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The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal

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Articles

The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal

Marc A. Greendorfer*

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INTRODUCTION

Commercial boycotts have a storied history in the United States. In some quarters, in fact, boycotts are seen as a “ringing affirmation of the constitutional right of all citizens to organize . . . to achieve political, economic[,] and social change.”¹ As with any other right, however, the right to boycott is not without limitations. When the desire of individuals to effect change through boycotts intersects with the legitimate goals of government, the right to boycott is often inhibited, if not suppressed in its entirety. As the United States Supreme Court stated in *NAACP v. Claiborne Hardware Co.*:

Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances. A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. The right of business entities to “associate” to suppress competition may be curtailed. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.²

Since it has been well established that there are limits on the free-speech rights accompanying commercial boycotts, the obvious inquiry is where the line between permissible restrictions and impermissible infringements on First Amendment rights resides. In *Claiborne*, the Court addressed the rights of United States

The title of this Article is based on an oft-repeated passage from the play *Romeo and Juliet* commonly understood to stand for the truism that changing the name of something does not change its underlying nature: “What’s in a name? That which we call a rose; By any other name would smell as sweet; So Romeo would, were he not Romeo call’d, Retain that dear perfection which he owes” WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 1.

1. Leonard Orland, *Protection for Boycotts*, N.Y. TIMES (July 31, 1982), <http://www.nytimes.com/1982/07/31/opinion/protection-for-boycotts.html>.

2. 458 U.S. 886, 912 (1982) (citations omitted).

citizens who boycotted certain local commercial enterprises as part of a campaign to realize equal rights under domestic law.³ In essence, the boycotters used their First Amendment rights to demand enforcement of existing domestic civil rights laws in their communities.⁴ Thus, it is not surprising that the Court held that the primary boycotts in *Claiborne* were protected. In doing so, though, the Court reiterated that the situation would have been dramatically different if the government had interposed a compelling rationale for limiting the right to boycott, such as protecting the right of “consumers to remain free from coerced participation in industrial strife.”⁵

Both the United States Congress and the United States Supreme Court have followed the general principle that when a boycott interferes with commerce or disrupts important policy goals of the government, the right to boycott is vulnerable to government infringement, especially if the boycott is of a secondary or tertiary nature.⁶ It is under this principle that we must examine a particularly noxious strain of boycott whose supporters claim an exemption from the application of United States anti-boycott laws: foreign boycotts of Israel and its affiliates that are forced upon individuals and companies in the United States.

The “BDS Movement,”⁷ a Palestinian Arab organization with supporters and affiliates throughout the world, is the most prominent organization today to promote a boycott and divestment campaign against Israel.⁸ The BDS Movement has

3. *Id.* at 886.

4. *Id.* For a more detailed analysis of the BDS Movement’s activity under the First Amendment, see Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112 (2016). In short, there is no supportable legal basis for claims that BDS Movement activity has the same protected status as the primary boycott activity at issue in *Claiborne* and, in fact, there is ample precedent for the position that BDS Movement activity, as a form of discriminatory conduct, is not protected by the First Amendment.

5. *Claiborne*, 458 U.S. 886 at 912.

6. See *infra* Part II for a discussion of the characteristics of primary, secondary, and tertiary boycotts.

7. “BDS” is an acronym standing for “Boycott, Divest, and Sanction” that is used by a number of affiliated groups seeking to foster, *inter alia*, boycotts of Israel.

8. Though the history of the BDS Movement is not clearly defined, according to the BDS National Committee, the self-acknowledged global organizing and coordinating entity of the BDS Movement, BDS:

heretofore relied on the United States government's failure to enforce existing anti-boycott laws to grow its influence in the United States and, as a result, has lured United States entities and individuals, including unions, into implementing its illegal boycotts.⁹ This lack of enforcement, however, should not mean that the BDS Movement's activities are lawful or that those who support and participate in its activities are immune from civil and criminal prosecution. In fact, this Article will show that, because the BDS Movement is affiliated with other illegal foreign boycotts and has ties to designated foreign terror organizations, supporters face significant risks, including severe monetary penalties and criminal liability under federal anti-boycott, anti-trust, and anti-racketeering laws.

Part I of this Article examines the BDS Movement, including the history of other foreign boycotts against Israel, to determine whether existing federal laws apply to the BDS Movement's activities—specifically, the anti-boycott provisions of the Export Administration Amendments of 1977, as amended (EAA Anti-Boycott Law).¹⁰ Part II of this Article discusses the legislative history of the EAA Anti-Boycott Law and the global events that occurred during the congressional debates on the EAA Anti-Boycott Law to demonstrate that the purpose of the law was to broadly prohibit foreign interference in domestic commerce and

[W]as launched in July 2005 with the initial endorsement of over 170 Palestinian organizations The efforts to coordinate the BDS campaign, that began to grow rapidly since the 2005 Call was made public, culminated in the first Palestinian BDS Conference held in Ramallah in November 2007. Out of this conference emerged the BDS National Committee (BNC) as the Palestinian coordinating body for the BDS campaign worldwide.

Palestinian BDS National Committee, BDS MOVEMENT, <http://www.bdsmovement.net/bnc> (last visited Sept. 9, 2016). This website claims to be the official outlet for the BDS National Committee, which in turn claims to be the Palestinian Arab authority in charge of the BDS Movement.

9. See Mario Vasquez, *UE Becomes First National Union in U.S. to Endorse BDS Against Israel*, IN THESE TIMES (Sept. 1, 2015, 3:56 PM), <http://inthesetimes.com/working/entry/18361/ue-unions-israel-bds-palestine-labor> (recognizing that the United Electrical, Radio, and Machine Workers of America was the first national union in the United States to endorse the BDS Movement).

10. Pub. L. No. 95-52, 91 Stat. 235 (codified at 50 U.S.C.A. § 4607 (Westlaw through Pub. L. No. 114-244)). For a detailed examination of the EAA Anti-Boycott Law, see Alan S. Dubin, *A Journey Through the Anti-Boycott Laws*, 14 TULSA L. REV. 695 (1979).

affairs. Part III of this Article examines whether other existing federal laws apply to the BDS Movement's activities, including anti-trust, anti-terrorism, and anti-racketeering laws. Finally, this Article concludes by providing suggestions for private actions against and government prosecutions of the BDS Movement's illegal activities. As with any prosecution or litigation, the outcome of legal action against the BDS Movement and its supporters cannot be predicted with certainty; what is certain, however, is that the BDS Movement and its supporters are being misled by advice and opinions claiming that their activity is lawful and without risk.

I. THE HISTORY OF FOREIGN BOYCOTTS AGAINST ISRAEL

A. *Before BDS: The Arab League's Direct Boycott*

Before there was a BDS Movement, or even an Arab League or a State of Israel, there were boycotts against Jews, especially those advocating for the establishment of a modern state of Israel.¹¹ During the Ottoman reign over the land of Israel, which was commonly referred to as Palestine at that time, there were numerous calls for Arab boycotts of Jews.¹² Once the British succeeded the Ottoman Empire in the early twentieth century and began recognizing the rights of Jews to their historic homeland, the Arab boycott of Jews in Palestine intensified¹³ and quickly became a pan-Arab movement that threatened to expand into a general boycott of British goods.¹⁴ Between 1909 and 1939, at

11. This Article assumes that the reader has a basic understanding of the history of Israel. For a general overview of the history of Israel prior to its founding in 1948, see generally JOAN PETERS, *FROM TIME IMMEMORIAL: THE ORIGINS OF THE ARAB-JEWISH CONFLICT OVER PALESTINE* (1984) and ILAN PAPPE, *A HISTORY OF MODERN PALESTINE: ONE LAND, TWO PEOPLES* (2d ed. 2006). I have purposely referred to books containing opposing views of the modern history of Israel to provide, what I hope, is a balanced background on the topic. I am not endorsing either point of view by including them here.

12. AARON J. SARNA, *BOYCOTT AND BLACKLIST: A HISTORY OF ARAB ECONOMIC WARFARE AGAINST ISRAEL* 3 (1986) (documenting boycotts in 1891, 1908, and 1911).

13. *Id.* at 5 ("Following Arab pogroms of Jews in 1920 and 1921, the boycott weapon was further developed as a major instrument in the campaign against Jewish settlement. In 1922, the Fifth Palestine Arab Congress passed a resolution calling on Arabs to boycott Jewish businesses. This policy was widely adopted in western Palestine in 1929, a year of bloody outbreaks of Arab violence against Jews incited by the mufti.")

14. *Id.* at 6–7 ("The boycott became a pan-Arab issue at an October 27

least thirteen different Arab boycotts were implemented, including one that was fostered by the Grand Mufti of Jerusalem, Haj Amin al-Husseini, who later collaborated with Adolf Hitler during World War II and reportedly modeled his boycott after the pre-World War II Nazi boycott of Jewish businesses in Europe.¹⁵ The early Arab boycotts, however, while far-reaching and lethal in their objectives, were disorganized and ineffectual in practice.

A more organized and enduring boycott was established immediately after World War II, concurrent with the establishment of a pan-Arab organization known as the Arab League.¹⁶ The origins of the BDS Movement can be traced directly to the boycott of Israel that was initiated by members of the Arab League in response to the creation of the modern State of Israel in 1948 (Arab League Boycott).¹⁷ In fact, the Arab League was so intent on engaging in a boycott of Israel that it started its boycott nearly three years before the establishment of the modern State of Israel.¹⁸

[1929] congress of 800 Arabs from western Palestine, Trans-Jordan, Syria, Iraq and Egypt. The congress vowed to boycott all Jewish merchandise and to compel other Arabs to do the same [At a successor congress in 1937, [r]esolutions were passed demanding the repeal of the Balfour Declaration [wherein the British promised to establish a Jewish state in Palestine] and a boycott against Jews as a patriotic duty. Unless Britain altered its policy, a boycott of British goods by Arab and Moslem countries was threatened.”]

15. GIL FEILER, FROM BOYCOTT TO ECONOMIC COOPERATION: THE POLITICAL ECONOMY OF THE ARAB BOYCOTT OF ISRAEL 21–24 (1998).

16. As a response to the Balfour Declaration and the progress then being made by Zionists to fulfill the dream of re-establishing a Jewish state, the Arab League, also known as the League of Arab States, was founded in 1944 with “strong support” from Britain. SARNA, *supra* note 12, at 7. The purpose of the Arab League was “to promote pan-Arab cooperation in the political, military, economic, and social spheres.” *Id.* Though the Arab League was not founded solely to deny Jews the right to their own state in Palestine, that objective has always been a central focus of the Arab League. *Id.* The Arab League currently consists of twenty-two members. *See Profile: Arab League*, BBC NEWS (Feb. 5, 2015), <http://www.bbc.com/news/world-middle-east-15747941>. Among the twenty-two members is “Palestine,” which is not generally recognized as a state under international law. *See* Rick Richman, “*Palestine*” Does Not Qualify as a “*State*”, COMMENT. MAG. (Nov. 13, 2012), <http://www.commentarymagazine.com/2012/11/13/palestine-does-not-qualify-as-a-state/>.

17. *See The History and Antisemitic Nature of Boycott, Divestment, and Sanctions Campaigns*, AMCHA INITIATIVE, <http://www.amchainitiative.org/1842-2/> (last visited Aug. 12, 2016).

18. MARTIN A. WEISS, CONG. RESEARCH SERV., RL33961, ARAB LEAGUE BOYCOTT OF ISRAEL 1 (2015) (“The Arab League was founded in 1944, and in 1945 began a boycott of Zionist goods and services in the British controlled

While previous boycotts against Jews intended to prevent the re-establishment of a large Jewish population in Palestine, the Arab League Boycott intended to politically and commercially isolate the state of Israel and its Jewish population, preserve Arab purity and hegemony over the territory of Palestine,¹⁹ and ultimately, complement Arab military attempts to destroy Israel as a recognized political state.²⁰ Using the terms Zionist and Jew interchangeably,²¹ in 1945 the Arab League Council declared (Arab League Boycott Declaration of 1945) that:

Jewish products and manufactured (goods) in Palestine shall be (considered) undesirable in the Arab countries; to permit them to enter the Arab countries would lead to the realization of the Zionist political objectives. Accordingly,

mandate territory of Palestine. In 1948, following the war establishing Israel's independence, the boycott was formalized against the state of Israel and broadened to include non-Israelis who maintain economic relations with Israel or who are perceived to support it. The boycott is administered by the Central Boycott Office, a specialized bureau of the Arab League based in Damascus but believed for many decades to be operating out of Cairo, Egypt.”).

19. See [2 INTERNATIONAL AFFAIRS] MUHAMMAD KHALIL, THE ARAB STATES AND THE ARAB LEAGUE, A DOCUMENTARY RECORD, 161 (1962). The resolution of the Arab League to boycott Jews and Zionists, dated December 2, 1945, is contained in this volume of Khalil's work and states that the boycott was enacted so that “Palestine will remain an Arab (country).” *Id.*

20. FEILER, *supra* note 15, at 9 (“The original purpose of the Arab states when they declared the boycott in December 1945—two and a half years before the State of Israel was proclaimed—was to prevent its emergence as a state. Later the boycott was one of the means used to try and destroy the Jewish state—in other words, it was not an alternative to the use of military force, but a supplementary means.”).

21. In this Article, I will primarily use the term “anti-Israel” to refer to the ideology of various organizations and individuals who seek the destruction of Israel. However, the term “anti-Zionist” is in many ways equally applicable, since the goal of both ideologies is the elimination of Israel. To some, the term “anti-Zionist” is actually a broader term that includes a genocidal component since Zionism is synonymous with Jews. For the purposes of this Article, however, any distinction between “anti-Israel” and “anti-Zionist” terminology is presumed to be outside the scope of this analysis. In the same vein, in the context of the ideological conflict with the existence of Israel as a Jewish state, I will use the terms “Arab” and “Islamic” interchangeably, while acknowledging that in other contexts there are fundamental distinctions between the two terms: not all Arabs are Muslim and not all Muslims are Arabs. In the Middle East, however, especially *vis-à-vis* the conflict with Israel, Israel's protagonists are overwhelmingly Muslim Arabs. A notable exception is Iran—an Islamic republic that is not Arabic—but is extremely active in anti-Zionist affairs.

until these objectives are changed, the Council of the League decides that every State of the League should, before January 1, 1946, take measures which they consider fit and which will be in conformity with the principles of administration and legislation therein, such as making use of import licenses in this respect in order to prevent these products and manufactured (goods) from entering (these) countries regardless of whether they have come directly from Palestine or by any other route. *(These States should) also oppose Jewish industry by all possible means.*²²

Participation in the Arab League Boycott was not limited to established states. Indeed, the boycott declaration directed:

[P]eoples not represented on the Council of the League to collaborate and co-operate with the States of the League concerning this decision, so that the institutions, organizations, merchants, commission agents, and individuals in these (States) will refuse to deal in, distribute, or consume Zionist products and manufactured (goods).²³

The meaning of this may not be obvious on its face, but fortuitously, the boycott declaration provided an explanation:

The Committee further draws attention to (the fact) that the boycott (of Zionist goods) should not be confined to governmental action only, but should also be (undertaken) through the people. Thus, necessary propaganda should be conducted in order to convince the Arab peoples of the necessity of boycotting Zionist goods, so that the boycott becomes the firm creed of every Arab which he may most enthusiastically preach to all and which he may defend faithfully and genuinely.²⁴

This declaration shows that the Arab League Boycott was intended to be carried out through multiple and coordinated channels, using state and non-state actors. On the one hand, the members were to engage in primary boycotts. Concurrently, non-government organizations, through individuals and groups of

22. KHALIL, *supra* note 19, at 161 (emphasis added).

23. *Id.*

24. *Id.* at 163 (emphasis added).

individuals, were directed to maintain a concerted propaganda effort aimed at furthering the goals of the boycott. Because the Arab League believed that Jews were using resources from around the globe to establish their state, the Arab League Boycott targeted Jewish economic interests globally through secondary and tertiary boycotts.²⁵

The operational terms of the Arab League Boycott were further solidified upon the establishment of the State of Israel in 1948, expanding upon and formalizing the principles of the Arab League Boycott Declaration of 1945 into a true bureaucratic enterprise. As it has recently been described in a report to the United States Congress:

The boycott [after its 1948 formalization] is administered by the Central Boycott Office, a specialized bureau of the Arab League based in Damascus but believed for many decades to be operating out of Cairo, Egypt.

....

The boycott has three tiers. The primary boycott prohibits citizens of an Arab League member from buying from, selling to, or entering into a business contract with either the Israeli government or an Israeli citizen. The secondary boycott extends the primary boycott to any entity world-wide that does business with Israel. A blacklist of global firms that engage in business with Israel is maintained by the Central Boycott Office, and disseminated to Arab League members. The tertiary boycott prohibits an Arab League member and its nationals from doing business with a company that in turn deals with companies that have been blacklisted by the Arab League. The boycott also applies to companies that the Arab League identifies as having “Zionist sympathizers” in executive positions or on the board of the company. According to one analyst, the “nature and detail of these rules reflect the boycotting countries’ tolerance for only the most minimal contacts with Israel.”²⁶

From its initial tactic to generally boycott Jewish goods, the

25. *See id.* at 161.

26. WEISS, *supra* note 18, at 1–2 (citations omitted).

Arab League Boycott steadily progressed into a broader and more regulated endeavor. The Arab League's Central Boycott Office initially provided oversight of the boycott, and the movement was bolstered by the establishment of state-level boycott offices in each Arab League state.²⁷ The first tangible directive from the Arab League was a requirement that anyone selling goods to a member would have to provide a negative certification (a certification that the goods being sold were not of Israeli origin).²⁸ This certification requirement led to the creation of a propaganda unit which ensured that the boycott of Jewish goods was strictly enforced and well publicized.²⁹ These directives were quickly implemented and successful.³⁰

Shortly after the establishment of the modern State of Israel in 1948, the Arab League Boycott was expanded to include a total ban on all commercial and financial transactions with Israel as well as a sea and air blockade.³¹ The Arab League Boycott gained a powerful new weapon in 1954. Pursuant to Arab League Council Resolution 849, the Central Office for the Boycott of Israel (CBO), which had been established and incorporated into the political apparatus of Arab League states several years earlier, promulgated a wide-ranging and unified set of rules and regulations binding all Arab states.³² Under these rules and regulations, a primary boycott of Israel and Israeli products was formalized, making illegal any dealings between Arab individuals and entities and Israel or Israeli individuals and companies.³³ In addition to the primary boycott of Israel, secondary and tertiary boycotts were instituted to prohibit any dealings between Arab League members and any entity that: (1) did business with Israel either directly or indirectly, (2) provided support to Israel, or (3) processed goods or services through Israeli facilities prior to their introduction into Arab markets.³⁴

By 1959, the most notorious weapon in the Arab League Boycott's arsenal was adopted: the blacklist. An entity could be

27. *Id.* at 1; KHALIL, *supra* note 19, at 163.

28. KHALIL, *supra* note 19, at 163.

29. FEILER, *supra* note 15, at 25.

30. *Id.*

31. *Id.* at 27.

32. *Id.* at 32.

33. *Id.* at 32–33; SARNA, *supra* note 12, at 40–41.

34. *See* WEISS, *supra* note 18, at 1–2.

placed on the Arab League blacklist for numerous reasons including having operations or branches in Israel; manufacturing goods or components in Israel; providing intellectual property rights to Israeli companies; owning equity of Israeli companies; rendering consulting and technical services to Israel; or even simply having a “bias in favour of Israel,” or refusing to answer Arab League questionnaires regarding Israel.³⁵ The financial consequence of being placed on the Arab League blacklist was severe: the offending party was forced to choose between either terminating the offending acts or losing access to Arab League member markets.³⁶ It should be noted, however, that while the CBO was responsible for establishing a uniform set of rules and maintaining the blacklist, the enforcement of the boycott was and still is effectuated by, and at the discretion of, individual Arab League members.³⁷

Furthermore, as the Arab League Boycott Declaration of 1945 set forth, non-members and non-governmental organizations supporting the Palestinian Arab cause were expected to participate in the propaganda efforts as well as the boycott itself.³⁸ The best modern example of this is the case of Iran. Though a non-member of the Arab League, Iran is one of the most vehement supporters and advocates of the Arab League Boycott and anti-Israel agitprop.³⁹ In fact, the secondary and tertiary elements of the Arab League Boycott are actively supported by a wide range of non-Arab League entities.⁴⁰

In many ways, it is the non-member and non-governmental organization participants in the Arab League Boycott who wield the most enforcement power.⁴¹ This is logical, given that the Arab

35. FEILER, *supra* note 15, at 34.

36. *Id.* at 37 (“[I]f a company was blacklisted, no private or public factor in the Arab world was to trade with it. Anyone found to have broken the regulations was liable to be fined, imprisoned or have boycotted goods confiscated.”).

37. WEISS, *supra* note 18, at 2.

38. See KHALIL, *supra* note 19, at 163.

39. See FEILER, *supra* note 15, at 40.

40. See SARNA, *supra* note 12, at 39 (listing Bangladesh, Iran, Malaysia, Mali, Pakistan, and Uganda as boycott participants and further identifying joint Arab-foreign chambers of commerce as being major NGO enforcement agents of the boycott).

41. *Id.* at 40. While there are only twenty-two members of the Arab League, Sarna points to far more than twenty-two entities that enforce the boycott internationally. See *id.* at 38–40.

League Boycott had always been presented as “one of the Arab weapons in confronting the Zionist entity”⁴² Just as the Palestine Liberation Organization, Hamas, and other non-state paramilitary terror organizations have carried out the majority of acts constituting the violent resistance prong of the Arab League’s Palestine agenda, non-governmental organizations have carried out a significant portion of the economic and political resistance prong of that agenda.

The Arab League Boycott blacklist has had extensive and crippling consequences for companies that refuse to comply with the boycott. Among the first companies to succumb to the blacklist threat and comply with the Arab League Boycott by terminating business operations in Israel were American Express, Brown and Williamson, Shell Oil, British Petroleum, Standard Oil, Socony Mobil, Texaco, British Overseas Airways, Japan Air Lines, Iberia, Qantas, Mitsubishi, Suzuki, Yamaha, Toyota, Honda and Nissan.⁴³ Companies that refused to comply with the Arab League Boycott and were thus placed on the blacklist include Renault, TWA, Coca Cola, Ford Motor Company, and RCA Limited.⁴⁴ At its height in the mid-1970s, the Arab League Boycott’s blacklist applied to over 6,300 entities from nearly 100 countries as well as over 600 cargo ships.⁴⁵ The number of companies and entities that chose to comply with the boycott is impossible to know but must surely have been more than the 6,300 entities that are known to have refused to comply.

The original Arab League Boycott continues to this day, though at this point it has been described as frequently ineffectual due to the varied and, at times, conflicting interests of its members.⁴⁶ Indeed, the Arab League Boycott has always been something of a hydra. On the one hand, the boycott is the child of

42. FEILER, *supra* note 15, at 40 (quoting the CBO Commissioner General).

43. SARNA, *supra* note 12, at 15–27.

44. *Id.*

45. *Id.* at 34–35.

46. WEISS, *supra* note 18, at 2 (“Overall enforcement of the boycott by member countries appears sporadic. Some Arab League members have limited trading relations with Israel. The Arab League does not formally or publicly state which countries enforce the boycott and which do not. Some Arab League member governments have maintained that only the Arab League, as the formal body enforcing the boycott, can revoke the boycott. However, adherence to the boycott is an individual matter for each Arab League member and enforcement varies by state.”).

Arab world bigotry, particularly against Jews who accede to the position of a political ruling class. The treatment of Jews (among others) as “dhimmis” (a minority group allowed to continue his or her faith in exchange for the payment of a tax and the acceptance of second-class status within Arab society) is a well-documented historical example of the antipathy directed against non-Muslims generally, and against Israel’s existence as a Jewish state in a region dominated by Muslim Arab states, specifically.⁴⁷ From this perspective, Israel is not an existential threat, but rather, a “blight upon the neighborhood” and an affront to the dignity of the Arab ego.

On the other hand, Palestinian Arabs see boycotts as a means to an end: the destruction of Israel and corresponding establishment of a Palestinian Arab state that supplants it.⁴⁸ Just as two people cannot simultaneously occupy the same space, two countries cannot simultaneously exist within the same territory. Israel’s existence is an existential impediment to the creation of a Palestinian Arab state.⁴⁹ Consequently, for those in Arab states who do not put the issue of Palestinian Arab statehood as a primary cause, the Arab League Boycott is a tangential matter at best. For nationalistic Palestinian Arabs and their supporters, however, the perceived lack of progress being made through the existing enforcement of the Arab League Boycott has been untenable.

