zionism and political criticism of Israel with

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236. *Israel: New Anti-Boycott Law Violates Freedom of Expression*, ARTICLE 19 (July 21, 2011), <https://www.refworld.org/docid/4e38ef1b2.html>.

237. Hum. Rts. Comm., *supra* note 46, at 5.

238. *Id.*

239. *Israel: New Anti-Boycott Law Violates Freedom of Expression*, *supra* note 236.

240. Kaye, *supra* note 43.

241. U.N. Hum. Rts. Comm., *Ballantyne et al. v. Canada*, ¶ 11.4, U.N. Doc CCPR/C/47/D/359/1989 & 385/1989/Rev.1 (1993).

anti-Semitism.<sup>242</sup> As has been repeatedly affirmed and demonstrated, participating in the boycott, divestment, or sanctions practices of the BDS movement does not hold up to the accusations of anti-Semitism or discrimination because it does not target individuals based on their religious, cultural, or national origins.<sup>243</sup> Revising and weaponizing the definition of anti-Semitism “to shield Israel from being held accountable to universal standards of human rights and international law” does more harm than good by equating all Jewish people with the State of Israel, which is a baseless claim and is vehemently opposed by many Jewish organizations worldwide.<sup>244</sup>

Even in some European countries where constitutional protections of free speech differ from those of the United States in that inciting discrimination and hate speech are protected, strict anti-discrimination laws are improperly used to silence any calls for or participation in the BDS movement.<sup>245</sup> Indeed, according to the European Court of Human Rights, a boycott does not meet the standard of incitement to discrimination.<sup>246</sup> Any form of hate speech is barred by laws regarding incitement to discrimination which, based on the case law of the European Court of Human Rights, is a form of “incitement to intolerance,” which is beyond the limits of the protection of Article 10 of the European Convention on Human Rights.<sup>247</sup> To the European Court of Human Rights, the call for a boycott combines expressing an opinion with the impetus to treat the boycotted entity differently.<sup>248</sup> The Court has characterized BDS this way: an expression of a protest which incites differential treatment at its intended target, which is the State of

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242. Peter Beaumont, *Trump Could Label Oxfam and Amnesty Antisemitic Over Criticism of Israel*, THE GUARDIAN (Oct. 22, 2020), <https://www.theguardian.com/us-news/2020/oct/22/donald-trump-considers-labelling-rights-groups-antisemitic-criticism-israel>; *Federal Legislation*, *supra* note 66; *Anti-boycott Legislation Around the Country*, *supra* note 65.

243. *Know What to Boycott*, *supra* note 15.

244. *First Ever: 40+ Jewish Groups Worldwide Oppose Equating Antisemitism with Criticism of Israel*, JEWISH VOICE FOR PEACE (July 17, 2018), <https://jewishvoiceforpeace.org/first-ever-40-jewish-groups-worldwide-oppose-equating-antisemitism-with-criticism-of-israel/>.

245. U.N. Experts Publish, *supra* note 113; Patrick Smyth, *Budapest to Ask EU to Halt Money to NGOs Opposed to Israel*, THE IRISH TIMES (Oct. 15, 2018, 1:00 AM), <https://www.irishtimes.com/news/world/europe/budapest-to-ask-eu-to-halt-money-to-ngos-opposed-to-israel-1.3663445>; Abunimah, *France Now More Repressive of Boycott Calls Than Israel*, *supra* note 36.

246. *Baldassi and Others v. France*, App. No. 15271/16, Judgment, § 81 (June 11, 2020), <https://hudoc.echr.coe.int/eng-press?i=003-6718555-8953654>.

247. *Baldassi and Others v. France*, App. No. 15271/16, Judgment, § 81 (June 11, 2020), <https://hudoc.echr.coe.int/eng-press?i=003-6718555-8953654>.