As a result, more radical supporters of the Palestinian Arab cause sought a way to return the Arab League Boycott to its foundational principle of weakening and isolating Israel (with the

47. For an overview of the concept of the dhimmi and its treatment in Islamic countries, see generally BAT YE’OR, *THE DHIMMI: JEWS AND CHRISTIANS UNDER ISLAM* (1985). Even though there are states with Islamic governments or populations that are not Arab states, such as Iran, terms that refer to Islamic states generally are discussed herein in the context of Arab states as members of the Arab League.

48. There are some Palestinian Arabs who accept the right of Israel to exist as a Jewish state and seek a two-state solution, see *infra* Part I.A, but neither the BDS Movement nor its affiliates take this position.

49. Though there are some who argue that a Palestinian Arab state already exists in the form of Jordan, for purposes of this Article the argument that Jordan is not Palestine, favored by many in the Arab world, will be adopted. For an overview on the topic of Jordan as the Palestinian Arab state, see generally Daniel Pipes and Adam Garfinkle, *Is Jordan Palestine?*, DANIEL PIPES MIDDLE EAST FORUM (Oct. 1988), <http://www.danielpipes.org/298/is-jordan-palestine>.

ultimate goal of creating a Palestinian Arab state in the stead of Israel).⁵⁰ This internal conflict came to the fore in 2001 at the United Nations-authorized “2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance” held in Durban, South Africa (Durban I).

1. The Durban Conference and the Rise of the NGO Arm of the Arab League

Durban I consisted primarily of two facially separate but parallel and concurrent conferences. At one of the conferences (Governmental Durban Conference), recognized governments and related entities met⁵¹ while literally across the street from the

50. This goal, from the original Arab League Boycott declaration, KHALIL, *supra* note 19, at 162–63, is regularly championed by more militant supporters of Palestinian Arabs, such as the government of Iran. See, e.g., Michael Segall & Daniel Rubenstein, *Sworn to Destruction: What Iranian Leaders Continue to Say about Israel in the Rouhani Era*, JERUSALEM CTR. FOR PUB. AFFAIRS (Jan. 7, 2014), <http://jcpa.org/article/20-threats-iranian-leaders-made-in-2013> (“In 2012, the Jerusalem Center published a collection of Iranian leaders’ statements from 2009–2012. The study proved that anti-Israel incitement was never confined to Ahmadinejad, who in any event is no longer in power. The entire Iranian leadership, which takes its cues from Supreme Leader Ali Khamenei and his predecessor, the late Ayatollah Ruhollah Khomeini, yearns for the day when Israel will be destroyed.”). Additionally, Hamas, the entity that governs the Gaza portion of the Palestinian territories, was formed with the destruction of Israel as an explicit goal. That goal was sanitized in recent years so that statement is less certain, but the generally accepted understanding is that the softening of language calling for the destruction of Israel was for political posturing and did not reflect an actual change in purpose. See Chris McGreal, *Hamas Drops Call for Destruction of Israel from Manifesto*, GUARDIAN (Jan. 11, 2006), <https://www.theguardian.com/world/2006/jan/12/israel>; see also Khamenei Manifesto, *infra* note 444 (a proclamation calling for the destruction of Israel from the supreme leader of Iran).

51. According to the United Nations, the following is a list of participants at Durban I:

All Member States of the United Nations; [a]ll regional organizations and commissions involved in the preparation of regional meetings; [r]epresentatives of organizations which have received a standing invitation from the General Assembly to participate as observers; UN specialized agencies, regional commissions, bodies and programmes; [r]epresentatives of UN mechanisms in the field of human rights; [i]nterested non-governmental organizations to be represented by observers, in accordance with UN Economic and Social Council resolution 1996/31; [o]ther interested governmental organizations, to be represented as observers.

Participation in the Conference, WORLD CONFERENCE AGAINST RACISM, <http://www.un.org/WCAR/particip.htm> (last visited July 6, 2016).

Governmental Durban Conference, non-governmental organizations (NGOs)⁵² held their conference (NGO Durban Conference).

Durban I was widely considered to have been a debacle, a conference against racism that had, as its primary focus, the promulgation of racism against Israel and Jews.⁵³ Durban I did not start out with that focus, though. Prior to Durban I, a series of regional meetings were held to formulate an agenda and plan of action that would be the focus of the conferences at Durban I.⁵⁴ Initially, the regional meetings appeared to have made progress in moving away from the racist and discredited “Zionism-is-racism” theme that had infected the international body for decades.⁵⁵

This period of comity ended at the fourth and final regional meeting held in Tehran, Iran, as Islamic states commandeered the agenda and turned it on its head. What had started as a repudiation of the international community’s past anti-Israel activities turned into an agenda that was focused upon reiterating and expanding upon prior anti-Israel screeds, complete with repeated accusations that Israel was in the process of “ethnically cleansing” its Arab population.⁵⁶ In fact, by the end of the meeting in Tehran, the Durban I Declaration and Plan of Action

52. Though a complete list of NGOs attending Durban I is too long to include in this Article, the United Nations reported that approximately 4,000 separate NGOs were in attendance. Press Release, World Conference Against Racism, Call to Eradicate Discrimination and Intolerance Marks Conclusion of World Conference Against Racism, Agrees on Need for Remedial Measures; Urges End to Middle East Violence, U.N. Press Release RD/D/45 (Sept. 8, 2001), <http://www.un.org/WCAR/pressreleases/rd-d45.htm>.

53. Tom Lantos, *The Durban Debacle: An Insider’s View of the UN World Conference Against Racism*, 26 FLETCHER F. WORLD AFF. 31, 31 (2002). Congressman Lantos, a United States delegate to Durban I and the founder of the Congressional Human Rights Caucus, described Durban I as “an anti-American, anti-Israel circus” that was organized as “a transparent attempt to de-legitimize the moral argument for Israel’s existence as a haven for Jews.” *Id.* at 31, 37.

54. *Id.* at 34.

55. *Id.* (“The documents that emerged from [the first three regional meetings] attempted to tackle a range of vexing issues from the legacy of slavery to the need to confront the global resurgence of anti-Semitism. Significantly, the Europe and Latin American regional conferences took concrete steps to prevent the return of the anti-Israel ‘Zionism-is-racism’ language that doomed the two previous World Conferences. Further, they explicitly condemned anti-Semitism in their draft documents.”).

56. *Id.* at 36.

deemed Israeli policies to be a “crime against humanity,”⁵⁷ a theme which would become a central plank of the BDS Movement’s attack on Israel.

It is important to note here that the propaganda agenda agreed upon at the regional meeting in Iran was exactly the type of propaganda that the Arab League Boycott Declaration of 1945 ordered non-government actors to disseminate.⁵⁸ Not coincidentally, after the conclusion of Durban I in October 2001, the Arab League’s Central Boycott Office met and an overwhelmingly majority of member-states called for the revitalization of the Arab League Boycott.⁵⁹

While the Governmental Durban Conference started with the same anti-Israel agenda that infected the regional meeting in Iran, the withdrawal of the United States and Israeli delegations early on led to a minor retrenchment away from overt bigotry and anti-Israel propaganda by the remaining Governmental Durban delegations.⁶⁰ Nonetheless, until the last minutes of the Governmental Durban Conference, Islamic states that had historically supported the Arab League Boycott attempted to force amendments that mirrored the extremist anti-Israeli language which would be formalized in the NGO Durban Conference documents, including the new thematic demonization of Israel as an “apartheid” state.⁶¹

57. *Id.*

58. KHALIL, *supra* note 19, at 163.

59. *Towards a Global Movement: A Framework for Today’s Anti-Apartheid Activism*, BDS MOVEMENT 24 (June 2007), <https://www.bds-movement.net/files/bds%20report%20small.pdf> [hereinafter BDS Manifesto]; see also Dina Ezzat, *A Peaceful Weapon*, AL-AHRAM WEEKLY (Oct. 18–24, 2001).

60. It may be too charitable to describe the final statement of the Governmental Durban Conference as less bigoted, but some progress was made in toning down the rhetoric. As Congressman Lantos described the document, “[t]he compromise . . . removed some of the anti-Israeli language Not only does the final document single out one regional conflict for discussion, it does so in a biased way: the suffering of the Palestinian people is highlighted, but there is no discussion of the Palestinian terrorists attacks on Israeli citizens.” Lantos, *supra* note 53, at 48.

61. *Id.* According to Congressman Lantos, the Islamic state delegates “continued to show the intransigence they had demonstrated in negotiations with the United States, launching a last minute parliamentary maneuver to salvage three of the most extreme paragraphs of anti-Israeli language that they had inserted into the conference documents in Geneva. [They] lost on a procedural motion offered by Brazil.” *Id.*

The NGO Durban Conference became, as expected, an orgy of anti-Semitism on a global scale. That conference hewed to the extremist propaganda campaign against Israel and Jews rooted in the Arab League Boycott Declaration of 1945. It was as though Arab League Secretary-General Amr Moussa, who was described as being the ringleader of the anti-Israel agenda at Durban I, had declared a rebirth of the Arab League's campaign against Israel, all the way down to the use of non-governmental forces to spearhead the hitherto near-dormant Arab League Boycott.⁶² Like the Arab League Boycott, the NGO Durban Conference resulted in a forum declaration that included an explicit call for "a policy of complete and total isolation of Israel as an apartheid state . . . which means the imposition of mandatory and comprehensive sanctions and embargoes, the full cessation of all links (diplomatic, economic, social, aid, military cooperation, and training) between all states and Israel."⁶³

Both conferences at Durban I also witnessed the official unveiling of a new tactic: the attempt to institutionalize anti-apartheid language against Israel. This tactic, which has its roots in the Iranian regional meeting (where the member-states of the Arab League had significant influence), is now the centerpiece of the BDS Movement's agenda against Israel. While the NGO Durban Conference declaration was clearly a continuation of the Arab League Boycott Declaration of 1945, it did not directly take on a life of its own upon the conclusion of Durban I. In the wake of Durban I there was strong condemnation of its anti-Semitic focus. Even the then-UN High Commissioner on Human Rights, Mary Robinson, could not deny that the conference had been hijacked by anti-Jewish extremists:

I also admit that it was an extremely difficult conference.

62. Dalia Shehori & Yair Sheleg, *Israel, U.S. Leave Durban; Peres Dubs Meet a Farce*, HAARETZ (Sept. 4, 2001, 12:00 AM), <http://www.haaretz.com/print-edition/news/israel-u-s-leave-durban-peres-dubs-meet-a-farce-1.68858> ("Foreign Ministry sources said the Muslim bloc's rejectionism was spearheaded by Arab League Secretary-General and former Egyptian foreign minister Amr Moussa and current Egyptian Foreign Minister Ahmed Maher. Though the U.S. did not publicly blame anyone, off the record, American government sources also said that Amr Moussa had been the main troublemaker.").

63. *NGO Forum Declaration, Article 425*, WORLD CONFERENCE AGAINST RACISM (Sept. 3, 2001), <http://ipo.org/racism-ngo-decl.htm> [hereinafter Durban NGO Declaration] (emphasis added).

That there was horrible anti-Semitism present—particularly in some of the NGO discussions. A number [of] people came to me and said they’ve never been so hurt or so harassed or been so blatantly faced with an anti-Semitism.⁶⁴

Commissioner Robinson’s choice of words should not be overlooked. What went on at Durban I was not just anti-Israel venom. It transcended the political issue of the State of Israel and descended into anti-Jewish hate. This was the mindset behind the birth of the BDS Movement. So while the extremist Islamic states had their way with the agenda at Durban I, the western world saw Durban I as a festival of bigotry and extremism. This, combined with the Islamic terror attacks against the United States on September 11, 2001—mere days after the conclusion of Durban I—tainted any immediate attempts to advance the movement against Israel that was at the core of the NGO Durban Conference’s declaration.

The Durban I boycott movement sat fallow for several years after the September 11th terrorist attacks, but as time passed, the landscape once again changed. In the wake of the United States’ 2003 invasion of Iraq, a large anti-war movement had taken hold throughout the western world. This movement was, in many ways, co-opted by, or operating in conjunction with, pro-Islamic, and, in particular, anti-Israel groups.⁶⁵ As the American public’s distaste for the war in Iraq grew, and the influence of anti-war

64. *Talking Point Special*, BBC NEWS (Nov. 21, 2002, 9:48 AM), http://news.bbc.co.uk/2/hi/talking_point/forum/1673034.stm.

65. For example, International A.N.S.W.E.R. was exceedingly active in anti-war protests in the United States after the September 11th Islamic terror attacks. These protests frequently were dominated by pro-Palestinian Arab, anti-Israel and anti-Semitic themes. See, e.g., *International Action Center & ANSWER: An ADL Backgrounder*, ANTI-DEFAMATION LEAGUE (Jan. 5, 2009), http://archive.adl.org/main_anti_israel/iac_answer_backgrounder_2cb9.html#_U_-4SzKwI3h (“ANSWER has consistently linked its anti-war initiatives and campaigns with an anti-Israel agenda. ANSWER considers Israel to be a capitalist outpost for the West, and regards terrorist organizations that advocate for Israel’s destruction, including Hamas and Hezbollah, to be legitimate resistance organizations. During a July 31, 2006, interview with FOX News, ANSWER’s national director, Brian Becker, said: ‘Do I consider Hezbollah a terrorist organization? The answer is no.’ ANSWER’s rallies opposing the United States wars in Iraq and Afghanistan often include signs condemning Israel and praising anti-Israel terrorist groups.”).

movements spread, there was a greater acceptance for the anti-war movement's anti-Israel message.

2. *Rebranding the Arab League Boycott, Post-Durban: The Ascension of the BDS Movement*

The genesis of the BDS Movement, much like the workings of the Arab League Boycott that spawned it, is somewhat amorphous. In July 2005, the NGO Durban Conference's spirit, if not body, was reanimated by over 100 non-governmental organizations that reasserted the call for a global movement against Israel.⁶⁶ The movement that they called for had the same essential goals and means as the NGO Durban Conference's declaration, and the Arab League Boycott Declaration of 1945 before it: the use of boycotts to isolate and weaken Israel.⁶⁷ From this call, the BDS Movement was publicly unveiled.

By design, the BDS Movement is not an organization with a clear and identifiable body. That is not to say that there is no such body; rather, in an attempt to avoid the reach of, *inter alia*, anti-boycott laws in the United States and elsewhere, the BDS Movement, as the latest iteration of the Arab League Boycott, simply presents a disembodied face to the world. Notwithstanding its claim to be a grassroots organization, the BDS movement's primary website shows that it is a thinly-veiled organ of the longstanding Arab League Boycott.⁶⁸ Indeed, a review of the

66. *Palestinian BDS National Committee*, BDS MOVEMENT, <http://www.bdsmovement.net/bnc> ("The broad consensus among Palestinian civil society about the need for a broad and sustained Campaign for Boycott, Divestment and Sanctions (BDS) resulted in the Palestinian Call for boycott, divestment and sanctions against Israel that was launched in July 2005 with the initial endorsement of over 170 Palestinian organizations. The signatories to this call represent the three major components of the Palestinian people: the refugees in exile, Palestinians under occupation in the West Bank and Gaza Strip and the discriminated Palestinian citizens of the Israeli state.").

67. *Id.* ("The BNC's mandate and role is: [t]o strengthen and spread the culture of boycott as a central form of civil resistance to Israeli occupation, colonialism and apartheid; [t]o formulate strategies and programs of action in accordance with the 9 July 2005 Palestinian Civil Society BDS Call; [t]o serve as the Palestinian reference point for BDS campaigns in the region and worldwide; [t]o serve as the national reference point for anti-normalization campaigns within Palestine; [and to] facilitate coordination and provide support [and] encouragement to the various BDS campaign efforts in all locations.").

68. *See id.*

original Arab League Boycott Declaration of 1945 reveals that the BDS movement's formal boycott apparatus—a Palestinian Arab group with the goal of spreading propaganda against and fostering a boycott of Israel—was modeled after the Arab League Boycott.

At the time of the Arab League Boycott Declaration of 1945, as is the case today, there was no internationally recognized state of Palestine, and there was no Arab League member state that purported to represent the Palestinian Arabs. Consequently, when the 1945 Arab League Boycott declaration was made, several non-governmental Palestinian Arab representatives were designated to sit on the Arab League Council to facilitate the Arab League Boycott.⁶⁹ In addition to the Palestinian Arab delegates, the Arab League explicitly determined that the boycott would have other non-governmental actors.⁷⁰

From its inception, the Arab League Boycott insisted on action not only by the “States of the League,” but also by all individuals and other entities that were not members of the Arab League or represented on the Arab League's council.⁷¹ Though the language of the declaration is a bit archaic, it is also an irrefutable directive to create parallel state-level and “grassroots” non-state level apparatuses to coordinate and cooperate on the implementation of the boycott of Israel.⁷² While it did distinguish between state and non-state actors in terms of identifying the participating groups, the Arab League Boycott did not otherwise draw distinctions between those who were represented by a recognized state and those who were acting at a non-state level.

The similarities between the BDS Movement's “Palestinian BDS National Committee” and the Arab League's “Higher Arab Executive Committee” (which consisted of Palestinian Arab delegates to the Arab Council for purposes of the Arab League

69. KHALIL, *supra* note 19, at 161 (“The Council resolves that there should be one or more representatives of Palestine, provided that the number of the (members of) the Palestine delegation does not exceed three. The delegation shall participate in all of the activities of the Council in accordance with the provisions of the Palestine Annex of the Pact of the League of Arab States. It shall be understood that the participation of the Palestine delegation means that it shall have the right to vote on the Palestine question and on those (matters) which Palestine can be bound to implement.”).

70. *Id.* at 163.

71. *Id.* at 161.

72. *See id.* at 163.

Boycott) are not coincidental. In name, in function, in tasks, in methodology and in goals, they are one and the same, separated only by the passage of time. What is today called the BDS Movement was always a recognized and required component of the Arab League Boycott. Prior to 2005, the BDS Movement was disorganized and operated without a declared name, but its role in the Arab League Boycott had been established in 1945. Furthermore, the Arab League Boycott was also a secondary boycott and the role of the BDS Movement was specifically designed to foster this purpose.⁷³

3. *The BDS Movement Today*

Perhaps the best source of information on the BDS Movement today is the manifesto published on its self-proclaimed official website, www.bdsmovement.net (BDS Manifesto).⁷⁴ This unsigned document, which is attributed to an organization referred to as “Grassroots Palestinian Anti-Apartheid Wall Campaign” (Wall Campaign) and titled “Towards a Global Movement: A Framework for Today’s Anti-Apartheid Activism,” is a bit of a mystery in its origins. The Wall Campaign website contains what appears to be the original draft of the BDS Manifesto,⁷⁵ (Original BDS Manifesto) but that document is significantly less detailed than the BDS Manifesto and makes no attempt to hide the fact that the BDS Movement is the successor to the Arab League Boycott.⁷⁶

For example, the Original BDS Manifesto critiques the problems with the existing Arab League Boycott and suggests that greater participation by non-governmental organizations and a more refined media campaign would make the Arab League

73. The primary boycott was the Arab League, its member states, and individuals in the Arab states refusing to engage in commerce with Israel. The secondary boycott was the collaboration to force the “institutions, organizations, merchants, commission agents, and individuals” to abide by the boycott. *Id.* at 161. In fact, by the wording of the declaration, it would appear that non-state actors were primarily tasked with working to spread the secondary boycott i.e., “collaborate and co-operate . . . so that [the other businesses and entities] will refuse to deal in” Israeli goods. *Id.*

74. BDS Manifesto, *supra* note 59, at ii.

75. *Towards a Global Movement: A Framework for Today’s Anti-Apartheid Activism*, STOP THE WALL 1 (June 2007), <https://www.stopthewall.org/downloads/pdf/bds-s.pdf> [hereinafter Original BDS Manifesto].

76. *See id.* at 6–8.

Boycott more successful.⁷⁷ Far from disclaiming its affiliation with the Arab League Boycott, the Original BDS Manifesto acknowledges that the BDS Movement is an attempt to make the Arab League Boycott a more successful weapon against Israel's existence.⁷⁸

Both the Original BDS Manifesto and the BDS Manifesto are dated June 2007, and both documents refer to www.bdsmovement.net as the coordinating body for the BDS Movement.⁷⁹ The BDS Manifesto departs from the Original BDS Manifesto, however, by attempting to position the BDS Movement as a "grassroots" movement.⁸⁰ Section 2.5 of the BDS Manifesto is even titled "The Boycott is Grassroots,"⁸¹ yet as is the case with any attempt to deny that which is obvious, this section of the BDS Manifesto trips over its own argument and shows that the BDS Movement is really nothing more than a rebranding and refocusing of the Arab League Boycott.

For example, Section 2.5 of the BDS Manifesto tells the story of Bahrain, which officially ended its participation in the Arab League Boycott in September 2005.⁸² To purportedly show that the BDS Movement is grassroots, the BDS Manifesto presents the fact that shortly after Bahrain ended its participation in the Arab League Boycott, the BDS Movement forced the government of Bahrain to reinstate its participation in the boycott.⁸³ While this may be a form of grassroots activism, the fact that the continuation of the Arab League Boycott, instead of the implementation of a unique BDS Movement objective, was the goal of the BDS Movement in Bahrain, indicates that the BDS Movement is simply a non-state enforcement arm of the Arab League Boycott apparatus, as was originally intended under the

77. *Id.* at 8.

78. *Id.* at 9 (Discussing the goals of various BDS Movement actors, the manifesto dismisses those who would accept a goal of coexisting with Israel by saying, "[t]his is clearly at odds with the Palestinian position in which the opposition to Zionism as an ideology forms the major impetus for the struggle." In other words, the very existence of Israel as a Jewish state is anathema to the BDS Movement's Palestinian Arab core constituency.).

79. Original BDS Manifesto, *supra* note 75 at 1; BDS Manifesto, *supra* note 59, at i, viii.

80. *See* BDS Manifesto, *supra* note 59, at 27–29 (providing examples of how local communities took action advancing the boycott).

81. *Id.* at 27.

82. *Id.* at 28.

83. *Id.*

Arab League Boycott Declaration of 1945. Indeed, in many ways the BDS Manifesto was—and still is—a call for the re-radicalization of the Arab League Boycott and a rejection of the normalization process between Arab states and Israel that was formalized in the 1993 Oslo Accords.

a. *The Ties that Bind: The Oslo Accords, Radical Rejectionism, and the BDS Movement*

The Oslo Accords were the result of intensive negotiations between Israeli and Palestinian Arab representatives. Pursuant to the Oslo Accords, Israel recognized the Palestine Liberation Organization as the representative of the Palestinian Arab people, and the Palestine Liberation Organization, in turn, was to recognize the right of Israel to exist and renounce the use of terrorism against Israel.⁸⁴ The ultimate objective of the Oslo Accords was to implement a “two-state” solution, wherein Israel would cede territory for the establishment of a new Palestinian Arab State.⁸⁵ Upon the conclusion of the peace negotiations under the Oslo Accords, the newly created Palestinian Arab state was to coexist peacefully alongside the existing State of Israel.⁸⁶

While history has shown that the Oslo Accords did not fulfill their promise,⁸⁷ the fact that Arabs, and in particular, Yasser Arafat—the man who was selected to use violence to carry out the Arab League Boycott’s mandate that “Palestine should remain an Arab country”⁸⁸—were willing to renounce the use of terror and to accept the existence of Israel constituted an egregious betrayal of the foundational principles of the Arab League’s Palestinian Arab agenda and those it represented.⁸⁹

84. Orde F. Kittrie, *More Process than Peace: Legitimacy, Compliance and the Oslo Accords*, 101 MICH. L. REV. 1661, 1667 (2003).

85. *Id.* at 1668.

86. *Id.* at 1667–68.

87. *Id.* at 1668 (concluding that “[t]he Oslo Accords were largely, if not entirely, a failure By mid-2003, the decade since the September 1993 signing [of the Oslo Accords] had seen the renewal of the Palestinian terrorist campaign against Israel, hundreds of dead on both sides, the reoccupation of most of the West Bank, enormous damage to both the Israeli and Palestinian economies, and the missing of practically every Oslo deadline.”).