248. *Id.*

Israel.<sup>249</sup> Incitement to differentiation is not a call to discriminate, nor is it an equivalent offense.<sup>250</sup>

The United States, France, and Israel continue to shirk their duties under international law by promulgating these regulations and laws that simply do not meet the exceptions carefully worded in Article 19 of the ICCPR. There is no proof in the text or background of any proposed or enacted American anti-BDS legislation or enacted Israeli anti-boycott laws that support genuine claims of national security, public order, or the protection of an individual's dignity.<sup>251</sup> And while French laws have a demonstrable intent to protect individuals against discrimination, French courts and legislatures consistently conflate BDS with discrimination to apply these laws to the movement.<sup>252</sup> Other European countries, namely Hungary and Germany, also continue to associate the BDS movement with targeted discrimination based on race, religion, sexuality, etc.<sup>253</sup> What all of these countries have in common is that they pride themselves on being strong democracies with strong protections for freedom of speech and assembly. In the United States, the Civil Rights Movement—which is another people's liberation movement that inspired BDS—thrived and paved the way for major changes regarding the status of Black Americans using boycotts;<sup>254</sup> in France, freedom of speech and press are touted as one of the state's biggest feats, especially after the Charlie Hebdo attack of 2015;<sup>255</sup> and, of course, Israel continues to consider itself the only democracy in the Middle East and a hub of equality for all.<sup>256</sup>

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249. *Id.*

250. *Id.*

251. Israel Anti-Boycott Act, H.R. 5595, 116th Cong. (2020); Law for Prevention of Damage to the State of Israel through Boycott, 5771-2011, S.H. 2304 1 (Isr.). See also Abunimah, Ten things to know about anti-boycott legislation, *supra* note 36; Howard, *supra* note 54.

252. Loi du 29 juillet 1881 sur la liberté de la presse [Law of 29 July 1881 on Freedom of the Press], Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 29, 1881 (updated as of July 8, 2014); Abunimah, *France now more repressive of boycott calls than Israel*, *supra* note 36; Dodman, *supra* note 96.

253. U.N. Experts Publish, *supra* note 113; Smyth, *supra* note 245; Abunimah, *France now more repressive of boycott calls than Israel*, *supra* note 36.

254. AJ+, *What Does BDS Mean for Palestine?*, YOUTUBE (Oct. 26, 2017), <https://www.youtube.com/watch?v=RAxYkenR48w>.

255. *Id.*

256. Joseph Massad, *Why Israel Cannot Be Called a Democratic State*, MIDDLE EAST EYE (Aug. 23, 2019, 6:32 PM), <https://www.middleeasteye.net/opinion/why-israel-cannot-be-called-democratic-state>; Michael Sfard, *Israel is Not a Democracy*, HAARETZ (Mar. 6, 2017), <https://www.haaretz.com/israel-news/.premium-israel-is-not-a-democracy-1.5478982>.

The irony of these countries' actions is their arbitrariness in choosing who will be protected by domestic and international human rights laws. Targeting the movement designed to improve the situation of Palestinians in the Occupied Palestinian Territories and others in the diaspora sends the signal that even nonviolent Palestinian resistance against Israel's continuous violations of international law, including, but not limited to, several U.N. Resolutions and the Fourth Geneva Convention,<sup>257</sup> is unacceptable. It is not necessary to support BDS to protect freedom of speech and expression, which intertwines with other fundamental rights like freedom of assembly and association. Yet, based on the United Nations response to South African apartheid, it is apparent that BDS is the floor, not the ceiling, for effective advocacy for Palestinian human rights and resistance against the Zionist entity.

In contrast, the efforts of the EU as a regional, inter-governmental organization to uphold the essential and inalienable right to freedom of speech and expression is an important step in the right direction. While the EU as an entity cannot be bound by an international treaty the way a country can be, adopting the principles and rules outlined in a treaty is one way to ensure compliance with international law, especially regarding a fundamental right that is shared across all regions and countries. Notably, some other European countries are making efforts to explicitly recognize the right to boycott, and specifically in the context of BDS.<sup>258</sup> Sweden, Ireland, and the Netherlands have all openly recognized and affirmed the right to boycott Israel.<sup>259</sup> While Dutch Foreign Minister Bert Koenders and Irish Foreign Minister Charles Flanagan have stated that their respective governments oppose a boycott of Israel, they maintain that the BDS movement is a legitimate political movement and protected political speech.<sup>260</sup> These European countries have confirmed that BDS is a civil society movement, and governments should not interfere with a civil society organization or its views.<sup>261</sup>

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257. List of international Law Violations by the State of Israel, IT IS APARTHEID, [http://itisapartheid.org/Documents\\_pdf\\_etc/IsraelViolationsInternationalLaw.pdf](http://itisapartheid.org/Documents_pdf_etc/IsraelViolationsInternationalLaw.pdf) (last updated 2020).

258. Abunimah, EU recognizes right to boycott Israel, *supra* note 36.

259. *Id.*

260. Kevin Squires, *Ireland Latest EU State to Defend BDS*, ELECTRONIC INTIFADA (May 28, 2016), <https://electronicintifada.net/content/ireland-latest-eu-state-defend-bds/16866>; Michael Deas, *BDS is Free Speech, Says Dutch Government*, ELECTRONIC INTIFADA (May 25, 2016), <https://electronicintifada.net/blogs/michael-deas/bds-free-speech-says-dutch-government>.

261. Squires, *supra* note 260; Deas, *supra* note 260; Ali Abunimah, *Sweden Denies Israeli Claim That it Opposes BDS*, ELECTRONIC INTIFADA (Mar. 16, 2016), <https://electronicintifada.net/blogs/>

While these efforts to protect freedom of expression by the EU and certain individual European governments are certainly admirable, they are merely the expected course, because all countries are expected to respect and adhere to their obligations under international law.<sup>262</sup> Palestinian civil society relies on the adoption of the BDS movement in its entirety to persuade Israel to respect the rights of Palestinians. The BNC urges all governments to adopt the sanctions and divestment portions of the BDS movement upon securing the right to boycott for their citizens.<sup>263</sup> Slowly but surely, the divestment segment of the BDS movement has gained traction and given the movement significant success in many sectors. Academic institutions and associations, including student governments at Stanford, UCLA, and Berkeley, have voted in favor of BDS measures, including divestment from companies involved in Israel's occupation.<sup>264</sup> Even state funds in Norway, Luxembourg, the Netherlands, and New Zealand have divested from Israeli or international companies and banks that have been implicated in Israel's occupation.<sup>265</sup> Divestment by public funds, universities, and any other institutions from corporations that are complicit in the illegal Zionist occupation of Palestine and ethnic cleansing of the native population has proven to be a successful tool to bring global attention and support to the prolonged plight of Palestinian people everywhere.<sup>266</sup>

Allowing a boycott is one of the barest minimum freedoms that can be upheld in conformity with international law. In order to truly

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ali-abunimah/sweden-denies-israeli-claim-it-opposes-bds [hereinafter Abunimah, Sweden Denies]

262. ICCPR, *supra* note 5, art. 2.

263. Abunimah, *Ten things to know about anti-boycott legislation*, *supra* note 36; Abunimah, *Sweden Denies*, *supra* note 261; Squires, *supra* note 260; Deas, *supra* note 260.

264. Olivia Exstrum, *Northwestern Poses Transparency Challenges as Students Move Forward with Divestment*, DAILY NORTHWESTERN (Feb. 24, 2015), <https://dailynorthwestern.com/2015/02/24/campus/northwestern-poses-transparency-challenges-as-students-move-forward-with-divestment/>; *See generally* BARGHOUTI, *supra* note 16, at 26; *US BDS Victories*, US CAMPAIGN FOR PALESTINIAN RIGHTS, <https://uscpr.org/campaigns/bds/bdswins> (last updated July 2021).