88. KHALIL, *supra* note 19, at 558–59.

89. SARA ROY, *HAMAS AND CIVIL SOCIETY IN GAZA: ENGAGING THE ISLAMIST SOCIAL SECTOR* 33 (2011) (“ Hamas (in alliance with ten other Palestinian factions based in Damascus) vehemently rejected and condemned the Oslo Accords because Hamas considered them a betrayal of Palestinian national

The BDS Manifesto's position, in fact, mirrors the reaction of Hamas and other militant Arab groups at the time of the signing of the Oslo Accords:

*[T]he failure of Oslo to bring about any of the goals of the Palestinian liberation struggle catalyzed new forms of resistance. Not all parties remained blind to the realities on the ground in which the ghettoization and expulsion of Palestinians from their lands today threatens a fresh catastrophe. Palestinians themselves confirmed the rejection of an illusionary peace process, notably in the second *intifada* and the recent elections in the [West Bank and Gaza Strip]. Furthermore, despite the euphoria of the Oslo Process and continual "peace" initiatives up until the Roadmap, normalization policies were not mirrored in the activities and calls from civil society and Palestinian solidarity movements in the Middle East.*

While governments shunned taking measures against Israel for its ongoing crimes—choosing to quietly reward the occupation with diplomatic ties, cooperation and trade—pressure groups pushed for reinvigorating the isolation of Israel in the understanding that *the Palestinian struggle was hindered rather than aided by Oslo*.⁹⁰

How can it be that a process whereby the Israeli and Palestinian Arab people were to formalize agreements that would result in their peaceful coexistence and mutual recognition could be considered a hindrance to the "Palestinian struggle"? The unfortunate answer is the goal of that struggle is not peace; rather, it is, as the Arab League Boycott Declaration of 1945, Hamas, and the BDS Manifesto reiterate, the destruction of Israel and the creation of an Arab state on its ruins.⁹¹

Even if the Oslo Accords did not represent a durable solution to the Palestinian Arab/Israeli issue, the Oslo Accords did

and historic rights.").

90. BDS Manifesto, *supra* note 59, at 27 (emphasis added).

91. KHALIL, *supra* note 19, at 159–61; *see also* BDS Manifesto, *supra* note 59, at 18 ("[T]he [Arab League] [B]oycott was deployed as a means to cripple the Zionist movement within Palestine and, immediately after 1948, to bring about Israel's demise.").

normalize Israel's status in global markets.⁹² While the member-states of the Arab League may have lost interest in actively participating in the Arab League Boycott (or perhaps it was politically expedient to allow a non-state actor to take over its boycott duties) the non-state actors within the Arab League and its affiliates wanted to unsheathe the boycott as a means of rolling back the post-Oslo integration of Israel's role in the world economy.⁹³

If there were any doubts as to this conclusion, the BDS Manifesto repeatedly speaks clearly of its roots in, and intention to reinvigorate, the Arab League Boycott, for "boycott activities are not a new phenomenon, but operated in one form or another for many decades only to subside during the 1990s."⁹⁴ For example, the BDS Manifesto, in its introductory pages, indicates that "[r]eflections upon *previous BDS strategies used to isolate Israel*, from within and outside the Middle East, are explored An evaluation seeks to learn *from past BDS experiences* and the implications for Palestine campaign work today."⁹⁵ In addition, a "reinvigoration" is then mentioned:

An analysis of the Arab League boycott highlights the strengths and drawbacks of strategies pursued by League states and promoted by what became increasingly authoritarian governments. We compare this to the *reinvigoration of the call to boycott Israel* in the Middle East, driven from below in recent years, and coming at a time when the majority of states and leaders in the region pursue normalization with the occupation.⁹⁶

A similar point is made again later in the document:

92. BDS Manifesto, *supra* note 59, at 24 ("[The Oslo Accords] triggered a chain of events, which brought about the integration of Israel into the global community . . .").

93. *See id.* at 27–29.

94. *Id.* at 13.

95. *Id.* at ii (emphasis added). References to "previous" BDS strategies can only mean the Arab League Boycott in the context of this statement. *See id.*

96. *Id.* at 2 (emphasis added). As a logical matter, one cannot reinvigorate something that is new; therefore, the object of reinvigoration here is the Arab League Boycott. *See id.* Furthermore, the distinction between state level action and action "driven from below" highlights the reversion to the NGO-focused strategy set out in the original Arab League Boycott declaration. *Id.*

After the failure of Oslo and the “peace process[.]” BDS initiatives are often presented as an innovative and effective means to pressure Israel. *Yet, the isolation of Israel through a comprehensive boycott campaign is not a new concept. It dates back to Israel’s creation from the destruction of over 450 towns and villages together with the forced exodus of more than 750,000 Palestinians from their lands. Boycotts and sanctions characterized the relations of states across the Middle East with Israel from 1948 until the Oslo Process, continuing today, albeit as weakened and largely ineffective mechanisms. Strengthening today’s BDS efforts and advocating strategies to take solidarity action forward requires exploration and understanding of previous boycott work.*

....

... [C]ampaigns outside [of] the ruling structures across the Middle East continue the tradition of the boycott as a means to support the Palestinian struggle.⁹⁷

But, perhaps the clearest reason the Arab League Boycott has been resurrected comes from non-governmental actors themselves:

While boycott offices are still retained by many League countries, they are redundant institutions in the majority of cases. Individual companies still request adherence to the boycott, at secondary and tertiary levels, including businesses from Bahrain, Bangladesh, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syria, United Arab Emirates and Yemen. *It is here*, and within the grassroots movements, *where BDS continues to work towards the isolation of Israel in the Middle East.*⁹⁸

And even if active boycotters were merely “grassroots,” “[t]he

97. *Id.* at 15–16 (emphasis added). The BDS Manifesto explicitly rejects that its call for a boycott of Israel is new and directly links its boycott to the Arab League Boycott. *Id.*

98. *Id.* at 27 (emphasis added). The key element of this passage is the reference to “it is here.” *Id.* The “here” is the secondary and tertiary boycotts promoted from within the various Arab countries as part of the overall Arab League Boycott apparatus. *Id.* at 16–17. The BDS Movement has thus explicitly acknowledged that it is an arm of the Arab League Boycott which promotes the secondary and tertiary boycotts specifically prohibited by the EAA Anti-Boycott Law.

setback to Israel's trade and investment program was considerable until anti-boycott legislation and policies were adopted, specifically in the United States."⁹⁹ But even so,

Israel's economic boom can be viewed as far less resilient and strong than assumed by many commentators, providing hope that a *reinvigorated BDS movement* can have some impact.

....

A BDS movement must be aware that the way in which the boycott is pursued can be more important than the attainment of specific goal[s].... It shows that governments and states cannot be relied upon to be the enforcers of a boycott, even though they may be a useful component in institutionalising it. Moreover, it demonstrates that today's boycott movement must clearly articulate its aims and goals and until what point the boycott is to be maintained. Whereas the Arab League has highlighted a variety of motives for the boycott, lack of overall clarity and purpose has not won it sympathy in the rest of the world.¹⁰⁰

The only way to interpret the above-quoted passage is as a parsing of responsibilities: member-states of the Arab League institutionalize the boycott, while non-state actors such as the BDS Movement act to sanitize and propagandize the boycott, just as the Arab League Boycott Declaration of 1945 required.¹⁰¹

The above-quoted passages are just a sample of the connections between the BDS Manifesto (and thus the BDS Movement as a whole) and the Arab League Boycott Declaration of 1945, not only in terms of goals and tactics but also in terms of

99. *Id.* at 32 (reviewing the effectiveness of the Arab League Boycott by analyzing its economic impact on Israel). For example, the BDS Manifesto describes how Barclays was pressured by Arab League states to liquidate its fifty percent holding in Barclays Discount Bank in Israel or face termination of its business in Egypt and several other League states. *Id.* Initially, Barclays ignored the threat but complied a year later after suffering outstanding losses. *Id.*

100. *Id.* at 37 (emphasis added). Again, the reference to "reinvigoration" clearly connects the BDS Movement with the Arab League Boycott. In order for something to be reinvigorated, the subject would have first needed to exist in a previous, related form.

101. See KHALIL, *supra* note 19, at 162–63.

the underlying *raison d'être* for each movement: to isolate, weaken, and ultimately eliminate the Zionist presence in Palestine.¹⁰² Time after time, the BDS Manifesto positions itself as the “reinvigoration” of the Arab League Boycott, or the historical continuation of the Arab League Boycott.¹⁰³ These words were carefully selected to remind participants that the BDS Movement is sanctioned by the Arab and Islamic world and has a long history of operations against Israel. The BDS Manifesto makes this clear in its description of the Arab League Boycott: “the boycott was deployed as a means to cripple the Zionist movement within Palestine and, immediately after 1948, to bring about Israel’s demise.”¹⁰⁴

b. *Is the BDS Movement a Grassroots Peace Movement or Another Face of Radical Islam?*

The BDS Movement claims that it is a grassroots movement that fights injustice, yet behind its revolutionary slogans and xenophobic¹⁰⁵ rhetoric, its true objectives are laid bare. We know that the BDS Movement, by its own words, is the reinvigoration of the Arab League Boycott.¹⁰⁶ By its own guiding principles, the BDS Movement is a rejectionist organization that has repudiated the two-state solution’s peace process.¹⁰⁷ Using sophisticated and decentralized management structures (to ensure the movement is not affiliated with other organizations and to make it more difficult to prosecute for its unlawful activities) and a slick propaganda campaign, the BDS Movement mimics other radical Islamic groups in claiming virtue while propagating hate and destruction.

It is no coincidence that the BDS Movement ties its rise to the same period in which Hamas rose to political power in the region. Hamas, founded in the late 1980s as a military and political organization with the goal of eliminating Israel and replacing it

102. See BDS Manifesto, *supra* note 59, at 18.

103. See *id.* at 2.

104. *Id.* at 18.

105. Although the BDS Manifesto claims to be a Palestinian-led movement for freedom, justice, and equality, it is primarily a xenophobic screed against Israel—the only sovereign minority constituency in the Arab-dominated Middle East.

106. See BDS Manifesto, *supra* note 59, at 2.

107. *Id.* at 27.

with an Islamic Palestinian Arab state, won a majority of seats in the Palestinian parliamentary elections in January 2006,¹⁰⁸ mere months after the BDS Movement's July 9, 2005, call for the reinstatement of the Arab League Boycott. Through this electoral victory, Hamas replaced Fatah¹⁰⁹ as the seat of power for the Palestinian authority in Gaza.¹¹⁰ Like the BDS Movement, Hamas rejects the Oslo Accords entirely as well as the corresponding two-state peace process and normalization of relations with Israel.¹¹¹ In fact, Hamas' rise to power was widely seen as a repudiation of the Palestine Liberation Organization's Fatah wing, which was Israel's Palestinian Arab counterpart in the Oslo Accords.¹¹²

Both Hamas and the BDS Movement call for the destruction of Israel as a Jewish state.¹¹³ However, Hamas, as a political and military organization, is nominally a separate entity. At times there may be internecine disputes between the two affiliated organizations, especially when it comes to matters that swing the scales of power and influence between the two. However, this is true of virtually all non-state actors in Palestinian Arab affairs (and the Islamic world generally). That the two organizations may be at odds on occasion does not affect their underlying ties and affiliations, especially on the strategic goal of establishing a Palestinian Arab state atop the ruins of Israel.¹¹⁴

108. JIM ZANOTTI, CONG. RESEARCH SERV., R41514, HAMAS: BACKGROUND AND ISSUES FOR CONGRESS 43 (2010).

109. Fatah is the dominant political arm within the Palestine Liberation Organization. While Fatah is nominally secular, its rival, Hamas, is unquestionably Islamic. *See id.* at 3.

110. *Id.*

111. *Id.* at 14, 41.

112. *Id.* at 3.

113. *See id.* at 13–14; BDS Manifesto, *supra* note 59, at 162.

114. *See, e.g.,* Haidar Eid, *Tough Questions for Hamas*, ELEC. INTIFADA (Nov. 2, 2010), <http://electronicintifada.net/content/tough-questions-hamas/9095>. Eid, a policy advisor for the Palestinian Policy Network (an organization formed in connection with the BDS Movement) and an influential voice in the BDS Movement, took issue with Hamas' choice to engage in the elimination of Israel in stages saying:

[I]t is obvious that Hamas is unable to realize that the war on Gaza in 2009 has created a new political reality whereby Israel pulled the trigger on the racist two-state/two-prison solution. Hamas insists on adopting this approach and claims it is a temporary tactic until the balance of power shifts, as the movement assumes it will within the truce period of ten or twenty years. During this time, it plans to

If we view the early to mid-2000s from a more global perspective, the BDS Movement's place in the Islamic world becomes clear. The 2001 call for the re-radicalization of the Arab League and its boycott against Israel at Durban I, as well as the globalization of radical Islamic terror operations under the al-Qaeda and other brands (in particular, the September 11th terror attacks) unveiled a more aggressive and ideologically pure international Islamist movement. Unlike the 1990s where the Oslo Accords appeared to signal the formalization of the Arab/Israeli peace movement that prominently began with normalization of ties between Egypt and Israel in the late 1970s, the 2000s witnessed a vengeful return to the pinnacle of Arab League radicalism and anti-Israel ideology. Indeed, this period closely resembles the infamous Arab League's 1967 "Three No's" declaration of principles: no peace with Israel, no recognition of Israel, and no negotiations with Israel.¹¹⁵

While the resurgence of Arab radicalism that began in the 2000s closely resembles the ideology from earlier periods in Arab League history with regard to Zionism and Israel, there is a significant difference with the new radicalism. Rather than being formalized at the state level, the new radicalism has taken root and spread at the non-state level.¹¹⁶ The member states of the Arab League, with the exception of several such as Libya and Syria, have largely continued the facial normalization process with Israel.¹¹⁷ Perhaps as a reaction to this "betrayal," the non-state members of the Arab League (and Islamic world as a whole) retrenched to the principles set out in the Arab League Boycott Declaration of 1945: a racist, rejectionist anti-Israel agenda.¹¹⁸

build a state after its model in Gaza.

Id. The dispute between this voice of the BDS Movement and Hamas was not over whether Israel should be allowed to exist as part of the realization of a Palestinian Arab state; rather, Eid condemned Hamas' deceitful consideration of a two-state solution as part of its overall strategy to weaken and then destroy Israel. *Id.*

115. In 1967, the Arab League met in Khartoum, Sudan, and issued a resolution at the conclusion of its summit. The third point of the resolution is now known as the principle of the "Three No's." *Khartoum Resolution, COUNCIL ON FOREIGN RELATIONS*, http://www.cfr.org/world/khartoum-resolution/p14841?breadcrumb=%2Fpublication%2Fpublication_list%3Ftype%3Dessential_document%26page%3D69.

116. See BDS Manifesto, *supra* note 59, at 27–29.

117. See *id.* at 16, 26–27.

118. See KHALIL, *supra* note 19, at 162–63.

Each of the anti-Israel actors today has a different structure and public persona. Hamas is a formal political and military entity with a centralized governing body and a territory under its control; al-Qaeda and the Islamic State¹¹⁹ are primarily militant terror organizations with very little centralization or formal political apparatus; the BDS Movement is primarily a propaganda organization with a decentralized governing structure. All of these organizations, however, strictly hew to the original Arab League “Three No’s” position that Zionism is incompatible with the Palestinian Arab identity and all strive to replace the Jewish state with a Palestinian Arab state.

The important point in considering any and all of these groups is that they, and their individual members, tend to be fungible when it comes to the issue of Israel. Groups may splinter from each other and operate under a different name with different strategies: one group may focus on violence while another may focus on propaganda.¹²⁰ Nominally peaceful groups may have

119. While al-Qaeda is widely known as an Islamic terror organization, the Islamic State is a relatively new iteration of radical Islamist ideology. The distinction is somewhat uncertain, but the landscape has been described as:

[T]he post-9/11 jihadi movement . . . split into two major groups—al-Qaeda and its declared affiliates, under the leadership of bin Laden and now Zawahiri—and everyone else, a motley collection of more or less like-minded insurgents and terrorists around the world who have maintained their independence, even though many were friendly or linked to al-[Q]aeda through shared resources or personnel.

J.M. Berger, *The Islamic State vs. al Qaeda*, FOREIGNPOLICY.COM (Sept. 2, 2014), http://www.foreignpolicy.com/articles/2014/09/02/islamic_state_vs_al_qaeda_next_jihadi_super_power. The Islamic State is one of the “motley collection” of other non-al-Qaeda radical Islamic groups. *Id.* Certainly, the anti-Israel, anti-Jewish agenda is not the only agenda for al-Qaeda and the Islamic State, but it serves as a prominent and binding role in each organization’s ideology and actions. *Id.*

120. The BDS Manifesto explicitly acknowledges this separation of tactics among the various anti-Israel groups, united by the overarching goal to destroy Israel:

[C]haracterizing the struggle as a whole as “non-violent” does not necessarily equate with the values of the oppressed for whom BDS forms one part or mechanism of support for their struggle. This raises important questions over the right to resist [T]he Palestinian struggle has evolved over the decades as an expression of the Palestinians, who challenge the occupation and use the means available to a subjugated people to seek the attainment of their rights. The Palestinian struggle cannot be so simply defined as

overlapping membership with groups committed to violence, but at their core, notwithstanding any moniker they adopt or flag they may fly, they are all part of the non-state apparatus that the Arab League Boycott Declaration of 1945 established: to eliminate Zionism.

Furthermore, the BDS Movement is but one part of the ascension of non-state actors in the global Palestinian Arab nationalist movement. As the importance of the Arab League¹²¹ has declined over the decades, the void has been filled by any number of other non-state actors that populate the spectrum from purely humanitarian to resolutely militant. While the names change, the group's objective remains the same: the demonization, marginalization, and destruction of Israel.¹²²

The BDS Movement may claim that it is not a racist organization, but brushing aside its oft-repeated and empty claims to be fighting against "colonialism" and an "apartheid" state, one finds that the substance of the BDS Movement's aims are rooted in racism, bigotry, and a desire to ethnically cleanse the only non-Arab Middle Eastern state from the map.¹²³ The BDS Movement, like its predecessors and affiliates, frames its goals as the

violent or non-violent; it brings together a variety of strategies in its path of resistance to advance national goals.

BDS Manifesto, *supra* note 59, at 11 (emphasis added).

121. The Arab League is something of a hybrid organization. As defined by the United Nations, the Arab League qualifies as a "non-governmental organization." See James Hall, *Economics of Non-governmental Organizations*, BREAKING ALL THE RULES (Nov. 13, 2013), <http://www.batr.org/negotium/111313.html> ("A non-governmental organization (NGO also often referred to as 'civil society organization' or CSO) is a not-for-profit group, principally independent from government, which is organized on a local, national or international level to address issues in support of the public good."). The Arab League can also be seen as a regional political organization or an intergovernmental organization. Whatever the case is, neither the EAA Anti-Boycott Law nor the other laws discussed herein refer specifically to non-governmental organizations or grants them unique treatment. Furthermore, there is no definitive legal definition of the term "non-governmental organization." To simplify the discussion on this non-substantive point, I refer herein at times to the Arab League as a non-governmental organization.

122. See Gerald M. Steinberg, *The Centrality of NGOs in Promoting Anti-Israel Boycotts and Sanctions*, 21 JEWISH POL. STUD. REV. 1, 18 (2009) (documenting the creation of hundreds of "human rights" NGOs devoted to anti-Israel advocacy).

123. See BDS Manifesto, *supra* note 59, at viii.

“liberation of Palestine”¹²⁴ and has abjectly rejected the principles of the Oslo Accords or any other bona fide peace process. This can only mean that like Hamas, al-Qaeda, the Islamic State and a long line of other Islamist non-state actors spawned by the Arab League, the BDS Movement is neither grassroots nor interested in coexistence with Israel as a Jewish state in any form.¹²⁵

Indeed, a co-founder of the BDS Movement, Omar Barghouti, was a signatory to a 2007 declaration titled “The One State Solution” that explicitly rejected the idea of a two-state solution and demanded the destruction of the State of Israel.¹²⁶ Barghouti has also stated on record that most Palestinian Arabs support a one-state solution (i.e., Palestine replacing Israel) and that solution would logically mean the elimination of Israel as a functioning state:

Two polls in 2007 showed two-thirds majority support for a single state solution in all flavors—some of them think of a purely Palestinian state without Israelis and so on—in exile it’s even much higher because the main issue is that refugees in particular, and people fighting for refugee rights like I am, know that you cannot reconcile the right of return for refugees with a two state solution. That is the big white elephant in the room and people are ignoring it—a *return for refugees would end Israel’s existence* as a Jewish state. The right of return is a basic right that cannot be given away; it’s inalienable. [] A two-

124. Section 1.4 of the BDS Manifesto is titled “Strengths and Weaknesses of BDS in Support of the Palestinian Liberation Struggle,” and there are numerous references to the BDS Movement’s goal to liberate Palestine throughout the document. See, e.g., BDS Manifesto, *supra* note 59, at 159.

125. The two-state solution, which was the basis for the Oslo Accords and has been the resolution sought by the United States and most other international entities, would have the Israeli/Palestinian Arab dispute resolved through the creation of a Palestinian Arab state that coexists with the existing state of Israel. See Karl Ritter, *New Swedish Government to Recognize Palestinian State*, U.S. NEWS (Oct. 3, 2014), <http://www.usnews.com/news/world/articles/2014/10/03/sweden-to-recognize-palestinian-state> (“[W]e believe that the process is one that has to be worked out through the parties to agree on the terms of how they’ll live in the future of two states living side-by-side.”).

126. See Ali Abunimah, et al., *The One State Declaration*, ELEC. INTIFADA (Nov. 29, 2007), <http://electronicintifada.net/content/one-state-declaration/793>.

state solution was never moral and it's no longer working—it's impossible with all the Israeli settlements and so on.¹²⁷

Even Norman Finkelstein, a prominent academic critic of Israel,¹²⁸ has deemed the BDS Movement to be a “cult” that seeks the destruction of Israel:

“They don't want Israel,” Finkelstein declared, “They think they're being very clever. They call it their three tiers We want the end of the occupation, we want the right of return, and we want equal rights for Arabs in Israel. And they think they are very clever, because they know the result of implementing all three is what? What's the result? You know and I know what's the result: there's no Israel.”¹²⁹

BDS Movement supporters go to great lengths denying the obvious intentions of their movement's goals and claim that they would support the continued existence of Israel as a state within the pre-1967 war borders.¹³⁰ BDS Movement supporters, however, put so many conditions on their “support of Israel”—such as the right of every Palestinian Arab to become a citizen of Israel and the elimination of Israel's status as a Jewish state¹³¹—that these supporters endorse an Israel that is vastly different from the Jewish state approved by the United Nations pursuant to United Nations Resolution 181¹³² or the Jewish state recognized by the

127. Ali Mustafa, “Boycotts Work”: *An Interview with Omar Barghouti*, ELEC. INTIFADA (May 31, 2009), <http://electronicintifada.net/content/boycotts-work-interview-omar-barghouti/8263> (emphasis added).

128. See, e.g., Matthew Abraham, *The Case for Norman Finkelstein*, GUARDIAN (June 14, 2007), <http://www.theguardian.com/commentisfree/2007/jun/14/abattleforacademicfreedom>.

129. Ali Abunimah, *Finkelstein, BDS and the Destruction of Israel*, AL JAZEERA (Feb. 28, 2012), <http://www.aljazeera.com/indepth/opinion/2012/02/2012227111759385177.html>. After extreme pressure from the BDS Movement and others, Finkelstein eased on his approach but did not repudiate its substance.

130. *Id.*

131. *Id.*

132. See G.A. Res. 181 (II) I–A ¶ 3 (Nov. 29, 1947) (calling for a partition of the British Mandate of Palestine into two-states: a Jewish state and an Arab state). This resolution was adopted by the United Nations General Assembly on November 29, 1947, accepted by the putative representatives of the to-be-formed Jewish state, but rejected outright by the Arab states. *UN General Assembly Resolution 181*, ISRAEL MINISTRY OF FOREIGN AFFAIRS,

United Nations in 1948. Instead, clinging to the Arab League's rejectionist and Arab supremacist positions from the earlier Zionist movement in Israel, the BDS Movement seeks to fundamentally transform Israel into a Palestinian Arab state that would also likely be Islamic.

It should not be forgotten that the history of Arab and Islamic states demonstrates a dual class society consisting of—using the BDS Movement's own terms—racism and apartheid.¹³³ For example, in the relatively liberal Kingdom of Jordan, which has a large Palestinian Arab population, Islam is the sole state religion and individuals are not allowed to either promote any other religion or, if they are Muslim, convert to any other religion.¹³⁴ The conditions for non-Muslims in other Arab countries, such as Saudi Arabia, are even less hospitable.¹³⁵ It is therefore easy to question the credibility of the BDS Movement's stance that Israel's actions as a Jewish state are racist and a form of

<http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/un%20general%20assembly%20resolution%20181.aspx>. Seeing that there would be no Arab recognition of the Jewish state recommended by the United Nations, Israel declared its statehood shortly after the expiration of the British Mandate, which was followed by Arab states declaring war on the newly-constituted Jewish state. See *Establishment of Israel: Declaration*, JEWISH VIRTUAL LIBRARY, http://www.jewishvirtuallibrary.org/jsource/History/Dec_of_Independ.html.