265. Adri Nieuwhof, *Biggest Dutch Pension Fund Dumps Israeli Banks*, ELECTRONIC INTIFADA (July 6, 2020), <https://electronicintifada.net/blogs/adri-nieuwhof/biggest-dutch-pension-fund-dumps-israeli-banks>; Ali Abunimah, *Luxembourg Pension Fund Dumps 9 Israeli Firms Over Settlements*, BDS (Feb. 25, 2014), <https://bdsmovement.net/news/luxembourg-pension-fund-dumps-9-israeli-firms-over-settlements>; Dan Goldberg, *New Zealand Gov't Fund Divests From Israeli Firms Over Settlement Construction*, JEWISH TELEGRAPHIC AGENCY (Dec. 16, 2012), <https://www.jta.org/2012/12/16/global/new-zealand-govt-fund-divests-from-israeli-firms-over-settlement-construction>; Palestinian BDS National Committee, *Norwegian Government Pension Fund Excludes More Israeli Companies*, BDS (Aug. 23, 2010), <https://bdsmovement.net/news/norwegian-government-pension-fund-excludes-more-israeli-companies>; *see also* BARGHOUTI, *supra* note 16, at 15.

266. BARGHOUTI, *supra* note 16, at 4; CCR and PalLegal Brief, *supra* note 1, at 12.

uphold principles of international human rights, including the right to self-determination and the right of return for Palestinian refugees adopted by the United Nations General Assembly,<sup>267</sup> it is essential that governments do their part in the larger BDS campaign by imposing a military embargo on Israel and banning products of companies that do business in Israel's illegal settlements. Calling for boycotts, divestment, and sanctions specifically against Israel is not a new phenomenon or a violation of international law: the United Nations Security Council called on members not to provide any assistance to Israel in the 1980s, and the General Assembly also called for a military embargo and economic sanctions against Israel to prevent any support to their illegal settlements and annexation of Occupied Palestinian Territory.<sup>268</sup>

As the United States, France, and Israel continue to punish individuals for participating in the BDS movement, it is more important than ever that international law be enforced to allow discourse and dissent with regard to Israel. Israel has barred and expelled, respectively, former Amnesty International USA director Raed Jarrar and Human Rights Watch director Omar Shakir for their advocacy for Palestinian rights and promotion of boycotts against Israel.<sup>269</sup> The United States has manipulated the definition of anti-Semitism to include the work of human rights organizations like Amnesty International that rightfully criticize the government of Israel for its violent mistreatment of Palestinians.<sup>270</sup> France has criminalized the entire BDS movement and imposed significant fines and the possibility of prison time on participants, and has chosen to defy the ECtHR decision in *Baldassi and Others*.<sup>271</sup>

Exempting Palestinian advocacy from the protections of freedoms of speech, expression, opinion, and assembly is a jarring departure from

267. *Legal Briefing—BDS: a Legitimate Human Rights Movement to be Respected and Protected by States*, PALESTINIAN BDS NATIONAL COMMITTEE (May 31, 2016), <https://bdsmovement.net/news/legal-briefing-bds-legitimate-human-rights-movement>.

268. *Id.*

269. Omar Shakir, Human Rights Watch, *Israel Wants to Deport Me for My Human Rights Work* (Apr. 18, 2019), <https://www.hrw.org/news/2019/04/18/israel-wants-deport-me-my-human-rights-work>; Amnesty Int'l, *Israel Denies Entry to Amnesty International Staff Member* (Oct. 31, 2017), <https://www.amnesty.org/en/latest/news/2017/10/israel-denies-entry-to-amnesty-international-staff-member/>.

270. Amnesty Int'l, *State Department Accusations of Antisemitism Against Amnesty International Are Baseless and an Affront to the Human Rights Movement* (Oct. 21, 2020), <https://www.amnestyusa.org/press-releases/statedepartmentamnestyinternationalaccusationsbaseless/?fbclid=IwAR3AC8tNZ0L3J0zRZS6TqnnsQLxEM7nw2BYutF4ixpYraNGRXWTdXaKzfiY>.