133. See, e.g., Karrie Kehoe, *Factbox-Women's Rights in the Arab World*, THOMSON REUTERS FOUND. (Nov. 12, 2013), <http://www.trust.org/item/2013111115632-hn9t2/?source=spotlight-writaw> (documenting the rampant denial of basic human rights towards women in Arab states); see also Alan Dershowitz, *Let's Have a Real Apartheid Education Week*, WORLDPOST (May 4, 2010), http://www.huffingtonpost.com/alan-dershowitz/lets-have-a-real-aparthei_b_485399.html (last updated May 25, 2011) (documenting state sponsored religious, sexual, gender and racial discrimination throughout the Arab world).

134. BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT (2007).

135. BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT (2013) (“[In Saudi Arabia,] [f]reedom of religion is neither recognized nor protected under the law The public practice of any religion other than Islam is prohibited Shia and other Muslims who did not adhere to the government's interpretation of Islam faced political, economic, legal, social, and religious discrimination The government detained individuals on charges of insulting Islam, ‘witchcraft and sorcery,’ and for engaging in private non-Muslim religious services Mosques are the only public places of worship, and the construction of churches, synagogues, or other non-Muslim places of worship is not allowed.”).

apartheid when in reality most, if not all, Arab states exist as repressive Muslim states.

What is more, the BDS Movement roots its anti-Israel creed in opposing alleged Israeli apartheid policies, yet the end result of the BDS Movement's activities, if successful, would be eliminating the only liberal democracy in the region (one whose respect for women's, minority and gay rights is inapposite to the neighboring Arab theocracies) and imposing an Islamic apartheid state in its stead. This is exactly the same result called for by Islamist groups like al-Qaeda and Hamas who are ideologically aligned with the BDS Movement. This comparison has also been made by Scholars for Peace in the Middle East, an international organization of scholars working for a peaceful resolution of the Israeli/Palestinian Arab dispute. In criticizing the BDS Movement's affiliation with Hamas and other radical terror organizations, Scholars for Peace in the Middle East stated:

A careful look at the BDS movement and its methodology shows not legitimate criticism but a movement that is racist and anti-Semitic

. . . .

Overall, the BDS campaign is contrary to the search for peace, since it represents a form of misguided economic warfare. It is directly in opposition to decades of agreements between Israeli and Arab Palestinians, in which both sides pledged to negotiate a peaceful settlement and a commitment to a two-state solution

. . . .

Scholars for Peace in the Middle East (SPME) urges those committed to peace and justice for the people of a region which has had too much war and violence to join with us in rejecting the politics of hatred that the BDS movement represents¹³⁶

In this context, it must be noted that the two-state solution is a compromise for both Israel and the Palestinian Arabs. Under the two-state solution, Israel's territorial integrity would be

136. *Israel's War with Hamas Reinigorates BDS Movement*, SCHOLARS FOR PEACE IN THE MIDDLE EAST (Sept. 11, 2014), <http://spme.org/spme-statements/updated-statement-condemning-current-calls-boycott-divestment-sanctions-bds-israel/18453/>.

compromised and its available land would be significantly reduced (which, in fact, has already been compromised as a result of the Israeli disengagement from Gaza in 2005). Naturally, this would have negative economic, social, and security ramifications on Israel. A smaller Israel with an armed and historically hostile new neighbor would mean that the buffer zones currently in existence and which protect against mortar and rocket attacks and border incursions would disappear.¹³⁷ As recent conflicts between Hamas and Israel have shown, the existing buffer zones provide a significant security benefit to Israel and allow Israel to defend its citizens against indiscriminate mortar and rocket fire directed at civilian populations. Defensive anti-missile systems and warnings will only be effective so long as there is sufficient time between a threat's detection and the projectile's impact. Oftentimes, this time is under one minute, as was the case in the 2014 war between Hamas and Israel.¹³⁸ During times of war or terrorism, a larger territory brings better odds to prevent casualties and prepare a defense, so any territorial concessions by Israel will have a significant harmful effect on its security.

Furthermore, the two-state solution represents Israel's recognition of a unique Palestinian Arab identity and state, a political compromise of historic proportions, and an implicit compromise that jeopardizes Israel's historic claims to the entirety of the land.¹³⁹ Some of Israel's proponents argue that the

137. See, e.g., BENJAMIN NETANYAHU, *A DURABLE PEACE: ISRAEL AND ITS PLACE AMONG THE NATIONS* 261–285 (1993) (explaining the heightened importance of territory for Israel due to the small size of the country and the presence of hostile entities at its borders). Mr. Netanyahu's book, first published in 1993 shortly before the Oslo Accords, accurately warned that the military buffer provided by the West Bank and, to a lesser extent, Gaza, would become ever more important as Israel's enemies acquired greater stores of short and long range missiles. See *id.* Mr. Netanyahu also opined that “[i]n the age of missiles territory counts more, not less. Long-range missiles increase the need for mobilization time, and short range missiles can destroy strategic targets within their reach. For both reasons, the control of a contiguous buffer area becomes more, not less, important.” *Id.* at 278.

138. See, e.g., Alessandra Ram, *An Actually Useful Version of Yo is Warning Israelis of Rocket Strikes*, WIRED (July 16, 2014, 12:00 PM), <http://www.wired.com/2014/07/an-actually-useful-version-of-yo-is-warning-israelis-of-rocket-strikes/> (discussing the Israeli Red Alert missile warning system: “[t]he user typically receives a warning via smartphone 15 to 90 seconds before a rocket hits.”).

139. See Dore Gold & Jeff Helmreich, *An Answer to the New Anti-Zionists: The Rights of the Jewish People to a Sovereign State in Their Historic*

Palestinian Arab compromise in the context of a two-state solution is illusory, since the Palestinian Arabs would give up no territory (no Palestinian Arab state currently exists) and there is ample documentation indicating that the Palestinian Arab strategy has always been to destroy Israel with the only nuance being the use of “stages” to chip away at Israel’s security in preparation of a final battle.¹⁴⁰ Dr. Michael Widlanski summarized the Palestinian Arab strategy in the following terms:

From 1968 through 1974, Fatah/PLO made it clear that it wanted to replace Israel with a “democratic Palestine.” This was a euphemism for what former PLO leader Ahmad Shukeiry had declared: “. . . destroying Israel and driving the Jews into the sea.” Beginning in 1974, the PLO further “moderated” its tone, but not its real goal. It adopted the “Strategy of Stages” and declared that it would try to gain parts of Palestine/Israel via peaceful means. Thereafter it would employ arms for the final battle. Arafat and Abbas refined this strategy further over the years.¹⁴¹

The strategy of eliminating Israel in stages is one that has also been adopted by Hamas.¹⁴²

While it is undeniable that both sides to a two-state solution will make significant compromises, the existential threat to Israel must not be underestimated. In this context, the fact that Israel has adopted the two-state solution as its objective in negotiations with the Palestinian Arabs carries great weight and should be viewed as evidence of Israel’s desire to achieve a peaceful coexistence with Palestinian Arabs in their own sovereign state. Hamas, al-Qaeda, many Arab states, and the BDS Movement, on

Homeland, JERUSALEM CTR. FOR PUB. AFFAIRS (Nov. 16, 2003), <http://www.jcpa.org/jl/vp507.htm>. I present this point of view only to compare the mainstream Israeli diplomatic approach, which accepts as a political reality that historic claims to the entire land of Israel will be compromised if there is to be peace with the Palestinian Arabs, to the Palestinian Arab approach, which generally refuses to make such a compromise since they claim the lands are historically Palestinian Arab.

140. Dr. Manfred Gerstenfeld, *Deceitful Palestinian Statements as Strategic Weapons*, ISRAEL NAT’L NEWS (Sept. 23, 2013, 12:30 PM), http://www.israelnationalnews.com/Articles/Article.aspx/13863#.VE6JOPnF_nh (op-ed interview with Dr. Widlanski).

141. *Id.*

142. Eid, *supra* note 114.

the other hand, can make no such claim with regard to peaceful coexistence with a sovereign Israel. Their position has always been that Israel, as a Jewish state, must be eliminated. From this perspective, the extremist nature of the BDS Movement comes into focus and its place alongside the most virulent enemies of peace is incontrovertible.

The Arab League Boycott Declaration of 1945 called for a non-state actor to represent Palestinian Arabs as part of the propaganda and economic campaign against Israel. This is the BDS Movement. The BDS Movement is also ideologically aligned with radical Islamist groups. The BDS Movement is not a grass roots movement, nor is it a peace movement. In charitable terms, the BDS Movement is simply the latest iteration of the longstanding Arab League mandate to eliminate the only non-Arab state from the Middle East. In less charitable terms, the BDS Movement is the non-violent propaganda arm of the modern Islamist terror movement.

II. THE BDS MOVEMENT UNDER UNITED STATES LAW

A. *Anti-Boycott Provisions of United States Laws*

As the Arab League Boycott matured and developed a sophisticated bureaucratic structure, the United States responded with a series of increasingly broad and powerful laws meant to blunt its impact and reach in the United States. United States' opposition to the Arab League Boycott was (and is) multi-faceted. First, the Arab League Boycott has had commercial ramifications in the United States. Companies that violate the secondary and tertiary boycott are put on a "black list" maintained by the Arab League's Office of Boycott Compliance.¹⁴³ Those companies lose access to markets in member states of the Arab League and supporting states/entities. Solely in economic terms, the Arab League Boycott has had negative financial consequences for the United States.¹⁴⁴ Second, as a matter of policy under both

143. SARNA, *supra* note 12, at 2.

144. The House Boycott Report indicated that it was impossible to quantify the amount of commercial activity affected by the Arab League Boycott in the 1970s, but the report estimated that hundreds of millions of dollars in trade was lost as a result of the boycott and billions of dollars were likely affected. H. SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE H. COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., REP. ON THE

domestic and international law, the interference of a foreign entity in the domestic affairs of a country is prohibited.¹⁴⁵ By using United States individuals and companies to further the boycott of Israel, the Arab League Boycott impermissibly interferes in United States internal affairs.¹⁴⁶

In the early days of the Arab League Boycott, when it was focused on the primary boycott of Israel by Arab states, United States' policy was one of non-partisan acceptance of the right of the Arab states to conduct their domestic affairs without third party interference.¹⁴⁷ As the nature of the Arab League Boycott became better known, however, and allegations of its racist objectives spread, the United States Senate initially took action by means of a resolution condemning religious discrimination introduced into the United States by foreign entities.¹⁴⁸

ARAB BOYCOTT AND AMERICAN BUSINESS, H.R. DOC. NO. 75-384, at 30-36 (1976) [hereinafter HOUSE BOYCOTT REPORT].

145. See U.N. Charter art. 2, ¶ 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter. . ."). This provision has been interpreted to prohibit any state from interfering in the domestic affairs of another state, including by use of economic coercion. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, 181, ¶¶ 210-11 (June 27) ("The Court then considers the question whether, if one State acts towards another in breach of the principle of non-intervention, a third State may lawfully take action by way of counter-measures which would amount to an intervention in the first State's internal affairs. This would be analogous to the right of self-defense in the case of armed attack, but the act giving rise to the reaction would be less grave, not amounting to armed attack. In the view of the Court, under international law in force today, States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack.'"); see also HOUSE BOYCOTT REPORT, *supra* note 144, at 11-12 (regarding American policy to prevent foreign interference with domestic commercial affairs).

146. FEILER, *supra* note 15, at 68.

147. *Id.* at 151.

148. S. Res. 323, 84th Cong. (1956) ("Whereas it is a primary principle of our Nation that there shall be no distinction among United States citizens based on their individual religious affiliations and since any attempt by foreign nations to create such distinction among our citizens in the granting of personal or commercial access or any other rights otherwise available to United States citizens generally is inconsistent with our principles; Now, therefore, be it Resolved, That it is the sense of the Senate that it regards any such distinctions directed against United States citizens as incompatible with the relations that should exist among friendly nations, and that in all negotiations between the United States and any foreign state every

It was, in a point of historic irony,¹⁴⁹ dockworkers that set in motion action by the Executive Branch of the United States Government to combat the secondary and tertiary effects of the Arab League Boycott. In 1960, the Seafarer's International Union and other dockworkers' organizations handling Israeli cargo and ships voiced their concern that supporters of the Arab League Boycott were harassing dockworkers and interfering with international commerce, which had a direct economic impact on the dockworkers.¹⁵⁰

In response to the concerns of the dockworkers, the United States Department of State condemned the discriminatory Arab League Boycott and the United States Senate adopted a resolution that authorized the President of the United States to withhold aid and assistance to Arab states for as long as the Arab League Boycott interfered with shipping and cargo handling.¹⁵¹ While this authorization did not result in direct action against the boycott, it was a significant crystallization of United States' policy that would lead to tangible anti-boycott legislation.

By the mid-1960s, bills were introduced in the United States Congress to prohibit domestic compliance with the Arab League Boycott and, through an amendment to the then-existing Export Control Act, the first legislative response to the Arab League Boycott was enacted in 1965.¹⁵² The amendment, without prohibiting domestic compliance with the Arab League Boycott, stated that it was United States' policy to oppose boycotts "fostered or imposed" by foreign countries against other countries that were friendly to the United States.¹⁵³ While the amendment did not make compliance with foreign boycotts illegal, it did, for the first time ever, require anyone who had received a boycott request to report the same to the United States Department of Commerce.¹⁵⁴

Notwithstanding legislative policy statements, until the mid-

reasonable effort should be made to maintain this principle.”).

149. See *infra* Part II.C for an overview of how dockworkers went from condemning boycotts of Israeli in the 1960s to being primary actors in the BDS Movement's boycott propagation efforts in 2010–2014.

150. FEILER, *supra* note 15, at 152.

151. *Id.* at 152–53.

152. Pub. L. No. 89–63, 79 Stat. 209 (1965); see also FEILER, *supra* note 15, at 155–56.

153. *Id.*

154. FEILER, *supra* note 15, at 156.

1970s the United States' response to the Arab League Boycott was primarily disapprobation rather than affirmative action against the boycott. In fact, a House of Representatives Committee report found that as late as 1975 the United States was not only not rolling back the Arab League Boycott, but "the Commerce Department actually served to encourage boycott practices implicitly by condoning activity declared against national policy or simply by looking the other way"¹⁵⁵

Were it not for the aggressive economic warfare embarked upon by the Organization of the Petroleum Exporting Countries (OPEC)¹⁵⁶ in 1973 there likely would have been no change in the United States' "look the other way" response to the Arab League Boycott. As the 1976 House Boycott Report acknowledged:

The boycott's impact has, however, changed substantially in recent years. This change is a direct result of the fivefold increase in the price of oil which followed the Arab-Israeli war of October 1973. Due to the normal time lags in oil payments, massive accumulation of oil revenues did not begin until 1974. That year, the combined current account surpluses of the OPEC nations . . . was \$62 billion.¹⁵⁷

1. The Legislative Tide Turns: Enactment of the EAA Anti-Boycott Law

In the waning months of the Gerald Ford administration, the United States Congress commenced drafting and debating legislation to finally confront the pernicious Arab League Boycott. The Ford administration had signaled its opposition to anti-boycott legislation, fearing that it would further antagonize the Arab League into punitive economic action against American

155. See HOUSE BOYCOTT REPORT, *supra* note 144, at viii. The HOUSE BOYCOTT REPORT was a comprehensive study of the background and effects of the Arab League Boycott prepared in the wake of the OPEC oil crisis of 1973. This report was the primary source of information for Congressional consideration of the EAA Anti-Boycott Law, which was enacted the year after the HOUSE BOYCOTT REPORT was published.

156. OPEC is a cartel focused on controlling the price of petroleum exports globally. Though its membership is not exclusively Middle Eastern, its agenda is dominated by the oil producing states of the Middle East. See *About Us*, OPEC, http://www.opec.org/opec_web/en/about_us/24.htm.

157. HOUSE BOYCOTT REPORT, *supra* note 144, at 10.

companies.¹⁵⁸ Nonetheless, the United States Congress saw the shocking increase in economic clout of Arab League states resulting from OPEC oil supply manipulation as the greater threat. This was, perhaps, the tipping point in terms of action; there had been longstanding concerns in the United States that the boycott was an unacceptable and racist intervention in domestic affairs, but until the OPEC oil crisis the boycott had very little direct impact on American consumers.¹⁵⁹

In light of OPEC's new and dramatic influence on the global economy, the United States considered the affiliated Arab League Boycott to be "an aspect of the larger Arab-Israeli conflict" that continued to have a "significant impact within the United States and [raised] fundamental issues concerning our commitment as a people to principles of free trade and freedom from religious discrimination."¹⁶⁰

The legislative response with the first tangible enforcement provisions¹⁶¹ was an amendment to the 1976 Tax Reform Act. This legislation, known as the "Ribicoff Amendment," was a fairly discrete policy implementation that denied tax benefits to companies that participated in the Arab League Boycott.¹⁶² Because the Ribicoff Amendment did not prohibit companies from complying with the Arab League Boycott (that is, a company that felt that the loss of tax benefits was worth the additional revenue gained from working with Arab League members could simply lose the tax benefits and continue complying with the boycott), it is not a focus of this Article, even though the provisions of the Ribicoff Amendment are still in effect.¹⁶³ As an indication of United

158. SARNA, *supra* note 12, at 92 ("President Gerald Ford had been convinced by Secretary of State Henry Kissinger that the goodwill of Arab nations needed to be cultivated on behalf of U.S. efforts to facilitate a Middle East peace settlement. This meant that new legislative measures against the Arab trade boycott would be opposed by the administration since it was feared they could provoke Arab hostility toward the U.S."); *see also* FEILER, *supra* note 15, at 163.

159. *See generally* HOUSE BOYCOTT REPORT, *supra* note 144.

160. *Id.* at vii.

161. In late 1975, though President Ford prohibited compliance with certain boycott requests by exporters in the United States, this action (authorized under the Export Administration Act) had a limited effect and was not specific to the Arab League Boycott. *See* SARNA, *supra* note 12, at 93.

162. *See id.*

163. *See Enforcement—Office of Antiboycott Compliance (OAC)*, BUREAU OF INDUS. AND SEC., U.S. DEPT OF COMMERCE, <http://www.bis.doc.gov/>

States policy, though, the Ribicoff Amendment stands alongside the EAA Anti-Boycott Law as a resounding pronouncement that foreign boycotts imposed in the United States on friendly countries were contrary to United States' interests and would not be tolerated.

Though amendments to the Export Administration Act were also on the table in Congress at the time, the Ford administration's desire to avoid political conflict with Arab countries on the eve of the 1976 presidential election ultimately resulted in the abandonment of any new anti-boycott legislation.¹⁶⁴ At the same time, however, the economic impact of the Arab League Boycott was revealed to Congress. In 1975, the House Boycott Report estimated that transactions with an aggregate value of over \$4 billion (in 1975 dollars) had been subject to boycott requests in that year alone.¹⁶⁵

Moreover, while the quantifiable effects of the boycott were enormous, its disruptive impact on trade involving American companies was even more alarming. The House Boycott Report examined the case of the Xerox Corporation, which had been placed on the Arab League Boycott's blacklist simply because it had sponsored a television series about United Nations members, which included one episode on Israel.¹⁶⁶ For this, the Arab League deemed Xerox to be "pro-Zionist" and Xerox was excluded from virtually all trade with Arab League states.¹⁶⁷

What this showed Congress was that the Arab League Boycott was far more than requests for certificates of origin or questionnaires regarding factory locations; it was a wide ranging attack on any American business or individual who was seen as being sympathetic to, or supportive of, Israel. Indeed, the reach of the Arab League Boycott was so great that American entertainers with abstract ties to Israel (such as through the purchase of State of Israel bonds) were banned from entry to Arab League states and their works were boycotted.¹⁶⁸ The Arab League Boycott of

[index.php/enforcement/oac](#) for an overview of the Ribicoff Amendment and enforcement thereof; *see also* FEILER, *supra* note 15, at 162–63.

164. *See* SARNA, *supra* note 12, at 98.

165. HOUSE BOYCOTT REPORT, *supra* note 144.

166. *Id.* at 37.

167. *Id.* at 37–38.

168. SARNA, *supra* note 12, at 57–58. The Arab League Boycott resulted in bans on the works of, among others, Elizabeth Taylor, Danny Kaye, Eartha Kitt, Edward G. Robinson, Harry Belafonte, Paul Newman, and Sophia

American entertainers continues to this day, with the BDS Movement claiming in 2014 that it coerced Elvis Costello and Carlos Santana to cancel scheduled performances in Israel;¹⁶⁹ other entertainers, such as the Rolling Stones, have defied the BDS Movement's threats.¹⁷⁰

With an ailing economy in the United States and the Arab world aggressively using its new commercial strength to force foreign conflicts into American domestic affairs as a backdrop, the victory of Jimmy Carter in the 1976 presidential election ushered in a new push by business and political groups for comprehensive anti-boycott legislation. Though in later years Jimmy Carter would become known for his vehement anti-Israel, pro-Arab views and policies,¹⁷¹ in the early days of his administration he welcomed the legislation already under consideration in Congress to curb the effects of the secondary and tertiary aspects of the Arab League Boycott. In fact, during the 1976 presidential debate between Mr. Carter and President Ford, Mr. Carter attacked President Ford's record on the boycott and declared:

I believe that the boycott of American businesses by the Arab countries . . . is an absolute disgrace This is the first time that I remember in the history of our country when we've let a foreign country circumvent or change our Bill of Rights . . . it's a disgrace that so far Mr. Ford's administration has blocked passage of legislation that would have revealed by law every instance of the boycott, and it would have prevented the boycott from

Loren. Even Walt Disney films were banned due to the inclusion of the Hebrew name "Samson" for a horse in *Sleeping Beauty*.

169. *Cultural Boycott*, BDS MOVEMENT, <https://bdsmovement.net/cultural-boycott> (last visited Sept. 10, 2016).

170. *BDS campaigners call on Rolling Stones to cancel Israel concert*, HAARETZ (Mar. 26, 2014) <http://www.haaretz.com/news/diplomacy-defense/1.582182>.

171. Professor Alan Dershowitz recently described Jimmy Carter as a "cheerleader for Hamas." Molly Wharton, *Dershowitz: Jimmy Carter Is a 'Cheerleader' for Hamas*, NAT'L REV. THE CORNER (Aug. 8, 2014), <http://www.nationalreview.com/corner/384980/dershowitz-jimmy-carter-cheerleader-hamas-molly-wharton>. See also Ethan Bronner, *Jews, Arabs and Jimmy Carter*, N.Y. TIMES, Jan. 7, 2007 (In a review of Jimmy Carter's book PALESTINE: PEACE, NOT APARTHEID, the deputy foreign editor of the *New York Times*, a newspaper that is generally considered to have an anti-Israel bias, describes Carter as offering "a narrative that is largely unsympathetic to Israel" and disputes Carter's claim that Israel is an apartheid state.).

continuing.¹⁷²

With a willing executive branch in place, the legislative branch's strong desire¹⁷³ to take decisive action against the Arab League Boycott was reinvigorated and legislative efforts to resurrect the stillborn amendments to the Export Administration Act began almost immediately upon President Carter's inauguration.¹⁷⁴ Between January and June of 1977, the House of Representatives and Senate worked their way through the technical aspects of the nascent legislation, dealing with issues such as the duration of waivers and availability of exemptions,¹⁷⁵ and by late June a bill emerged from Congress ready for consideration by the President.¹⁷⁶ On June 22, 1977, President Carter signed the bill into law. In his public statement upon signing the EAA Anti-Boycott law, President Carter proclaimed:¹⁷⁷

For many months I've spoken strongly on the need for legislation to outlaw secondary and tertiary boycotts and discrimination against American businessmen on

172. *October 6, 1976 Presidential Debate*, COMM'N ON PRESIDENTIAL DEBATES, <http://www.debates.org/index.php?page=october-6-1976-debate-transcript>.