271. Abunimah, *France Defies*, *supra* note 212; de Leo, *supra* note 84; Abunimah, *Sweden Denies*, *supra* note 261.



the founding principles of many nations and instruments of international law, including the Universal Declaration of Human Rights.<sup>272</sup> These anti-BDS efforts across countries only serve the ever-powerful Israel lobby, which works to delegitimize and stigmatize advocacy for Palestine by labeling it as terrorism and anti-Semitism— labels the BDS movement has proven time and again to be untrue. The BDS movement pursues a genuine and legitimate human rights agenda in conformity with international law and United Nations resolutions.<sup>273</sup>

## V. CONCLUSION

Considering many of the most stringent anti-BDS laws are coming from countries that pride themselves on their strong democratic values and free speech protections, the goal of this wave of legislation seems intent on targeting the movement for Palestinian rights without regard to the other human rights movements that can be undermined as a result. Singling out Palestinian activism to be restricted by legislation is a notable difference from the treatment of the movements and practices that inspired this Palestinian movement, specifically the boycott of apartheid South Africa. Toward the end of the South African apartheid era, there was a strong system of boycotts and sanctions imposed by the United Nations, which necessarily required negative action targeting a specific group of people who happened to be part of the institutions that upheld the apartheid regime.<sup>274</sup> This was a tradeoff accepted by the United Nations and the international community as a whole to levy adequate pressure against the South African government.<sup>275</sup> The same needs to be true for the Palestinian BDS movement to force Israel to afford Palestinians the rights that have long been denied to them.

The entire goal of the BDS movement is to advocate for the rights Palestinians are entitled to under international law, which have been systematically denied to them by Israel.<sup>276</sup> The BDS National Committee outlines carefully the methods of engaging in BDS to avoid arbitrary or discriminatory boycotts against individuals which would not be in furtherance of the goal of the movement.<sup>277</sup> It is apparent that the objective of BDS is to target deliberate state policies and to maintain non-violent means of applying international law to end Israeli

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272. G.A. Res. 217A (III), at 74–75 (Dec. 10, 1948).

273. BARGHOUTI, *supra* note 25, at 6; *What is BDS?*, *supra* note 6.

274. BARGHOUTI, *supra* note 25, at 106–07.

275. *Id.*

276. *What is BDS?*, *supra* note 6.

277. *Know What to Boycott*, *supra* note 15.

rights violations. It was only after the ICJ issued an advisory opinion in 1971 denouncing South Africa's occupation of Namibia as illegal that the United Nations levied significant sanctions against South Africa. Following this precedent, the BDS movement hopes to launch the United Nations to act against Israel by bringing attention to the ICJ's similar advisory opinion in 2004, which condemned Israel's colonial apartheid wall, the settlement enterprise that the wall protects, and its entire occupation regime as a violation of international law.<sup>278</sup> The BDS movement and its civil society participants do not direct the boycotts, divestment, or sanctions at Jewish people, but rather at the State of Israel and its economy and laws. As a political movement, BDS does not manifest prejudice against Jewish people or any individual Israeli person, nor does it demean Jewish individuals as being less worthy of respect.<sup>279</sup> Thus, again, BDS does not fall within the narrow limitations subject to the restriction of freedom of expression outlined in the ICCPR.

Chilling and criminalizing free speech related to BDS or Palestinian human rights continues to have a disparate impact on Palestinians living in all Palestinian territories, including the Gaza Strip, the West Bank, and 1948 Palestine, who are already mistreated and classified as second-class citizens. Traditional avenues of diplomacy have failed for decades and have not resulted in any tangible change in Israel's policies. This is what makes BDS so important: it is pressuring Israel to comply with international law and universally accepted principles of human rights. By silencing calls for the Palestinian right to return to their land and their homes, and their right to self-determination, anti-BDS legislation allows Israel to continue to violate numerous U.N. resolutions and the Fourth Geneva Convention. Deterring controversial and disfavored political movements is exactly what the ICCPR, the United States' First Amendment, and Article 10 of the European Convention on Human Rights were meant to protect against.

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278. BARGHOUTI, *supra* note 25, at 141.

279. See generally Richard J. Arneson, *What Is Wrongful Discrimination?*, 43 SAN DIEGO L. REV. 775, 787 (2006); Deborah Hellman, *Equal Protection in the Key of Respect*, 123 YALE L.J. 3036, 3046–47 (2014).