173. On the Ford administration's reluctance to enact comprehensive anti-boycott legislation, then-Congressman Jonathan Bingham said, "I get a little bit tired of hearing the executive departments say that they are opposed to the boycott and the opposition does not translate itself into much action." *Discriminatory Arab Pressure on U.S. Business: Hearing Before the H. Subcomm. on Int'l Trade and Commerce of the H. Comm. on Int'l Relations*, 94th Cong. 110 (1975).

174. SARNA, *supra* note 12, at 100–01 ("The 95th Congress lost no time in resuming consideration of the anti-boycott legislation. In the space of one week from January 4 to 10, 1977, five such bills were introduced.").

175. *Id.* at 101–02.

176. David Cain, *International Business Communication and Free Speech: Briggs and Stratton v. Baldrige*, 9 B.C. INT'L & COMP. L. REV. 131, n.55 (1986) ("The Senate Banking Currency and Housing Committee adopted the bill 90–1 (123 Cong. Rec. 13812 (May 5, 1977)), while the appropriate House Committee adopted the bill by a vote of 364–43 (123 Cong. Rec. 11450 (April 20, 1977)). The Conference Report was adopted by voice vote of the Senate (123 Cong. Rec. 17832 (June 7, 1977)) and by a vote of 306–41 in the House (123 Cong. Rec. 18382 (June 10, 1977)). See also Export Administration Amendments of 1977, Pub. L. No. 95–52, 91 Stat. 235 (1977) (amending the Export Administration Act of 1969).

177. *Export Administration Amendments of 1977, Remarks on Signing H.R. 5840 Into Law* (June 22, 1977), <http://www.presidency.ucsb.edu/ws/index.php?pid=7704>.

religious or national grounds My concern about foreign boycotts stemmed, of course, from our special relationship with Israel, as well as from the economic, military and security needs of both our countries. But the issue also goes to the very heart of free trade among all nations. I am, therefore, particularly pleased today to sign into law the 1977 amendments to the Export Administration Act, which will keep foreign boycott practices from intruding directly into American commerce. The new law does not threaten or question the sovereign right of any nation to regulate its own commerce with other countries, nor is it directed toward any particular country. **The bill seeks instead to end the divisive effects on American life of foreign boycotts aimed at Jewish members of our society.** If we allow such a precedent to become established, we open the door to similar action against any ethnic, religious, or racial group in America.¹⁷⁸

President Carter's admonition against bigoted foreign boycotts could easily be applied to the BDS Movement's activities today.

The EAA Anti-Boycott Law, as enacted,¹⁷⁹ is among the most straightforward and comprehensible examples of federal legislation extant. It is logically ordered with a minimum of internal or external cross references, fairly short in length, and unadorned by complicated or counterintuitive defined terms.¹⁸⁰ Though the EAA Anti-Boycott Law has statutorily lapsed by its own terms pursuant to its sunset provision, as the Congressional Research Service Report states, "its provisions are continued under the authorization granted to the President in the National Emergencies Act and the International Economic Emergency Powers Act, most recently under Executive Order 13222 signed August 17, 2001."¹⁸¹ Under this authority, the provisions of the

178. *Id.* (emphasis added).

179. The EAA Anti-Boycott Law was subsequently reenacted without alteration in the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified at 50 U.S.C.A. §§ 4601-4623 (Westlaw through Pub. L. No. 114-244)).

180. Only eight terms were defined in the law: "person," "United States person," "good," "technology," "export," "controlled country," "United States," and "Secretary." 50 U.S.C.A. § 4618 (Westlaw through Pub. L. No. 114-244).

181. WEISS, *supra* note 18, at 5. Executive Order 13222 was amended by

EAA Anti-Boycott Law remain in effect as though its sunset provisions had not yet become effective.

The law directed the President to issue regulations that would effectuate its provisions—to wit, the law first prohibits:

[A]ny United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any [of the enumerated] actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation.¹⁸²

The prohibited actions under the law include:

- Refusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country
- Refusing, or requiring any other person to refuse, to employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person.
- Furnishing information with respect to the race, religion, sex, or national origin of any United States person or of any owner, officer, director, or employee of such person.
- Furnishing information about whether any person

President Barack Obama on March 8, 2013 in Executive Order 13637. Exec. Order No. 13637, 78 Fed. Reg. 49, 16129 (Mar. 13, 2013). The 2013 amendments did not affect the EAA Anti-Boycott Law's operative provisions. For a further discussion on the current status of the law and its regulations see *infra* Part I.B.

182. 50 U.S.C.A. § 4607(a)(1) (Westlaw through Pub. L. No. 114–244).

has, has had, or proposes to have any business relationship (including a relationship by way of sale, purchase, legal or commercial representation, shipping or other transport, insurance, investment, or supply) with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country. . . .

- Furnishing information about whether any person is a member of, has made contributions to, or is otherwise associated with or involved in the activities of any charitable or fraternal organization which supports the boycotted country¹⁸³

There are a number of exceptions provided for in the law, but they are all of a non-substantive and technical nature and do not diminish the law's general prohibition on United States entities and individuals from refusing to do business with a boycotted country that is protected by the law.¹⁸⁴ Importantly, while the

183. § 4607(a)(1)(A)–(F) (Westlaw).

184. § 4607(a)(2)(A)–(F) (Westlaw) provides the following exceptions to the law:

(A) complying or agreeing to comply with requirements (i) prohibiting the import of goods or services from the boycotted country or goods produced or services provided by any business concern organized under the laws of the boycotted country or by nationals or residents of the boycotted country, or (ii) prohibiting the shipment of goods to the boycotting country on a carrier of the boycotted country, or by a route other than that prescribed by the boycotting country or the recipient of the shipment;

(B) complying or agreeing to comply with import and shipping document requirements with respect to the country of origin, the name of the carrier and route of shipment, the name of the supplier of the shipment or the name of the provider of other services, except that no information knowingly furnished or conveyed in response to such requirements may be stated in negative, blacklisting, or similar exclusionary terms, other than with respect to carriers or route of shipment as may be permitted by such regulations in order to comply with precautionary requirements protecting against war

EAA Anti-Boycott Law explicitly preempts state laws that purport to govern the same subject matter as the EAA Anti-Boycott Law,¹⁸⁵ the law also explicitly states that it does not “supersede or limit the operation of the antitrust or civil rights laws of the United States.”¹⁸⁶ This is an important proviso, as prior to the enactment of the EAA Anti-Boycott Law the United States had used antitrust laws against the Arab League Boycott and those laws, and others, may still be used to prosecute those who participate in the secondary and tertiary boycotts of Israel.¹⁸⁷ The EAA Anti-Boycott Law has survived a number of legal challenges, including claims that its application violates First and Fifth Amendment rights.¹⁸⁸

risks and confiscation;

(C) complying or agreeing to comply in the normal course of business with the unilateral and specific selection by a boycotting country, or national or resident thereof, of carriers, insurers, suppliers or services to be performed within the boycotting country or specific goods which, in the normal course of business, are identifiable by source when imported into the boycotting country;

(D) complying or agreeing to comply with export requirements of the boycotting country relating to shipments or transshipments of exports to the boycotted country, to any business concern of or organized under the laws of the boycotted country, or to any national or resident of the boycotted country;

(E) compliance by an individual or agreement by an individual to comply with the immigration or passport requirements of any country with respect to such individual or any member of such individual’s family or with requests for information regarding requirements of employment of such individual within the boycotting country; and

(F) compliance by a United States person resident in a foreign country or agreement by such person to comply with the laws of that country with respect to his activities exclusively therein, and such regulations may contain exceptions for such resident complying with the laws or regulations of that foreign country governing imports into such country of trademarked, trade named, or similarly specifically identifiable products, or components of products for his own use, including the performance of contractual services within that country, as may be defined by such regulations.

185. § 4607(c) (Westlaw).

186. § 4607(a)(4) (Westlaw).

187. See FEILER, *supra* note 15, at 164 (describing the prosecution of the Bechtel Corporation in 1977, “which established the general principle that compliance with the tertiary boycott constituted a violation of US antitrust laws . . .”).

188. See, e.g., *Briggs & Stratton Corp. v. Baldrige*, 782 F.2d 915 (7th Cir. 1984) (finding that boycott participation is not protected speech); *Trane Co. v.*

B. *The BDS Movement Under the EAA Anti-Boycott Law*

The EAA Anti-Boycott Law was enacted in response to the Arab League Boycott, but its reach was significantly broader than just that boycott. The EAA Anti-Boycott Law prohibits compliance with *any* boycott by a foreign country of a friendly country.¹⁸⁹ But does that mean that the BDS Movement is subject to the law? This section will examine that question.

In discerning the meaning and permissible application of the provisions of a statute, the United States Supreme Court, in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, developed the following two-part test:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹⁹⁰

With the question of whether the EAA Anti-Boycott Law applies to the BDS Movement, we have a question as to the meaning of a statute where the responsible agency's

Baldrige, 552 F. Supp 1378 (W.D. Wis. 1983) (finding that the EAA Anti-Boycott Law does not violate the First, Fifth, and Ninth Amendments and, in particular, that the governmental interest in conducting foreign policy through legislation such as the EAA Anti-Boycott Law is substantial and the law directly advances the government's interests). Note, however, that one court has found that there is no private right of action available for violations of the EAA Anti-Boycott Law. *See Israel Aircraft Indus. Ltd. v. Sanwa Bus. Credit Corp.*, 16 F.3d 198 (7th Cir. 1994). Whether other circuit courts would follow this holding (and whether the Supreme Court would uphold the result) remains an open question. *See also* Cain, *supra* note 176, at 140 (noting at n.79 that while there may be a private right of action exemption in the law for some purposes, that exemption may not exist for other types of claims).

189. § 4607(a)(1) (Westlaw).

190. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

interpretation thereof is silent, which is a slightly different scenario than the typical *Chevron* case where an agency's application of a law to certain parties is being challenged. Nonetheless, the core issue of statutory interpretation remains, so the two-part *Chevron* test should apply to such a question.¹⁹¹

Only the first part of the *Chevron* test need be applied, since Congress has directly addressed the precise question of whom or what the boycott prohibition applies to: any unsanctioned boycott imposed or fostered by a foreign country against a country friendly to the United States. Under the first prong of the *Chevron* test, the issue is how to properly define the operative statutory terms "impose," "foster," and "foreign country." Conveniently, *Chevron* provides the answer to that question: "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."¹⁹² The "traditional tools of statutory construction" include the "statute's text, structure, purpose, and legislative history."¹⁹³

A fundamental canon of legal interpretation, known as the "ordinary-meaning rule," states that "the words of a statute are to be taken in their natural and ordinary signification and import . . ."¹⁹⁴ In looking at the ordinary meaning of words, one looks at "what the text says and fairly implies."¹⁹⁵ Applying this canon to the remarkably clear and concise text of the EAA Anti-Boycott Law, one finds that the law prohibits any individual or entity in the United States from refusing to do business with an entity or individual from a friendly country that is the subject of a foreign boycott.

The ordinary meaning of the EAA Anti-Boycott Law shows that if there is a boycott against a country that is friendly to the United States, and that boycott is foreign in origin, Americans may not participate in that boycott if one of two conditions is met:

191. Some would argue that under *Chevron*, the Commerce Department not only can, but must, enforce the EAA Anti-Boycott Act against the BDS Movement.

192. *Chevron*, 467 U.S. at 843, n.9.

193. *Ariz. Pub. Svc. Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000) (citing *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984)).

194. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69 (2012) (citing JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (1826)).

195. *Id.* at 16.

either the boycott is “imposed” by a “foreign country” or it is “fostered” by a “foreign country.”¹⁹⁶ Notwithstanding the fact that each of these three terms has a common meaning, in order to understand the scope of the prohibited activity under the EAA Anti-Boycott Law we must analyze each term as it is used in the context of the law so that we may see what the text “fairly implies.”

This Article will first examine the two terms that have not been subject to conflicting definitions, “imposed” and “fostered,” and then it will examine the source of the conflicting definitions for the third term, “foreign country,” and present a reasoned definition of that term.

1. The Meanings of “Imposed” and “Fostered”

The EAA Anti-Boycott Act does not define either “imposed” or “fostered” and neither term is known to be a legal term of art,¹⁹⁷ so we must resort to the common dictionary definition of these terms. The *Merriam Webster Dictionary* defines “imposed” as “to cause (something, such as a tax, fine, rule, or punishment) to affect someone or something by using your authority.”¹⁹⁸ *Black’s Law Dictionary*, an authoritative legal dictionary relied upon by federal courts in the United States, has a substantially similar definition.¹⁹⁹

196. 50 U.S.C.A. § 4607(a)(1) (Westlaw through Pub. L. No. 114–244).

197. SCALIA & GARNER, *supra* note 194, at 75 (discussing the need to consult law dictionaries to discern meaning of a word or phrase before resorting to a “nonscholarly dictionary.”) In certain circumstances, the Dictionary Act, 1 U.S.C. § 1, defines ordinarily used terms in statutes, but the Dictionary Act does not define either of the terms discussed here. *Id.*

198. MERRIAM WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/imposed>.

199. BLACK’S LAW DICTIONARY 824 (9th ed. 2009) [hereinafter BLACK’S 9th ed.]. Shortly after the EAA Anti-Boycott Law was enacted in 1977 the 5th edition of *Black’s Law Dictionary* was published. Though the 5th edition is not authoritative at the time of the writing of this Article, because it was the current edition at the time that the EAA Anti-Boycott Law became effective I have compared definitions in the two editions when citing to *Black’s* herein. In no instance was there a substantive difference between any of the defined terms to the extent that it would have changed the conclusions reached herein, though there were, of course, stylistic and immaterial differences. For example, in the case of the word “impose,” BLACK’S 9th ed. defined the word as “[t]o levy or exact (a tax or duty)” while the 5th edition used the definition “[t]o levy or exact as by authority; to lay as a burden, tax, duty or charge.” BLACK’S LAW DICTIONARY 680 (5th ed. 1979) [hereinafter BLACK’S 5th

For a foreign country to be able to impose a boycott on someone or something, it would need to have authority over that person or thing. By way of example, a foreign country could issue a decree that none of its citizens shall do business with XYZ Corporation, a company that has operations in Israel. In this case, the foreign country has imposed a boycott. If a citizen of the foreign country were to be resident in the United States, since that citizen is still subject to the jurisdiction and laws of his or her home country, the boycott would be imposed on that person. That citizen, if he or she defied the decree of his or her country of citizenship and purchased the products of XYZ Corporation, could be subject to the penalties imposed by the foreign country, such as imprisonment or monetary fines. But for any United States citizen or resident who owes no allegiance to that foreign country or otherwise is not subject to its jurisdiction, business dealings with XYZ Corporation have no consequence; the foreign country's boycott could not be said to have been imposed on the United States person.²⁰⁰

The word "fostered," however, has a much broader meaning. *Merriam Webster's Dictionary* defines foster as "to promote the growth or development of" and lists as synonyms "advance, cultivate, encourage, forward, further, incubate, nourish, nurse, nurture, [and] promote."²⁰¹ There is no *Black's Law Dictionary* definition for "fostered." The ordinary meaning of "fostered," therefore, is to encourage or promote something, whether or not the foreign entity has authority to compel action by the individuals or entities that are the intended audience.

Since the principle proponent for a restrictive reading of the EAA Anti-Boycott Law, the National Lawyers Guild,²⁰² has been silent on the meaning of the term "fostered or imposed by," there is no other known interpretation in the context of the EAA Anti-

ed.]. While there are stylistic differences between the two definitions, one definition does not contradict the other.

200. Arguably, however, if the United States citizen sought to do business with the foreign country, the foreign country could prevent the business relationship from being consummated. This would be an extraterritorial imposition of the boycott on a United States citizen.

201. MERRIAM WEBSTER DICTIONARY, *supra* note 198.

202. See *infra* Part II.B.3 for a full discussion of the National Lawyers Guild legal memorandum, which is the primary source of the erroneous opinion that the EAA Anti-Boycott Law only applies to boycotts that are directly imposed by a foreign government.

Boycott Law that is contrary to the dictionary definitions of these words. Nonetheless, to ensure that there is a proper understanding of these prefatory words in the EAA Anti-Boycott Law, it is important to go beyond the obvious meaning of the words to determine whether a contrary meaning could have been intended.

2. *“Imposed” or “Fostered by” in the Context of the EAA Anti-Boycott Law*

In the context of the EAA Anti-Boycott Law, while the United States respected the autonomy of any foreign entity that desired to engage in a primary boycott of Israel (for example, the government of Syria refusing to buy wheat grown by Israeli farmers), it also sought to insulate American individuals and companies from any attempt to embroil them in the Arab world’s war against Israel.²⁰³

a. *Background: The Use of Similar Terms in Earlier Congressional Debates*

In the House Boycott Report, commissioned in late 1976 to examine the reach of the Arab League Boycott on United States’ interests, a subcommittee of the House of Representatives’ Committee on Interstate and Foreign Commerce concluded that the Arab League Boycott was having far reaching and harmful effects. In response, the House Committee recommended that the existing anti-boycott law should be “amended to prohibit all agreements to refrain from doing business (a) with a foreign country friendly to the United States or (b) with a company or supplier boycotted by a foreign concern, thereby furthering a foreign imposed boycott or restrictive trade practice.”²⁰⁴

Though the terms “foreign imposed” and “foreign concern” were not used in the EAA Anti-Boycott Law, an examination of how they were used in the House Boycott Report, the precursor to the EAA Anti-Boycott Law, sheds important light on the objectives of the law. The House Boycott Report presumably uses the terms

203. HOUSE BOYCOTT REPORT, *supra* note 144, at 13 (“Major factors in this drive for anti-boycott legislation were concerns about religious discrimination and U.S. support for Israel as well as the concern that foreign concerns should not be allowed to dictate American business practices.”).

204. *Id.*

“foreign concern” and “foreign imposed boycott” to refer to the same thing: the source of the boycotts. The term “foreign country,” however, clearly means the boycotted, rather than the boycotting, country.²⁰⁵

The House Boycott Report’s identification of boycotts by a “foreign concern” and “foreign imposed boycott[s]” must be read in line with another canon of statutory interpretation, the “Presumption of Consistent Usage.”²⁰⁶ Under this canon, if there is a document that “has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea. If it says *land* in one place and *real estate* later, the second provision presumably includes improvements as well as raw land.”²⁰⁷ Thus, the House Boycott Report’s use of “foreign concern” and “foreign imposed” in the text quoted above must be read in a way that each of the different formulations has its own specific meaning.

The term “foreign concern” refers to the parties engaging in the boycott. The drafters understood that boycotts that were the subject of the proposed anti-boycott law originated from and were enforced by more than just foreign governments. The primary focus of the proposed legislation was the Arab League Boycott and Congress knew that neither the Arab League nor Palestine was a recognized state, yet both were instrumental in the boycott’s operations. Congress also knew that the Arab League called upon a host of non-governmental actors to carry out its boycott of Israel. Consequently, a “foreign concern” should be read to mean any foreign source of support or promotion for the boycott of a friendly country.

This interpretation also logically explains why “foreign imposed” boycott was used later in the sentence, as it was intended to encompass any foreign boycott that was enforced under authority, such as by a state. By way of example, the BDS Movement’s boycott can be considered a boycott of a friendly foreign country (Israel) by a foreign **concern** (the BDS Movement) that furthers a foreign **imposed** boycott (the boycott imposed by states and other entities pursuant to the Arab League Boycott).

205. For its meaning in the context of the EAA Anti-Boycott Law, the term “foreign country” is examined in depth *infra* Part II.B.3.

206. SCALIA & GARNER, *supra* note 194, at 170.

207. *Id.* (emphasis added).

The foregoing is primarily an aside, since the House Boycott Report is not the controlling document for purposes of interpreting the EAA Anti-Boycott Law. The House and Senate debates discussed *infra* provide legislative and world history that is closer in time to the enactment of the law. Nonetheless, the House Boycott Report is helpful in understanding the missing context for the “fostered or imposed” language: Congress was concerned with boycotts originating outside of the United States, and even if one gives “foreign concern” and “foreign imposed” distinct meanings, neither limits the applicability of the law’s prohibition solely to boycotts initiated by a foreign government.

b. *The Policy Goal of Including “Imposed” or “Fostered” in the EAA Anti-Boycott Law*

The more important prong of the “imposed or fostered” predicate is clearly the “fostered” element. While there are certainly cases where a foreign country would have the authority to impose its will on its subjects in the United States, the cases of this are relatively infrequent and, for the most part, were not the problem that Congress sought to address. Rather, Congress focused on American citizens and businesses that would be targeted by foreign concerns that could only indirectly dictate compliance with a boycott through economic coercion.

Furthermore, while individual Arab League countries promulgated rules and regulations to implement the Arab League Boycott, the boycott at a more conceptual level was not one that originated from any individual member country. The individual countries were simply the political subdivisions within the Arab League that could “impose” the provisions of the Arab League Boycott on their respective citizens and companies. The boycott as a weapon to be used against Israel, however, was conceived by and existed (and continues to exist) above the country level, at the Arab League itself. Consequently, the boycott is implemented in non-Arab League entities through various Arab League affiliates, such as the BDS Movement, that “foster” the boycott’s secondary and tertiary elements. This is why the term “fostered” was used in the EAA Anti-Boycott Law’s description of the type of boycotts that were to be prohibited.

The House Boycott Report also examined the non-state elements of the Arab League Boycott in considerable detail and

concluded that they were as much the target of the proposed anti-boycott law as state actors were. One area of focus in the House Boycott Report was the various United States-Arab chambers of commerce that were located in major United States cities. While these organizations were described as being incorporated entities, each independent from the other and with no Arab League membership status, the House Boycott Report described them as raising “unique issues regarding the Arab boycott and its impact on U.S. laws and business practices.”²⁰⁸ In particular, the House Boycott Report found that the non-governmental organizations such as the chambers of commerce served “to carry out the interests and policies of foreign governments” in enforcing the Arab League Boycott and stated that their actions were “in contravention of expressed U.S. policy”²⁰⁹

From this history it becomes clear that the entire apparatus of the boycott machine, not just the governments that had the legal power to impose penalties for noncompliance with the boycott, was the subject of the proposed legislation. A non-state actor on its own can only sanction its own members for unauthorized activities, but when a non-state actor serves as a promoter of an activity, such as a boycott, and acts in coordination with facially independent governmental entities that have the legal authority as a sovereign to impose penalties and punishment on those who do not comply, the reach of the governmental entities is dramatically expanded.

The only logical explanation for the use of the term “fostered by” in the Congressional reports and hearings prior to the enactment of the EAA Anti-Boycott Law is that Congress always meant to include both non-state entities, such as the Arab League, and subordinate non-governmental entities, such as chambers of commerce or organizations like the BDS Movement, as well as governments, within the scope of the law. Excluding non-state actors, such as the Arab League, from the reach of the EAA Anti-Boycott Law would have been utterly nonsensical and would have hindered, if not absolutely undermined, the efficacy of the law. In addition, as discussed *infra*, this type of exclusion would clearly contradict the meaning of the term “foreign country” as it was ultimately included in the EAA Anti-Boycott Law.

208. HOUSE BOYCOTT REPORT, *supra* note 144, at 43.

209. *Id.*

Such a result would violate the canon of statutory interpretation known as the “Presumption against Ineffectiveness,” which states that there is a presumption that a textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored.²¹⁰ The EAA Anti-Boycott Law’s purpose is clear on its face. It was enacted to prevent foreign concerns (which includes states as well as non-state actors) from using United States individuals and businesses to further boycotts against countries that are friendly to the United States and, in particular, to counter the imposition of the secondary and tertiary aspects of the Arab League Boycott in the United States. An interpretation of the EAA Anti-Boycott Law that exempts boycotts fostered by non-state actors would clearly obstruct the purpose of the law.

Supreme Court Justice Antonin Scalia explained the Presumption against Ineffectiveness through a well-known 19th century case.²¹¹ In that case, a statute imposed a tax on private companies based on number of shares of the company’s capital stock above a certain numerical threshold.²¹² The company that was subject to the tax argued that the statute’s language referred to the number of shares of stock that it could issue, rather than the number that it had actually issued.²¹³ The Court rejected this argument, pointing out that a company could evade taxation simply by authorizing an astronomically large number of shares without changing the number of shares that were actually issued.²¹⁴ Justice Scalia concluded that such an absurd result, which undermined the clear purpose of the statute, violated the Presumption against Ineffectiveness.²¹⁵ A claim that foreign foes of Israel could evade the reach of the EAA Anti-Boycott Law by simply interposing a non-state entity to promote the boycott would be an equally absurd result. Yet, this is the exact claim that has been made by legal groups providing the BDS Movement with cover for its unlawful boycott activities.

Notwithstanding the Presumption against Ineffectiveness and the House Boycott Report’s explicit language, in the next section

210. SCALIA & GARNER, *supra* note 194, at 63–65.

211. *Id.* at 64.

212. *Id.*

213. *Id.*

214. *Id.* at 64–65.

215. *Id.* at 63–65.

this Article will assume, hypothetically, that the term “fostered by” cannot be read to require that non-state actors must be included within the scope of the EAA Anti-Boycott Law’s provisions. Even with the established understanding of the term “fostered by” so bastardized, a more persuasive argument in favor of reaching the conclusion that non-state actors are covered by the provisions of the EAA Anti-Boycott Law exists.

3. What is a Foreign Country? Smoke, Mirrors, and the National Lawyers Guild’s Defense of the BDS Movement

With two of the three definitional hurdles now resolved, the missing piece of the interpretative puzzle is the proper definition of the term “foreign country” within the context of the EAA Anti-Boycott Law. Before examining the meaning of the term “foreign country,” this Article will first explain why the interpretative question exists. The National Lawyers Guild (NLG), a United States legal advocacy organization, has publicly disseminated a memorandum (NLG Opinion) supporting the BDS Movement’s legality under, *inter alia*, the EAA Anti-Boycott Law.²¹⁶ At the time of the publication of this Article, no other legal organization or authority in the United States was known to have issued any such legal guidance on the topic of the BDS Movement’s status under the EAA Anti-Boycott Law. Thus, to the extent those participating in the BDS Movement or complying with its boycott activities in the United States have relied on any publicly available guidance in support of their activities, the NLG Opinion is likely the source of that guidance.²¹⁷

The NLG Opinion provides no legislative background on the EAA Anti-Boycott Law nor does it examine the background of the Arab League Boycott or the BDS Movement (other than to erroneously state that the BDS Movement is not acting in “concert

216. *Impact of Federal Anti-Boycott and Other Laws on BDS Campaigns*, NAT’L LAWYERS GUILD INT’L COMM. (Oct. 2009), http://www.nlginternational.org/report/NLG_BDS_legal_memo.pdf [hereinafter NLG Opinion].

217. While the NLG Opinion states that it is a draft and individuals should seek the advice of an attorney if they want specific legal advice on boycott activities, it has been cited by a number of organizations that participate in the BDS Movement. *See, e.g., The Legality of Academic Boycott: Frequently Asked Questions*, CTR. FOR CONST. RTS. 3, https://www.ccrjustice.org/files/FAQonLegalityofBoycott_1.10.14_FINAL_SH.pdf; *see also* NLG Opinion, *supra* note 216.

with the Arab League’s boycott of Israel . . .”).²¹⁸ Rather, it jumps to a conclusory observation that limits its reach solely to boycotts initiated by foreign governments:

[BDS Movement activities are not prohibited under the EAA Anti-Boycott because the EAA Anti-Boycott Law] specifically defines an “unsanctioned” foreign boycott as one that is “fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation.” A boycott against the State of Israel or an Israeli company or concern would be prohibited under the EAA only if the boycott is specifically intended to support or comply with boycotts initiated by foreign countries. The phrase “foreign country” refers to the official government of the country and does not encompass NGOs.²¹⁹

The NLG Opinion contains a number of materially misleading statements. First, neither the EAA Anti-Boycott Law nor 15 C.F.R. part 760—the regulations that implement the EAA Anti-Boycott Law—(Regulations)²²⁰ limit “foreign country” to mean only the official government of a country.²²¹ Further, the NLG Opinion limits prohibited boycotts to those “initiated by foreign countries.” The plain language of the EAA Anti-Boycott Law and the Regulations, however, contains no such limitation. While “initiated” may be a synonym for “imposed,” the NLG Opinion’s use of “initiated” effectively strips the term “fostered” out of the text of the law. The EAA Anti-Boycott Law prohibits boycotts that are “fostered” by foreign countries. This means any foreign boycott that is promoted, not just initiated, by a foreign country.²²²

An example will demonstrate the significance of the NLG Opinion’s misdirection. Assume for purposes of this hypothetical that the BDS Movement is not a foreign country under any legal standard. Further, assume that the BDS Movement is the entity that has initiated a boycott of Israel and that boycott is being

218. See NLG Opinion, *supra* note 216.

219. *Id.* at 1.

220. 15 C.F.R. pt. 760 (Westlaw) [hereinafter Regulations].

221. *Id.*

222. *Supra* Part I.B.1.

promoted in the United States by companies and officials from Syria, but Syria did not initiate the boycott. Under the NLG Opinion's "initiated by foreign countries" standard, neither the BDS Movement's boycott nor Syria's boycott promotion would be subject to the EAA Anti-Boycott Law because the boycott was initiated by the BDS Movement, rather than Syria. Given the text, history, and purpose of the law, this result would clearly be illogical, and, yet, it is the NLG Opinion's conclusion.

The NLG Opinion also deceptively states:

[I]t is our opinion that the [EAA Anti-Boycott Law's] anti-boycott provisions cannot lawfully be enforced unless the EAA [Anti-Boycott Law] is reenacted by Congress. Presidential Executive Orders purport to continue the [EAA Anti-Boycott Law], but this is, in our opinion, dubious authority for imposing sanctions for violation of the anti-boycott provisions.²²³

It is exceedingly unlikely that any court would rule that the continuation of the EAA Anti-Boycott Law and the Regulations are without proper authority. The continuation of the law was effected pursuant to a series of presidential executive orders (Executive Orders) explicitly provided for under congressional authorization contained in the International Emergency Economic Powers Act (IEEPA).²²⁴ The IEEPA provides the President with discretionary authority to promulgate regulations covering a wide range of matters regarding commerce and foreign affairs, and it has been cited as authority under each Executive Order issued to continue the EAA Anti-Boycott Law and Regulations.²²⁵

The NLG Opinion presents no challenge as to the enforceability of the IEEPA, and the Executive Orders that have continued the EAA Anti-Boycott Law's provisions have never been questioned as to form or effect. The powers granted to and exercised by numerous presidents under the IEEPA are likely a political question²²⁶ that should be resolved by the legislative and

223. NLG Opinion, *supra* note 216, at 2.

224. Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C.A. §§ 1701-1707 (Westlaw through Pub. L. No. 114-244)).

225. *Id.*

226. *See, e.g.,* Goldwater v. Carter, 444 U.S. 996, 997 (1979) (holding that "[t]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups, or

executive branches. The United States Supreme Court has ruled that “[w]here a statute . . . commits decision making to the discretion of the President, judicial review of the President’s decision is not available.”²²⁷ The IEEPA gives the President discretion to continue the EAA Anti-Boycott Law.

The Executive Orders explicitly state that the provisions of the EAA Anti-Boycott Law shall continue in full force and effect. No court has ever taken any action or rendered any decision validating the NLG Opinion’s conclusion that there is no valid authority to enforce the EAA Anti-Boycott Law. As such, unless Congress enacts superseding provisions to the IEEPA that eliminate the President’s authority to continue laws that may have lapsed or acts to supersede the EAA Anti-Boycott Law itself, the EAA Anti-Boycott Law—with the terms and provisions that existed on its sunset date in 2001—should be considered fully effective.

The question of which entities are subject to the EAA Anti-

even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.”). Congress has chosen to not take any action in response to use of Presidential authority under the IEEPA by successive administrations to extend the effectiveness of the EAA Anti-Boycott Law. If Congress had considered this use of the IEEPA to be an unauthorized expansion of the powers granted therein, Congress could have amended the IEEPA to explicitly limit that exercise of Executive authority. No Congress has ever done so. It would be extremely unusual for the Judiciary to step in to a matter that has been sanctioned by both other branches of government. In fact, a 2001 report from the Ways and Means Committee of the House of Representatives detailed the many times that Presidential authority under the IEEPA has been used, generally, and with regard to the extension of the EAA Anti-Boycott Law specifically. H. COMM. ON WAYS AND MEANS, OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES, 107TH CONG., WCMP 107–4, at 210 (2001). It would be anomalous for Congress to chronicle the use of the IEEPA over such an extended period of time without amending the law, were it to have disagreed with the Executive’s use of the law. *But cf.* *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (finding that a statutory right to identify Jerusalem as part of Israel on a United States passport is not a political question).

227. *Dalton v. Specter*, 511 U.S. 462, 477 (1994); *but c.f.*, *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (finding a limit to the use of executive orders where there was an independent conflict between the exercise of grant of authority and another law). In the case of the continuation of the EAA Anti-Boycott Law, the IEEPA clearly grants the President discretion to provide for the continuation of this law, so *Dalton* would likely result in the court refusing to interfere with the President’s authority.

Boycott Law's prohibitions is another area of obfuscation in the NLG Opinion. The NLG Opinion only discusses official governments of a country (whose acts the NLG Opinion states are subject to the law) and non-governmental organizations (whose acts the NLG Opinion claims are not subject to the law).²²⁸ Though the NLG Opinion is silent on why it did not include other types of entities, the likely reason that it only discussed official governments and non-governmental organizations is that the NLG Opinion was focusing on the legality of the BDS Movement, which is known as a non-governmental organization. Yet, there is a wide gap between official governments, on the one hand, and non-governmental organizations, on the other hand.

Non-state actors, which include non-governmental organizations as well as intergovernmental organizations,²²⁹ fill part of this gap. The Arab League, as an intergovernmental organization, is a prime example of the type of non-state actor²³⁰ that was intended to be subject to the EAA Anti-Boycott Law. As the next section of this Article will demonstrate, contrary to the unfounded and patently absurd conclusion of the NLG Opinion, to the extent any non-state actor²³¹ qualifies as a representative of a

228. NLG Opinion, *supra* note 216.

229. For an overview of the types of entities that are considered to be non-state actors, see generally NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM (Richard A. Higgott et al. eds., 2000).

230. Professor Andrew Clapham, the first Director of the Geneva Academy of International Humanitarian Law and Human Rights and a former advisor to the United Nations, has defined non-state actors to include "any entity that is not actually a state, often used to refer to armed groups, terrorists, civil society, religious groups or corporations; the concept is occasionally used to encompass inter-governmental organizations [A] non-state actor can be any actor on the international stage other than a sovereign state . . ." ANDREW CLAPHAM, POSTCONFLICT PEACE-BUILDING: A LEXICON 200–12 (Vincent Chetail ed., Oxford University Press 2009).

231. While I have included citations to scholars who have attempted to define the term "non-state actors," the question is far from resolved. For purposes of this Article, non-state actor should be understood under the Andrew Clapham definition: any entity other than a sovereign state. While this may not be an appropriate definition for other purposes, such as the issue of the status of armed non-state actors under international law, it is appropriate to rebut the disjunctive approach of the NLG Opinion regarding the applicability of the EAA Anti-Boycott Law *vis à vis* "official governments" and all other entities/parties, a colloquial definition of "non-state actors" as "any entity that is not an official government" is appropriate. See, e.g., Noelle Higgins, *The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements*, 17 HUM. RTS. BRIEF 12–18 (2009).

foreign country, whether as a non-governmental organization, intergovernmental organization or other entity, it would be subject to the EAA Anti-Boycott Law.

a. *The Legal Meaning of “Foreign Country”*

The EAA Anti-Boycott Law does not define the term “foreign country,” nor does it include any provision that explicitly or implicitly excludes any type of non-state actors from its operation. While the Regulations contain the word “country” in over 700 separate instances, not one of them has any language that refers to the official government of a country comprising that country, nor is there any mention of, nor exclusions for, non-state actors.²³²

To arrive at its misleading and erroneous conclusion limiting the reach of the EAA Anti-Boycott Law, the NLG Opinion inserted a word into the EAA Anti-Boycott Law and Regulations that does not exist in either document: the term “governments.”²³³ The operative term that is used in the law is “foreign countries,” which is very broad.²³⁴ The anti-boycott prohibitions never were intended to be limited to only boycotts that are imposed or fostered by foreign governments.

There can be no serious debate over what the term “foreign” means in the context of the EAA Anti-Boycott Law: it is anything outside of the United States. The term “country,” however, does not have such an obvious definition. According to *Black’s Law Dictionary*, a country is “a nation or political state . . . the territory

232. Even if the Regulations did state that foreign countries are specifically foreign governments and not non-state actors, they would likely be found to be overly narrow under, *inter alia*, *Chevron*, since the EAA Anti-Boycott Law does not contain those limitations and the legislative history of the law clearly indicates that no such limitation was intended. The Regulations actually use the phrases “foreign government” and “foreign country” as distinct and unique terms. *See, e.g.*, Regulations, *supra* note 220, § 760.3(d)(18), *Examples of Suppliers of Services* (iii) (“A, a U.S. construction company, is hired by C, an agency of the *government* of boycotting *country* Y, to build a power plant in Y.”) (emphasis added). If a government is a country, the Regulations’ example would be redundant in referring to a government of a country. If the Regulations sought to limit the term “country” to mean only its “government,” it would have provided an appropriate definition for “foreign country” to limit the meaning in such a manner.

233. NLG Opinion, *supra* note 216.

234. Likewise, neither the EAA Anti-Boycott Law nor the Regulations make any exceptions for NGOs.

of such a nation or state".²³⁵ While a state is not synonymous with a government, a state is managed by its government²³⁶ and a fair reading of the word would require one to presume that a reference to a state is also a reference to that state's government.²³⁷

A "nation" on the other hand, has a different constituency according to *Black's Law Dictionary*. *Black's* defines a nation as "[a] large group of people having a common origin, language and tradition and usu. constituting a political entity."²³⁸ While a nation *may* also be a state²³⁹ it does not have to be a state. *Black's* notes that:

[A] nation is a group of people bound by a common history, common sentiment and traditions and, usually by common heritage. A state, on the other hand, is a society of men united under one government. **These two forms of society are not necessarily coincident.** A single nation may be divided into several states, and conversely, a single state may comprise several nations or parts of nations.²⁴⁰

235. BLACK'S 9th ed., *supra* note 199, at 404. BLACK'S 5th ed. defines a country as "[t]he territory occupied by an independent nation or people, or the inhabitants of such territory. In the primary meaning, 'country' denotes the population, the nation, the state or the government, having possession and dominion over a territory." BLACK'S 5th ed., *supra* note 199, at 316. In this definition, there is a clear use of the disjunctive with regard to a government and the other types of aggregations that can constitute a country, such as a group of people without a government representing them.

236. BLACK'S 9th ed., *supra* note 199, at 1537 (citing THEODORE D. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW § 36, at 34 (5th ed. 1878)).

237. BLACK'S 5th ed. explicitly defines a state as a people who exercise their sovereignty "through the medium of an organized government. . . ." BLACK'S 5th ed., *supra* note 199, at 1262.

238. BLACK'S 9th ed., *supra* note 199, at 1121. BLACK'S 5th ed. defines a nation, at its core, as having the same characteristics: "a people, or aggregation of men, existing in the form of an organized rural society, usually inhabiting a distinct portion of the earth, speaking the same language, using the same customs, possessing historic continuity, and . . . generally, *but not necessarily*, living under the same government and sovereignty." (emphasis added).

239. BLACK'S 9th ed., *supra* note 199, at 1121 (defining a nation-state as a nation that is coincident with a state).

240. *Id.* (emphasis added) (citing JOHN SALMOND, JURISPRUDENCE 136 (Glanville L. Williams ed., 10th ed. 1947)).

b. *The Term “Foreign Country” in Context*

The proper understanding of the EAA Anti-Boycott Act’s use of the term “foreign country” is that any boycott that is fostered or imposed by either (i) a foreign state (meaning a body of people acting through a sovereign government) **or** (ii) a foreign nation (meaning a body of people who share commonalities, but are not necessarily organized as a state or acting through a government) against a friendly country, is prohibited. Since a foreign nation is any group of people having commonality but not necessarily acting through a government,²⁴¹ the term “foreign country” may include non-state actors representing such people.

This is a far broader definition than was used in the NLG Opinion and it clearly does not exclude non-state actors of any nature.²⁴² A non-state actor, therefore, can be, and often is, a representative of a nation.²⁴³ The BDS Movement declared that it

241. If a group of people is acting through a government, they are properly termed a state, under the *Black’s Law Dictionary* definition. A group of people not acting through a government but having commonality would thus be properly termed a nation under the *Black’s Law Dictionary* definition. Without a government, a nation acts through its popular representatives, which is the case with the Palestinian Arabs and their representatives, which include the BDS Movement.

242. See *United Nations and the Rule of Law*, UNITED NATIONS, <https://www.un.org/ruleoflaw/> (last visited Sept. 9, 2016). Coincidentally, the United Nations refers to non-governmental organizations as “civil society organizations.” This is the same term that the BDS Movement uses in describing its Palestinian Arab origins. See *About Us*, BDS MOVEMENT, <https://bdsmovement.net> (last visited Sept. 9, 2016). A civil society is generally understood to refer to the social compact between individuals that is distinct from the political apparatus that governs a society; that is, a civil society may be a nation that actions outside of the constraints of a political system. A state, as *Black’s Law Dictionary* notes, is a political society, but it only governs to the extent that the civil society (i.e., the people who constitute a non-governmental nation) permits it to do so. See BLACK’S 9th ed., *supra* note 199, at 1537.

243. Obviously, not all non-state actors can be considered nations for purposes of the EAA Anti-Boycott Law. To be a nation, there must be a commonality at the core of the organization. Amnesty International and Wikimedia, two of the largest non-governmental organizations according to The Global Journal, would not properly be considered nations since they represent issue-oriented non-national causes. See NGO ADVISOR, <http://theglobaljournal.net/group/top-100-ngos/> (last visited Sept. 29, 2016). The BDS Movement, on the other hand, acknowledges that it is an aggregation of Palestinian Arabs working to further the goal of establishing a Palestinian Arab state in the future, which clearly meets the threshold criteria of having a common origin and tradition. There is no Palestinian

was formed by and speaks for Palestinian Arab civil society. In fact, the BDS Movement was founded upon the principle that it speaks for the entirety of the Palestinian Arab nation; to wit, the BDS Movement was formed by the agreement of the representatives constituting:

[T]he three major components of the Palestinian people: the refugees in exile, Palestinians under occupation in the West Bank and Gaza Strip and the discriminated Palestinian citizens of the Israeli state.²⁴⁴

The BDS Movement has said that these three components are to represent the entire Palestinian Arab civil society, which in turn, would *a fortiori* constitute a legal entity known as the Palestinian Arab nation.

Indeed, while other entities may claim to represent a portion

Arab state at the current time. The Palestinian Arab people, arguably a unique national identity, operate through non-state apparatuses that represent the Palestinian Arab nation. The BDS Movement, like Hamas, is one of those apparatuses and serves as a mechanism for the Palestinian Arabs to assert a right to self-determination. Non-state organizations are often, in fact, precursors to political states and the vehicle through which the political state is formed and founded. *See generally* DEVELOPMENT, NGOS AND CIVIL SOCIETY (Deborah Eade ed., 1st ed. 2000). The Palestinian Arab statehood journey is a case in point. To deny the representative status of a non-state actor is to deny the peoples' right to future political statehood. The fact that there are non-Palestinian Arabs who support the BDS Movement has no bearing on its representative status; there are non-Palestinian Arabs who support Hamas and Fatah, yet those two political organizations are accepted as representatives of a Palestinian Arab nation. The determinative factors are the origin of the organization (Palestinian Arab civil society) and its objectives (the establishment of a political state for the nation of Palestinian Arabs to supplant the political state of Israel for the nation of Jews). The determination of whether other non-state organizations are nations (and thus foreign countries) would clearly have to be made on a case-by-case basis for purposes of the EAA Anti-Boycott Law. It is important to note that the treatment of the BDS Movement as a representative of a foreign country under the EAA Anti-Boycott Law would not represent an American acknowledgement of Palestinian Arab statehood. Such recognition relates solely to the recognition of a government and political system; the EAA Anti-Boycott Law does not limit the definition of foreign countries to only those that are states. 50 U.S.C.A. § 4607 (Westlaw through Pub. L. No. 114–244).

244. *Palestinian BDS National Committee*, BDS MOVEMENT, <https://bdsmovement.net/bnc> (last visited Sept. 9, 2016). The language in the 2005 document calling for the initial formation of the BDS Movement states that “[t]he Palestinian political parties, unions, associations, coalitions and organizations [endorsing the document] represent the three integral parts of the people of Palestine: Palestinian refugees, Palestinians under occupation and Palestinian citizens of Israel.”

of Palestinian Arab political society, only the BDS Movement has claimed to represent all of the elements of the Palestinian Arab civil society, within Israel, in disputed territories and worldwide. Hamas may claim that it represents Palestinian Arabs in Gaza, and Fatah may claim that it represents Palestinian Arabs in the West Bank/Judea and Samaria, but those are mere fragments of the Palestinian Arab nation as a whole. If there is any representative of the Palestinian Arab nation, which was Balkanized by Hamas, Fatah, and even the Palestine Liberation Organization in the aftermath of the Oslo Accords, it is now the BDS Movement, which rests its legitimacy on the support of hundreds of smaller representatives of Palestinian Arab civil society.²⁴⁵ No other representative of the Palestinian Arabs makes a claim to such wide popular support. This is all in the context of the Palestinian Arab claim to statehood, based on the assertion that the Palestinian Arab people are a unique people with a common tradition and history.²⁴⁶ This assertion coincides with the legal definition of a nation and only the BDS Movement claims support of the whole of that nation.

Since a foreign country is, *inter alia*, any foreign nation, a foreign non-governmental organization like the BDS Movement that purports to represent the entirety of a distinct national identity would be considered the representative of that nation. For purposes of the EAA Anti-Boycott Law the BDS Movement, representing the Palestinian Arab nation, could therefore be a foreign country that imposes or fosters an illegal boycott.

The only explanation for the NLG Opinion's conclusion that

245. *Id.*

246. See Manuel Hassassian, *Historical Dynamics Shaping Palestinian National Identity*, 9 PALESTINE-ISRAEL J. OF POL., ECON. & CULTURE (2002). Hassassian, the Palestinian Authority's current diplomatic representative to the United Kingdom, argues that there is a distinct Palestinian Arab identity, one that became more established concurrent with the establishment of the State of Israel. See also PAPPE, *supra* note 11. The official position of the United States, is less clear. While the United States clearly considers the Palestinian Arabs to be a unique people, the United States neither recognizes a Palestinian Arab state nor supports the establishment of such a state at the present time. See, e.g., Jen Psaki, Spokesperson, *Daily Press Briefing*, U.S. DEP'T OF STATE (Oct. 3, 2014), <http://www.state.gov/r/pa/prs/dpb/2014/10/232550.htm> ("We believe international recognition of a Palestinian state is premature. We certainly support Palestinian statehood, but it can only come through a negotiated outcome, a resolution of final status issues, and mutual recognition by both parties.").

non-governmental organizations are not covered by the EAA Anti-Boycott Law is that the National Lawyers Guild relied upon wishful thinking, rather than the legal analysis, in reviewing the text of the statute. In fact, though, neither the law, nor the implementation of regulations, nor the dictionary definition of the term “country” limits the term to an “official government.” Nor can any of the foregoing be understood to do anything other than specifically include non-state actors within the scope of the anti-boycott law. While under some theories of statutory interpretation there would be no need for further review of the EAA Anti-Boycott Law (since the foregoing discussion settles any question as to the meaning of the statute’s text), other theories of statutory interpretation require that we review the reasons that the law was enacted and the intentions of those who drafted and debated it.²⁴⁷

c. Understanding the Meaning of “Foreign Country” Through the Congressional Debates on the EAA Anti-Boycott Law

Though the NLG Opinion does not discuss the legislative history of the EAA Anti-Boycott Law, it does note that the Commerce Department, as the agency responsible for implementation of the Regulations, refers to the prohibited boycotts as those that are “foreign boycotts” generally, but then dismisses this more general term without explanation.²⁴⁸ Far from being an isolated inconsistency, the term “foreign boycotts” appears 10 times in the Regulations.²⁴⁹ While the use of the term “foreign boycotts” may be inconvenient for the NLG Opinion’s conclusions, it is, in fact, critical to the understanding of the scope of the EAA Anti-Boycott Law.

The term “foreign boycott” reflects the Executive Branch’s rulemaking efforts to implement the Congressional goal of prohibiting any boycotts that originate from foreign sources, be they a state, a government or any other foreign entity that is

247. Though outside the scope of this Article, the theory of textualism holds that the text of the statute, without regard to any external factors, governs the implementation of the law. The theory of original intent, on the other hand, requires a review of the reason that a law was enacted to discern how to apply the law, which may result in an application of the law contrary to its plain language.

248. NLG Opinion, *supra* note 216, at n.1.

249. See 15 C.F.R. pt. 760 (Westlaw).

furthering the goals of a boycott against a country that is friendly to the United States. This is in line with the definition of “foreign country” as described in the preceding section of this Article.

The legal meaning of the term “foreign country” (as including non-governmental organizations), however, is not the only basis for concluding that the BDS Movement’s activities are subject to the EAA Anti-Boycott Law. Since the text of the EAA Anti-Boycott Law is the ultimate authority on the scope of its prohibitions²⁵⁰ and the law is broad on its face, the legislative history of the law can provide greater insight into any conflicts between the legal meaning of “foreign country” (as determined in the preceding section of this Article) and the intended scope of the law as it was enacted. While the general political climate in the early 1970s was dealt with in the section of this Article discussing the meaning of the EAA Anti-Boycott Law’s “fostered or imposed” language,²⁵¹ a more thorough examination of world events occurring at the time of the EAA Anti-Boycott Debates is necessary to understand the objectives of the law.

d. *The Globalization of the Arab/Israel Conflict: The Weaponization of Commerce as the Impetus for the EAA Anti-Boycott Law*

Though anti-boycott legislation had been the subject of Congressional discussion for decades, a perfect storm of global political events occurring in the early 1970s intensified the effort

250. In the federal system, Congress enacts legislation and an Executive Branch agency is responsible for implementing that law through regulations it writes to detail enforcement and other matters. A regulation written by an Executive agency cannot change the controlling legislation enacted by Congress, so while regulations can be drafted at the discretion of the responsible agency, they have to comport with and are limited by the contours of the legislation. As the Supreme Court recently stated, “[a]n agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always ‘give effect to the unambiguously expressed intent of Congress.’” *Util. Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2445 (2014). In order to determine whether regulations are within the scope of the law, courts often will review the legislative history of the law. Thus, while the EAA Anti-Boycott Law has lapsed, it and the regulations that are in effect pursuant to the executive orders are best understood by reference to the legislative history of the EAA Anti-Boycott Law under which they were developed.

251. *Supra* Part II.B.1.

to counteract what had become an economic and humanitarian crisis. On October 6, 1973, a coalition of Arab League members, led by Egypt and Syria, launched a multi-front surprise attack on Israel.²⁵² With the goal of destroying the State of Israel, precisely as first called for in the Arab League's foundational documents from the 1940s and as later codified in the "Three No's" Arab League policy from 1967,²⁵³ Arab League forces²⁵⁴ initially achieved overwhelming battlefield successes against Israel and were within days, if not hours, of accomplishing their goal of destroying Israel as a state.²⁵⁵ Israel was perilously close to depleting its remaining military supplies and issued repeated requests to the United States for immediate shipments of replacement materiel. Though it had initially resisted Israel's requests, the United States began a significant airlift of military equipment to Israel that, by the time it was completed on October 14, 1973, had "played a decisive role in preventing the defeat of Israel."²⁵⁶

United States' intervention in support of Israel was seen as a declaration of war against the Arab League.²⁵⁷ The PLO called for all Arab oil producing nations to suspend the production of oil that would be exported to the United States, and Iraq quickly

252. Yom Kippur War, HISTORY, <http://www.history.com/topics/yom-kippur-war> (last visited Sept. 24, 2016).

253. See *Khartoum Resolution*, *supra* note 115.

254. In addition to Egypt and Syria, participants in the Arab League military coalition included Algeria, Iraq, Jordan, Kuwait, Lebanon, Morocco, Saudi Arabia and Tunisia.

255. See, e.g., ABRAHAM RABINOVICH, *THE YOM KIPPUR WAR: THE EPIC ENCOUNTER THAT CHANGED THE MIDDLE EAST* 322 (2004) (describing Israeli ambassador to the United States being ordered by Israeli Prime Minister Golda Meir to urgently request arms shipments from the United States on the third day of the war with the admonition "Call Kissinger now. Tomorrow may be too late."). Israeli General Moshe Dayan stated at approximately the same time "this is the end of the third temple," a reference to the destruction of Israel, on the third day of the war. *Violent Week: The Politics of Death*, TIME (Apr. 12, 1976).

256. Chris J. Krisinger, *Operation Nickel Grass: Airlift in Support of National Policy*, AIRPOWER J. 11–16 (Spring 1989). See also RABINOVICH, *supra* note 255, at 491 (discussing the military and psychological implications of the United States' airlift of arms to Israel and concluding that the arms allowed Israel to move away from cautious tactics designed to preserve supplies).

257. Ibrahim F. I. Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 AM. J. INT'L L. 591 (1974).

responded by nationalizing two American oil companies.²⁵⁸ On October 17, 1973, just a few days after the completion of the United States airlift of supplies to Israel, Arab oil ministers delivered their own economic counterattack against Israel and the United States. They declared that oil production would be decreased by 5% per month until such time that Israel was forced to (i) withdraw to borders existing prior to the 1967 Arab-Israeli war and (ii) restore the “legitimate rights of the Palestinian people”.²⁵⁹ Countries that had been sympathetic to Arab interests would not have their oil deliveries cut; the United States was specifically targeted for the most severe reductions in deliveries.²⁶⁰

If these demands sound familiar, it is because they mirror the tenor of the calls of the Arab League Boycott Declaration of 1945 and the BDS Manifesto today to use commerce as a weapon against Israel. It is also worthy of note that the oil embargo, like the BDS Movement’s boycott, was instituted following the call for it by a Palestinian Arab non-state actor. The effects of the Arab League oil embargo were dramatic and extensive. Though the embargo was of a relatively short duration, by the time it ended in mid-1974 oil prices in the United States had quadrupled and the United States economy was thrust into a painful recession.²⁶¹ In the short term, the United States’ response to the oil embargo was a series of quick-fix policy measures, primarily focused on energy conservation mandates.²⁶² While the oil embargo was not permanent, it made such a strong impression on American policymakers that a number of long term legislative responses were initiated, including the study that led to the House Boycott Report.²⁶³

258. *Id.* at 592.

259. *Id.* at 593.

260. *Id.*

261. Michael L. Ross, *How the 1973 Oil Embargo Saved the Planet*, FOREIGN AFFAIRS (Oct. 15, 2013), <http://www.foreignaffairs.com/articles/140173/michael-l-ross/how-the-1973-oil-embargo-saved-the-planet>.

262. *Id.* (“The U.S. government’s response was bipartisan and far-reaching. Nixon pushed emergency conservation measures through Congress, including a nationwide 55-mile-per-hour speed limit. President Gerald Ford signed legislation that established mandatory fuel economy standards.”).

263. HOUSE BOYCOTT REPORT, *supra* note 144, at vii (specifically referring to the Arab League oil embargo of 1973–1974 as its impetus).

Though the House Boycott Report provides valuable insight into anti-boycott considerations, it was prepared for the 94th Congress, whose term ended before the EAA Anti-Boycott Law was enacted. As such, the Congressional debates of the 95th Congress, which enacted the law, are more relevant. The Congressional debates on what became the EAA Anti-Boycott Law memorialize what Congress considered in drafting the law and what the law was intended to accomplish. While the Arab oil embargo was the tipping point for the law's enactment, oil was far from the only concern. As an initial matter, Congress was concerned that the Arab League countries had amassed sufficient global economic influence to be capable of moving beyond the primary boycott of Israel. With their enhanced economic clout, the Arab League was rapidly expanding their use of commerce as a weapon to further their agenda against Jews and Israel, among other things.²⁶⁴

Congress paid particularly close attention to the bigoted foundation of the Arab League Boycott, noting that the boycott was, in addition to being an economic issue, a "discriminatory practice" that created "racial problems" in the United States.²⁶⁵ This concern was shared by a large number of American business interests that testified before Congress at the EAA Anti-Boycott Law hearings; indeed, none other than the AFL-CIO, the then-parent of the International Longshore and Warehouse Union,²⁶⁶ testified that:

[The boycott of Israel] attempts to impose upon the American people practices of racial and religious bigotry which violate American belief and law, and to make American firms the agents of hostile acts against a

264. Many Arab League members were also within the Soviet Union's sphere of influence, so the prospect that Soviet allies might possess a devastating economic weapon aimed at the United States was part of Congress' calculus in considering the law.

265. *Extension of the Export Administration Act: Hearings and Markup Before the H. Comm. on Int'l Relations*, 95th Cong. 111 (1977) [hereinafter *House EAA Hearing Report*] (testimony of Rep. Gilman).

266. See *infra* Part III.A for a discussion of the International Longshore and Warehouse Union's (ILWU) participation in the BDS Movement's illegal boycott of Israel in 2010 and 2014. Though the ILWU recently separated from the AFL-CIO, the irony that it was part of the union that so forcefully condemned the very same boycotts and urged Congress to enact the EAA Anti-Boycott Law which it now violates remains.

friendly nation. This constitutes a repugnant intrusion into American domestic life, and an unacceptable effort to coerce American foreign policy. The Executive Council [of the AFL-CIO] believes that the imposition of this boycott on Americans, American owned business, or on any transactions occurring on American territory must end now.²⁶⁷

The use of secondary and tertiary boycotts, where the Arab League actively coerced and intimidated foreign companies and individuals against engaging in any commercial activities with Israel upon the penalty of being excluded from Arab markets, was now a potent threat to the United States economy. On its own, this would have been a disturbing global phenomenon, but Congress had also just seen the American economy and American public targeted and hurt by the Arab oil embargo, which was directly rooted in the Arab League's desire to push the Palestinian Arab issue onto the shores of the United States. It was in this environment that the Congressional debates occurred.

Far from being concerned solely with boycotts of Israel initiated by foreign governments, as the NLG Opinion deceptively purports, Congress was acting in response to the increasingly effective efforts of non-state actors (the Arab League, among others), acting through and in coordination with other non-state entities and even states, to draw American companies and consumers into the Palestinian Arab-aspect of the broader Arab-Israeli dispute.²⁶⁸

The intention to create a law with a broad enough reach to combat the secondary and tertiary boycotts' economic coercion and intimidation of American interests is borne out through the voluminous testimony before both the House of Representatives and Senate. The most succinct declaration of American policy and statement of the goals of the nascent EAA Anti-Boycott Law were made by the Secretary of the Department of Commerce, Juanita M. Kreps, during Senate hearings on the bill:

I welcome the opportunity to appear before this committee to discuss what I believe is necessary

267. *House EAA Hearing Report, supra* note 265, at 389 (testimony of AFL-CIO Executive Council on the Arab Boycott).

268. *House EAA Hearing Report, supra* note 265, at 111 (testimony of Rep. Gilman).

legislation to prohibit **foreign boycott practices** that go beyond commercial dealings and intrude into the lives and business decisions of U.S. citizens . . . [w]e are in full accord that the law should prohibit U.S. persons from generally refusing to do business with a **boycotted country** friendly to the United States, or the nationals of that country, in order to comply with a **foreign boycott**. For example, U.S. persons should not be permitted to refuse a licensing agreement or other general arrangement to do business with a friendly nation or its nationals on the basis of boycott considerations [W]e are in full agreement that no U.S. persons should be permitted generally to refuse to do business with another U.S. person in order to comply with **foreign boycott** requirements. We should not permit **foreign boycotts** to cause American firms to boycott other American firms.²⁶⁹

In the House of Representatives' hearings on the EAA Anti-Boycott Law, Secretary of State Cyrus Vance explained the purpose and goal of the law in substantially identical terms:

Refusals by American firms to deal with a **friendly foreign country**, demonstrably related to a **foreign boycott**, should be prohibited. So, in general, should refusals to deal with other U.S. firms. We believe that decisions as to what commerce U.S. firms may or may not have with other countries or with other U.S. firms should be made consonant with American policy, by Americans and only Americans.²⁷⁰

In each of the preceding quoted statements from the Congressional hearings, the remarks were prepared in advance and carefully worded. And in each of the statements, there was a clear decision to use the general term "foreign boycotts" rather than a term that would limit the targeted boycotts to those that

269. *Foreign Investment and Arab Boycott Legislation: Hearing on S. 69 and S. 92 Before the S. Subcomm. on Int'l Fin. of the S. Comm. on Banking, Hous. and Urban Affairs*, 95th Cong. 446–47 (1977) [hereinafter *Senate EAA Hearing Report*] (emphasis added to show that "foreign boycott" was used as a term without regard to the participation of a foreign country's government).

270. *House EAA Hearing Report*, *supra* note 265, at 5 (emphasis added). The same comments were made by Secretary Vance to the Senate. *Senate EAA Hearing Report*, *supra* note 269, at 426.

originate from a foreign governmental entity. The bold text in each passage shows the deliberate and repeated use of this convention. For example, in Secretary Vance's prepared remarks, he specifically referred to the boycotted entity as a country but used the general term "foreign boycott" to describe the subject of the legislation. Secretary Kreps' testimony was identical in this regard.²⁷¹

The legislative history of the EAA Anti-Boycott Law shows that lawmakers' only substantive areas of concern with the proposed law were in discrete technical points relating to enforcement. The overall goal of the law, however, was universally accepted and agreed upon. For example, in the Senate, Senator Adlai Stevenson, the subcommittee chairman, described the imposition of a foreign boycott against Israel as a threat to national sovereignty:

The Arab boycott intrudes upon American sovereignty. It interferes with basic human rights and religious freedom. It impedes free competition in the marketplace and systematically enlists American citizens against their will in a war with Israel. It excludes other Americans from economic opportunities. Such behavior cannot be tolerated.²⁷²

Senator William Proxmire's comments not only supported those of Senator Stevenson, they expanded on the economic rationale for the law:

The Arabs have not hesitated to use their clout to conduct an economic war against Israel. In the prevailing circumstances in the Middle East, I do not question the authority of the Arab nations to refuse to do business with Israel, even though I believe that business relationships over time might help to defuse the situation. But I do object to the Arab nations using their

271. There were instances where the boycotts under consideration were referred to as those from foreign countries or states, such as in Secretary Vance's introductory remarks. See *House EAA Hearing Report*, *supra* note 265, at 6 for an example in the context of distinguishing primary boycotts from secondary and tertiary boycotts. The use of these specific terms, however, was far outweighed in both House and Senate hearings by general references to "foreign boycotts."

272. *Senate EAA Hearing Report*, *supra* note 269, at 1.

power to dictate the terms of trade to American firms. Ours is a pluralistic society. We believe that quality and price should be the ultimate arbiter in the marketplace both in our domestic and foreign commerce. The Arab boycott is fundamentally destructive of these basic tenets We cannot sit back and let the Arabs dictate a fragmentation of our own economic relations to serve their own selfish and destructive purposes.²⁷³

And, in describing the nature and geographic scope of the threat posed by the anti-Israel boycott, Senator Harrison Williams noted:

The reach and scope of the Arab boycott have been extended far beyond the Middle East. It is no longer a direct and primary boycott of Israel. It is now an unfocused and transnational assault on fundamental American freedoms and longstanding precepts of unimpeded international commerce Against this background, new and effective antiboycott legislation must be enacted in order to accomplish several objectives. First, the basic Export Administration Act must be strengthened to make it illegal for American firms to engage in secondary or tertiary boycotts.²⁷⁴

The undisputed goal of the law under debate was to prevent foreign boycotts from being introduced into American commerce. There was no argument or disagreement with this objective by members of either the House or the Senate. Even the *New York Times*, known as being critical of Israel, voiced editorial support for this broad goal.²⁷⁵

273. *Id.* at 2–3.

274. *Id.* at 3.

275. *Id.* at 266–67 (exhibit consisting of the editorial from the *New York Times* (Sept. 14, 1976) that took issue with the Ribicoff Amendment but wholeheartedly endorsed the EAA Anti-Boycott Law, with the conclusion that “Congress nevertheless should strengthen the Export Administration Act by making it illegal for American firms to engage in secondary or tertiary boycotts. The threat of economic reprisal by the Arabs cannot be accepted as a basis for permitting American firms to submit to odious terms that violate the rights and interests of other Americans, or abridge this nation’s sovereign powers.”). It is important to note, again, that the law was referred to as a general law that prohibited Americans from engaging in the secondary or tertiary boycotts of Israel. Nowhere is there any hint of a limitation that would make the law applicable only to boycotts that are from a foreign government.

Furthermore, the targeted boycott activity was described by the effect it had on the United States. The focus was on the ideology behind the boycott, not the political status of the boycotting entity. Whether or not the boycott originated in a foreign government was not germane for the law's intended reach; rather, any foreign boycott that infringed upon the sovereignty and free will of America, its citizens, and its businesses in order to further the Arab war on Israel was to be subject to the law's provisions.

To the extent there were any areas of disagreement on the proposed law, however, they were specific to the following areas:

- The extent to which the law should apply to the operations of foreign subsidiaries of United States companies.
- Whether the law would pre-empt state laws on the topic of participation in foreign boycotts.
- Whether there would be grace periods and grandfather provisions after the law became effective.
- The scope of paperwork requirements for boycott reporting.
- The permissibility of providing positive, as opposed to negative, certifications of origin.²⁷⁶

Indeed, the issue of negative certifications (i.e., the requirement that American businesses affirmatively certify that their products did not include any Israeli components or rely upon Israeli labor or technology) versus positive certifications (i.e., a certification stating that the product was American) was the most frequently debated element of the proposed law.²⁷⁷

What was not in dispute was the overall scope of the EAA Anti-Boycott Law's provisions as they related to types of boycott activity affecting American business and individuals. Secretary of State Vance explained that the functioning of the law in respect of

276. *House EAA Hearing Report*, *supra* note 265, at 5–6.

277. *See, e.g., Senate EAA Hearing Report*, *supra* note 269, at 223 (testimony of Maxwell Greenberg) (describing the differences between positive certificates of origin, which were not unusual in international commerce, and negative certifications, which were primarily intended to have a discriminatory effect).

types of boycotts was black and white: "The main thrust of the principles which we have enunciated is that we should be dealing with secondary and tertiary boycotts and not the primary boycott."²⁷⁸ This, and not whether the source of the boycott was a government, is the only area where the substantive reach of the law was intended to be limited.

As to what was meant by a primary versus a secondary or tertiary boycott, one example was given by the Chairman of the Board of E.I. DuPont de Nemours and Company during the Senate hearings:

I think everyone agrees that every nation has a right to a primary boycott. It has a right to control what happens within the four corners of its own territory. If you start from that premise, you have a different set of rules in a sense for trade with that nation than you do for trade elsewhere. Let me just take a couple of the specific cases to illustrate what I have in mind and to distinguish it from the trade that would be affected in other parts of the world Suppose that Saudi Arabia, on its own volition, said we want to buy trucks, but we do not want DuPont tires on trucks that come into Saudi Arabia. Under the principles we have proposed, there would be no legal liability for an American shipper in respecting that request.

On the other hand, if, because of this request by the Saudis, the American shipper changed his line of suppliers and stopped putting DuPont tires on trucks going elsewhere, then one would have a right to infer that he had associated himself with the boycott and a jury might very well conclude that there was an implicit agreement in violation of the law.²⁷⁹

In this example, Saudi Arabia's refusal to purchase trucks that contained DuPont components was deemed to be a permitted exercise of a primary boycott. However, if Saudi Arabia demanded that the truck supplier cease using DuPont products on all of its trucks, even those sold to non-boycotting countries, it would be a

278. *House EAA Hearing Report*, *supra* note 265, at 12.

279. *Senate EAA Hearing Report*, *supra* note 269, at 481.

prohibited action.²⁸⁰

The best explanation of what would constitute a secondary or tertiary boycott, however, was provided by Professor Irwin Cotler, who testified before the Senate subcommittee on Canada's experience with anti-boycott laws:

Canadian firms, as a condition of doing business with an Arab League government, company or national must agree to refrain from doing business with Israel or any Israeli company or national, otherwise known as the secondary boycott. This, in effect, compels a Canadian boycott of a country with whom Canada has friendly relations and against whom Canada has not itself authorized a boycott.

Canadian firms, as a condition of doing business with any Arab League government, company or national, must agree to refrain from doing business with any other Canadian firms that do business with Israel, otherwise known as the tertiary boycott. This compels a restrictive trade practice with Canada and between Canadian firms.²⁸¹

Thus, under the EAA Anti-Boycott Law, any American company or person who refuses to do business with Israeli companies or individuals pursuant to a foreign boycott of Israel would be in violation of the prohibition on secondary boycotts of Israel. An American company or person who refused to do business with

280. The applicability of the EAA Anti-Boycott Law's prohibitions in the example given may not be as clear as the DuPont Chairman described. 50 U.S.C. § 4607 provides an exception for "complying or agreeing to comply with requirements . . . prohibiting the import of goods or services from the boycotted country or goods produced or services provided by any business concern organized under the laws of the boycotted country or by nationals or residents of the boycotted country . . ." 50 U.S.C.A. § 4607 (Westlaw through Pub. L. No. 114-244). Only if DuPont was an Israeli corporation or was using Israeli labor would the shipper be allowed to comply with the Saudi demand as it related to the shipment of trucks to Saudi Arabia. Thus, if DuPont had a factory in Israel making truck tires, Saudi Arabia could lawfully require the shipper to not use DuPont tires on the trucks it was selling to Saudi Arabia. In all other cases, the shipper could not lawfully comply with the Saudi demand. In no event would the shipper be permitted to comply with the Saudi demand that it not use DuPont tires for any of the other trucks it sold (i.e., even those sold to non-boycotting customers).

281. *Senate EAA Hearing Report, supra* note 269, at 518-19.

another American that did business with Israel would be in violation of the prohibition on tertiary boycotts of Israel.

Importantly, the EAA Anti-Boycott Law does not limit its prohibitions to defined types of boycott participation, such as providing negative certifications of origin. The law generally prohibits any refusal to do business that is based on compliance with a foreign boycott. If, for instance, a Syrian company demanded that United States dockworkers refuse to unload cargo from a ship that was believed to be owned by Israelis, the dockworkers would be in violation of the EAA Anti-Boycott Law if they complied with the demand. Certainly, providing a negative certificate of origin would violate the Regulations, but the actual scope of the law is far more encompassing than the specific prohibitions contained in the Regulations.

While the EAA Anti-Boycott Law applies to any foreign boycott of a friendly country, Congress was responding to the Arab League Boycott when it debated and passed the EAA Anti-Boycott Law. The Arab League Boycott is a boycott by a non-state actor (the Arab League). The clear legislative intent of the law was to prevent American businesses and individuals from being used as commercial weapons against Israel (or any other friendly foreign country) by foreign boycotters. Not only was there no intent to limit the application of the law to boycotts fostered or imposed only by foreign governments, there was an overriding intent to apply the prohibition against any and all attempts by *any* foreign source, in particular, non-governmental organizations, to impose secondary or tertiary boycotts of Israel on Americans.

4. Conclusion: Any Non-State Actor Can be a Foreign Country Under the EAA Anti-Boycott Law

Returning to the *Chevron* test and the principles of statutory construction that apply to understanding the EAA Anti-Boycott Law,²⁸² the text of the law and its legislative history more than fairly imply that foreign non-governmental organizations and non-state actors were intended to be included within the term “foreign country.” Furthermore, legislation that was enacted several months prior to the enactment of the EAA Anti-Boycott Law (and debated contemporaneously in the same Congress that produced

282. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

the House Boycott Report) showed that when Congress wanted to limit the application of a law to a foreign government and its subdivisions, it did so with elegant precision.

In the Foreign Sovereign Immunities Act,²⁸³ signed into law in October 1976, Congress not only used the term “foreign state” to designate those entities that would be immune from suit in United States courts, it provided a comprehensive definition for that term:

A “foreign state[.]” except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An “agency or instrumentality of a foreign state” means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.²⁸⁴

This is the definition that the NLG Opinion seeks to incorporate into the EAA Anti-Boycott Law, yet no such limiting definition was ever considered in Congressional debates on the EAA Anti-Boycott Law nor was one included in the final text of the law or the Regulations promulgated thereunder. Had Congress intended for the EAA Anti-Boycott Law to be limited to only foreign governments, it would have used the same language that it used in the contemporaneously enacted Foreign Sovereign Immunities Act. It chose to not use that definition, which, taken together with the legislative history showing that the focus of the law was to be all foreign boycotts, not just those by a foreign government, must be understood as a rejection of any such

283. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C.A. §§ 1602-1611 (Westlaw through Pub. L. No. 114-244)).

284. See 28 U.S.C.A. § 1603(a), (b) (Westlaw).

limitation on the term “foreign country.”

C. Are the BDS Movement’s Boycott Activities Subject to the EAA Anti-Boycott Law?

For the BDS Movement’s activities to be subject to the EAA Anti-Boycott Law, we would have to show that the boycotts promoted by the BDS Movement are imposed or fostered by a foreign country against a country that is friendly to the United States and not otherwise subject to a permitted boycott. The only argument that has been made to exempt the BDS Movement from the provisions of the EAA Anti-Boycott Law is that the BDS Movement is a non-governmental organization and the law only applies to governments. As this Article has documented, however, in order to support the interpretation favored by the NLG Opinion, one would have to textually revise the law, replacing “foreign country” with “foreign government,” and then rewrite the historical records of the EAA Anti-Boycott Law and the Arab League Boycott.

1. The BDS Movement as a Foreign Country: Is It Part of the Arab League Boycott or Does It Represent a Standalone Boycott?

While the BDS Movement represents a foreign country for purposes of the EAA Anti-Boycott Law, there is an open question as to the nature of its boycott activities. To wit, is the BDS Movement’s boycott of Israel a continuation of the Arab League Boycott or is it an entirely new and different boycott? Though the BDS Movement is not a member of the Arab League, it is precisely the type of non-state organization that was described and called for in the Arab League Boycott Declaration of 1945. By this standard, the BDS Movement “fosters” the Arab League Boycott. It would be nonsensical for the EAA Anti-Boycott Law, which was enacted in response to a boycott initiated by a non-state actor (the Arab League),²⁸⁵ to not apply to a non-state actor that is both an entity called for by the original Arab League Boycott Declaration of 1945 and also a distillation of the most politically radical and commercially disruptive elements of the Arab League (the BDS Movement).

285. See Hall, *supra* note 121, for a discussion on the status of the Arab League as a non-state entity.

Furthermore, in its own manifesto, the BDS Movement acknowledges that it exists to be the non-violent arm of the Palestinian Arab “resistance” movement whose goal is to eliminate Israel as a Jewish state. The BDS Movement, like the radical participants at Durban I, utterly rejects a two-state solution and hews to the original Arab League goal of Arab hegemony in Palestine. This is at a time when even many members of the Arab League have accepted, at least nominally, a two-state solution.

In many ways, the BDS Movement represents the re-radicalization of the Arab League. Where some of the Arab League states have found that the hard line anti-Zionist rhetoric of the past will not be tolerated by modern western nations, the BDS Movement is a veritable throwback to the origins of the Arab League and its unyielding resistance to any self-determination for Jews in their historic lands.

All one has to do is compare the BDS Movement’s activities and manifesto to the founding declaration of the Arab League Boycott to see that the BDS Movement is nothing more than the latest iteration of this proclamation from 1945: “the boycott (of Zionist goods) should not be confined to governmental action only, but should also be (undertaken) through the people. Thus, necessary propaganda should be conducted in order to convince the Arab peoples of the necessity of boycotting Zionist goods.”²⁸⁶

Therefore, even if the BDS Movement itself is not seen as a “foreign country” under the EAA Anti-Boycott Law, because it can be seen as the non-governmental apparatus that has been part of the Arab League Boycott since its inception in 1945, its activities constitute an alter ego of the member states of the Arab League Boycott. In other words, the BDS Movement is simply an organ interposed by foreign governments in an attempt to evade the reach of anti-boycott laws and it is the entity that “fosters” the Arab League Boycott today.

Alternatively, though it would be difficult for a reasonable person to do, if the connections between the BDS Movement and the Arab League’s call for a non-governmental boycott apparatus are ignored, the BDS Movement, as a “grass roots” boycott of

286. Nancy Turck, *The Middle East: The Arab Boycott of Israel*, 55 FOREIGN AFF. (Apr. 1977); Pact of the League of Arab States [LAS], *Boycott of Zionist Products and Goods*, Res. 70, at 18–19 (June 12, 1946).

Israel by “Palestinian civil society” still runs afoul of the letter and intent of the EAA Anti-Boycott Law. The law simply does not contain an exception for non-governmental organizations and by the law’s unambiguous text its prohibitions are not limited to the Arab League Boycott. Furthermore, any attempt to exclude non-governmental organizations from the operation of the EAA Anti-Boycott Law would violate the Presumption against Ineffectiveness, as states could simply run their boycott operations through non-governmental “astroturf”²⁸⁷ campaigns.

2. Policy Reasons to Apply the EAA Anti-Boycott Law to the BDS Movement

Ultimately, though, the BDS Movement should be seen as a hybrid of the Arab League Boycott and a separate and unique Palestinian Arab boycott with roots in current Islamist radicalism. This distinction is especially important in viewing the illegality of the BDS Movement’s boycott through the prism of the factors that gave rise to the EAA Anti-Boycott Law and the law’s policy objectives. On the one hand, Congress was concerned with the boycott’s economic impact of foreign interference in domestic American affairs. On the other hand, Congress was also concerned with the racist motivations and effects of the Arab League Boycott and sought to prevent Americans from being used to further a racist war against Jews and Israel. The House Boycott Report explicitly referenced the racist nature of Arab boycotts of Israel as an impetus for the EAA Anti-Boycott Law.

Despite emphatic Arab statements that the boycott is not directed against Jews, in practice the boycott is directed against supporters of Israel, including those living in the United States, many of whom are also members of the Jewish faith. The belief that the boycott is based on religious discrimination tends to generate a profound American reaction because it strikes closely at U.S. ideals.²⁸⁸

The BDS Movement, and the groups with which it aligns its goals, makes similar claims as to their non-racist nature. No

287. An “astroturf” campaign is one that is purported to be a grassroots campaign but, just as astroturf is an artificial substitute for grass, is in fact one that has been created by an *éminence grise*. See, e.g., Thomas P. Lyon & John W. Maxwell, *Astroturf: Interest Group Lobbying and Corporate Strategy*, 13 J. ECON. & MGMT. STRATEGY 561 (Dec. 2004).

288. HOUSE BOYCOTT REPORT, *supra* note 144, at 2.

amount of double talk and obfuscation, however, can hide the fact that the BDS Movement rejects the two-state solution, calls for the elimination of Israel as a Jewish state and has deep and disturbing ties to radical Islamist groups. At the NGO Durban Conference, which is widely understood to be the birthplace of the BDS Movement and which spawned the framework for the BDS Manifesto, the conference declaration could easily be mistaken for an al-Qaeda or Hamas screed:

We declare Israel as a racist, apartheid state in which Israels [sic] brand of apartheid as a crime against humanity has been characterized by separation and segregation, dispossession, restricted land access, denationalization, "bantustanization" and inhumane acts

[The NGO Durban Conference calls for] the reinstatement of UN resolution 3379 determining the practices of Zionism as racist practices which propagate the racial domination of one group over another through the implementation of all measures designed to drive out other indigenous groups, including through colonial expansionism in the Occupied Palestinian Territories (in the Gaza Strip, the West Bank, including Jerusalem), and through the application of discriminatory laws of return and citizenship, to obliterate their national identity and to maintain the exclusive nature of the State of Israel as a Jewish state to the exclusion of all other groups. Also call for the repeal of all discriminatory laws within the state of Israel, including those of return and citizenship, which are part of the institutionalized racism and Apartheid regime in Israel.²⁸⁹

The most blatant connection to radical Islam is the BDS Movement's ideological coordination and affiliation with Hamas. Prior to the introduction of the BDS Movement as a standalone propaganda arm, Hamas rejected the Oslo Accords' two-state solution and declared its goal of eliminating Israel as a Jewish state.²⁹⁰ This is the exact position that the BDS Movement has

289. Durban NGO Declaration, *supra* note 63, ¶¶ 162, 419.

290. JIM ZANOTTI, CONG. RESEARCH SERV., R41514, HAMAS: BACKGROUND AND ISSUES FOR CONG. (2010).

taken *vis à vis* any potential two-state solution. The ties between Hamas and the BDS Movement run much deeper than ideology, of course. As one recent news report found:

Much BDS and pro-Palestinian NGO activity in Europe and the United States is connected to radical Islamic groups and Palestinian terror organizations such as Hamas.

Hamas and its parent Muslim Brotherhood organization fuel and direct international BDS and anti-Israel political activities on hundreds of university campuses across the United States via the Muslim Students Association.

Many of the MSA's 600 chapters in North America have been branded "extensions of the Muslim Brotherhood," as the MB itself stated in its operational plan, captured in the FBI's raid on the Holy Land foundation—a Hamas charity, in 2001.

. . . Scores of other Pro-Palestinian BDS groups that are active in Israel Apartheid Week, such as American Muslims for Palestine and Students for Justice in Palestine, have funneled hundreds of thousands of dollars in donations to Hamas. The Investigative Project revealed material support the American Muslims for Palestine provided to Hamas.

Hamas's Gaza leadership has also endorsed international BDS activities against Israel. According to the Middle East Monitor, Hamas issued a statement on February 14, 2014, saying, "We in Hamas appreciate and welcome these economic boycotts against the Zionist occupation and we consider it a step in the right direction toward pressuring the occupation to stop its settlement activities and its Judaization of the Palestinian land."

. . . Hamas' role in BDS activities in London may be even less ambiguous.

Non-government organizations such as the British Muslim Initiative, the Palestine Solidarity Campaign (an umbrella group for pro-Palestinian groups and Stop the War Coalition, and action Palestine have twinned British and Gaza universities and stage university "occupations" of university offices until their BDS demands are met.

Mohammed Sawalha, Hamas' fugitive commander in Judea Samaria/West Bank, who fled in the early 1990s and became a British national, founded the British Muslim Initiative and is deeply involved leading the Palestine Solidarity Campaign.

Another leader of the London BDS Movement, and a Hamas insider in London, is Azzam Tamimi, a professor of political thought and a leader of the Palestine Solidarity Campaign.

... The international Israel Apartheid Week and its accompanying BDS campaign is far from being a peaceful grass roots movement to bring "justice, equality and peace to Palestine." Rather, it is largely a Muslim Brotherhood—and Hamas—fueled network that supports the same radical Islamic agenda of destroying Israel. NGOs involved in Israeli Apartheid Week and BDS should be placed under the legal and media spotlights for direct and indirect ties to and support for hybrid Islamic terror groups such as Hamas and Hezbollah that use BDS as a soft terror strategy to complement their "hard" terror campaigns.²⁹¹

The BDS Movement has been linked to other global Islamist terror organizations as well. For example, in 2010 the Humanitarian Relief Foundation (HRF), an Islamist group aligned with Hamas violently engaged Israeli military forces off of the coast of Gaza.²⁹² Immediately after the HRF incident, the BDS Movement issued an international call for, among other things, dockworkers in the United States to refuse to offload Israeli

291. Dan Diker, *The World from Here: Hamas and BDS*, JERUSALEM POST (Mar. 4, 2014), <http://www.jpost.com/Opinion/Columnists/The-world-from-here-Hamas-and-BDS-344303>. See also *Israel Imperiled: Threats to the Jewish State, Joint Hearing Before H. Foreign Affairs Comm., H. Subcomm. on Terrorism, Nonproliferation, and Trade, and H. Subcomm. on the Middle East and North Africa*, 114th Cong. (2016) (statement of Jonathan Schanzer, Vice President, Research Foundation for Defense of Democracies).

292. Editorial, *Turkey's Erdogan bears responsibility in flotilla fiasco*, WASH. POST (June 5, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/06/04/AR2010060404806.html?utm_term=.73f8428201ab ("[The Humanitarian Relief Foundation] is a member of the 'Union of Good,' a coalition that was formed to provide material support to Hamas and that was named as a terrorist entity by the United States in 2008.").

cargo,²⁹³ and BDS Movement supporters around the world organized protests against Israel in support of the HRF. Not only is the HRF a Hamas affiliate, one of its prominent members and a participant in the 2010 incident reportedly joined forces with the Islamic State terror organization and was killed in combat by American forces.²⁹⁴

The HRF has also been linked to al-Qaeda.²⁹⁵ It should also be noted that Hamas, like Hezbollah, al-Qaeda, and the Islamic State, has been designated a foreign terror organization by the United States.²⁹⁶ One need only examine al-Qaeda's historical statements regarding Israel and the Palestinian Arab issue to see that al-Qaeda, Hamas and the BDS Movement are ideological triplets on the subject. The following are selected statements from al-Qaeda leaders regarding Israel and Palestine:

Osama bin Laden, [Former] Al-Qaeda Leader

"We will continue, God permitting, the fight against the Israelis and their allies . . . and will not give up a single inch of Palestine as long as there is one true Muslim on earth." – May 2008

"The Palestinian cause is the major issue. . . . It was an important element in fueling me from the beginning and the 19 others with a great motive to fight for those subjected to injustice and the oppressed." – May 2008

293. *Statement of BDS National Committee*, BDS MOVEMENT (June 1, 2010), <http://www.bdsmovement.net/2010/in-response-to-israels-assault-on-the-freedom-flotilla-bnc-calls-for-action-710>.

294. Itamar Eichner, *From Marmara to ISIS atrocities; Prominent IHH member killed by US airstrikes after attacking IDF troops on Marmara and joining ranks of ISIS*, YNET.COM (Sept. 28, 2014, 9:54 AM), <http://www.ynetnews.com/articles/0,7340,L-4575328,00.html> ("Ya'akov Bolinet Alniak, a well-known figure within the [HRF] . . . joined the ranks of ISIS recently and was directly involved in combat in Syria. One of his last Facebook posts before being killed in US strikes on an ISIS camp in Syria read, 'My life and death are for Allah.'").

295. Susan Fraser, *Turkish police detain al Qaeda suspects*, USA TODAY (Jan. 14, 2014), <http://www.usatoday.com/story/news/world/2014/01/14/turkey-qaeda-erdogan-assad/4471453/> ("Turkish anti-terrorism police carried out raids in six cities on Tuesday, detaining at least five people with alleged links to al-Qaida The [HRF], said that police searched its office in Kilis, near the border with Syria on Tuesday, and detained one of its employees Another [HRF] employee was detained in Kayseri after a police raid at his home, said Saban Dozduyar, a spokesman for the group's local branch.").

296. *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, <http://www.state.gov/j/ct/rls/other/des/123085.htm>.

“In closing I would like to say that Palestine will not return to us through negotiations of the surrendered rulers and their conferences, nor by protests of the sitting scholars and their elections, as these are two faces to the same problem. Palestine will return to us by the permission of Allah if we wake from our ignorance and holdfast to our religion and sacrifice for it our money and lives.” – March 2008

“We will not recognize a state for the Jews, not even one inch of the land of Palestine. . . . Our jihad is to liberate Palestine—the whole of Palestine, from the river to the sea if Allah wills it. . . . Blood for blood, destruction for destruction.” – December 2007

Ayman al-Zawahiri, Al-Qaeda’s [Leader]

“Muslims everywhere, fight against the Zionist-Christian campaign, and strike its interests wherever you encounter them.” – January 2009

“As for the Mujahideen of HAMAS and the rest of the Mujahideen in Palestine, I supported them and continue to support them, and I call on the Ummah to aid them, especially the tribes of the Sinai.” – April 2008

“ . . . we endorse every operation against Jewish interests.” – April 2008

Adam Gadahn, American Al-Qaeda Spokesman

“End all support, moral, military, economic, political, or otherwise, to the bastard state of Israel, and ban your citizens, Zionist Jews, Zionist Christians, and the rest from traveling to occupied Palestine or settling there. Even one penny of aid will be considered sufficient justification to continue the fight.” – May 2007 ²⁹⁷

These quotes demonstrate that, like the BDS Movement, al-Qaeda has a history of rejecting Israel’s right to exist as a Jewish state, aligning itself ideologically with Hamas and calling for attacks on Israel’s economic interests. So, while in certain tangible ways the BDS Movement is an arm of the Arab League Boycott, in

297. *Al-Qaeda’s Jihad Against Israel and Jews: Al-Qaeda in its Own Words*, ANTI-DEFAMATION LEAGUE (Feb. 5, 2009), http://archive.adl.org/main_terrorism/al-qaeda_jews_israel2cb9.html#.VDMFvvdXng (emphasis added).

ideological ways it is more closely affiliated with the likes of Hamas, al-Qaeda, or the Islamic State.

The BDS Movement's rejection of the two-state solution and its call for the elimination of Israel as a Jewish state is Islamic/Arabic supremacy on blood-soaked steroids. As such, the war that Congress did not want Americans to be dragged into through any foreign boycott of Israel is now a genocidal campaign that directly threatens not only Israel, a friendly nation, but also the United States. The long line of Islamist attacks on American interests, most notably the September 11, 2001 al-Qaeda terror attacks that claimed nearly 3,000 American lives,²⁹⁸ are of the same origin as the BDS Movement's radical ideology.

Coerced American participation in the BDS Movement's actions against Israel, which occurs when, for example, BDS Movement activists picket at United States ports and cause dock workers to refuse to unload cargo from Israeli-affiliated ships,²⁹⁹ must be seen as a form of material support for both the BDS Movement and BDS Movement affiliates like Hamas and other Islamist groups as well.

Coordination between the BDS Movement and American dockworkers has serious implications on American commerce and national security. For example, one local of the dockworkers union in California has been very active in supporting BDS Movement activities against commerce tied to Israel.³⁰⁰ In 2014, the dockworkers union operating in the Port of Oakland, California, ILWU Local 10, heeded the BDS Movement's call to interfere with the docking and offloading of cargo from a ship with

298. Brad Plumer, *Nine facts about terrorism in the United States since 9/11*, WASH. POST (Sept. 11, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/09/11/nine-facts-about-terrorism-in-the-united-states-since-911/>.

299. See *supra* note 293 regarding the 2010 BDS activities at American ports to prevent ships believed to be affiliated with Israel from unloading cargo; subsequent BDS activities of the same nature have occurred in 2014. See also Charlotte Silver, *Protestors block and delay Israeli ships up and down US West Coast*, ELEC. INTIFADA (Aug. 28, 2014), <http://electronicintifada.net/blogs/charlotte-silver/protestors-block-and-delay-israeli-ships-and-down-us-west-coast>. It should be noted that boycotts by labor unions, such as those at the Port of Oakland, also violate the prohibition on secondary boycotts under § 8(b)(4) of the National Labor Relations Act. See, e.g., *Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n*, 456 U.S. 212 (1982).

300. See Silver, *supra* note 299.

alleged ties to Israel.³⁰¹ Union officials claimed that they were not participating in the BDS Movement's activities but were, instead, refusing to put workers in the middle of a potentially violent conflict between BDS protesters and police.³⁰²

The truth, however, comes directly from influential ILWU organizers and members. These individuals not only openly support the BDS Movement's activities against Israel,³⁰³ they openly acknowledge that the union coordinated with the BDS Movement to ensure that the Israeli cargo ship would not be unloaded.³⁰⁴ The 2014 Port of Oakland BDS Movement action was described in detail by one of the union-affiliated participants:

International calls for workers protest actions were made by the Palestinian General Federation of Trade Unions (PGFTU), the International Transport Workers Federation and the International Dock workers Council (IDC), as well as an urgent call for action by the Palestinian Boycott, Divestment and Sanctions (BDS) National Committee. Messages of support for labor action were sent to the International Longshore and Warehouse Union (ILWU) Local 10

. . . .

. . . [T]he anti-Zim protest on the morning of September 27 [didn't] require a picket line at the [stevedores association] terminal gate because longshore gangs didn't show up to work the Zim Shanghai. An announcement was made at the hiring hall about the picketing. Only one union member took a dispatch slip to work Zim. This was longshore workers solidarity in action

. . . A deal was sealed between the union and [the stevedores association]. All the jobs were filled on the evening dispatch and the police were removed by [the stevedores association] from the vicinity of the terminal. Longshoremen informed the pickets about the union/[stevedores association] deal, assuring them that Local 10 would honor the line. With no police to violate

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

free speech rights, picketers blocked the main gate with cars and pickets. Longshoremen saw the picket line, drove to another terminal and stood by with their union official. With no longshore workers the Zim Shanghai couldn't be worked. Not one container was moved after two full shifts. Zim sent her down to LA.irate Zionists were calling for the arrest of the protesters but to no avail³⁰⁵

Such close coordination between foreign organizations tied to terrorism and American unions that are, in effect, monopolistic gatekeepers for international commerce clearly implicates the provisions of the EAA Anti-Boycott Law.

The unfortunate reality is that while Arab and Islamist hate groups have changed their names, areas of operation and public personas over the decades, they have steadily expanded their focus from solely Israel to the western world as a whole. The Islamic Front became al-Qaeda, which became the Al-Nusra Front, but the ideology remained the same and their targets remained the same. Islamic Front affiliates bombed the World Trade Center in New York in the early 1990s and their successors in al-Qaeda finished the job less than 10 years later.³⁰⁶ Similarly, the Arab League's economic boycott became the BDS Movement, and tomorrow the BDS Movement may change its name and façade in an attempt to claim that it is yet another "grassroots" Palestinian Arab movement, but the core ideology will remain the same.

Enforcing the EAA Anti-Boycott Law against the boycott activities of the BDS Movement would not be without precedent. Federal laws and regulations aimed at combating the extremist anti-peace agenda originating from radical Arab/Islamist groups such as Hamas, Hezbollah, al-Qaeda (and now, the BDS Movement) by depriving those groups of support from Americans or American businesses have been enacted and upheld by federal

305. Jack Heyman, *How Protests Against Israeli Bombing of Gaza Stopped Zim Ships*, COUNTERPUNCH (Nov. 12, 2014), <http://www.counterpunch.org/2014/11/12/how-protests-against-israeli-bombing-of-gaza-stopped-zim-ships/>.

306. *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States*, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, at 60, 285 (2004).

courts.

For example, in the wake of the Oslo Accords and subsequent efforts by Hamas and other Palestinian Arab groups opposed to peace and a two-state solution to undermine the peace process, President Bill Clinton signed Executive Order 12947 on January 25, 1995.³⁰⁷ This executive order deemed a number of radical Palestinian Arab groups to be threats to the Middle East peace process and the interests of the United States and prohibited financial transactions with any of those groups and individuals deemed to be threats (the list was subsequently expanded through Executive Order 13099 on August 20, 1998 to include, among others, Osama bin Laden and al-Qaeda).³⁰⁸

After the September 11th Islamist terror attacks, President George W. Bush signed Executive Order 13224 on September 23, 2001.³⁰⁹ This executive order expanded the general strategy for disrupting the operations of Islamist groups by prohibiting Americans from providing material support to them.³¹⁰ Palestinian Arab affiliated groups opposed to a two-state solution constitute an overwhelming majority of the named entities subject to the prohibitions. These executive orders were signed pursuant to the authority of the President granted under the IEEPA, the same authority under which the EAA Anti-Boycott Law has been extended.

In litigation that followed the implementation of Executive Order 13224, the United States Supreme Court upheld a federal law³¹¹ that prohibits Americans from providing material support to, *inter alia*, Islamic terror organizations and in so doing found that prohibitions on providing support to terror groups did not violate the First or Fifth Amendment rights of those who sought to provide such support.³¹² In *Holder v. Humanitarian Law Project*, the Supreme Court found that a prohibition on providing support that was in the nature of humanitarian or advocacy activities to a terror organization was a valid exercise of the government's power

307. Exec. Order No. 12947, 60 Fed. Reg. 16, 5079 (Jan. 23, 1995).

308. Exec. Order No. 13099, 63 Fed. Reg. 164, 45167 (Aug. 20, 1998).

309. Exec. Order No. 13224, 66 Fed. Reg. 186, 49079 (Sept. 23, 2001).

310. *See id.*

311. *See* 18 U.S.C.A. § 2339B(a)(1) (Westlaw through Pub. L. No. 114–244).

312. *See* *Holder v. Humanitarian Law Project*, 561 U.S. 1, 2 (2010).

to protect the country from terrorism.³¹³ In particular, the Court found that the prohibition on speech and/or conduct in support of even demonstrably non-terrorist activities of a terror group was permissible under the First Amendment due to the fact that humanitarian or advocacy actions in support of a terror group work to legitimize and further the terror activities of the group.³¹⁴

In fact, the *Humanitarian Law Project* Court used facially benign support for Hamas's charitable work as an example of how any support for a terror group promotes its terror activities and differentiated that prohibited type of support from individuals engaging in "independent advocacy or expression of any kind," which is outside of the scope of the prohibition.³¹⁵ Those who engage in truly independent advocacy are free to "say anything they wish on any topic. They may speak and write freely about the [terror groups], the governments of [the terror groups' targets], human rights, and international law. They may advocate before the United Nations."³¹⁶

Similarly, even under the EAA Anti-Boycott Law Americans can protest against Israel or engage in independent advocacy before international organizations in support of Palestinian Arabs. What the EAA Anti-Boycott Law prohibits is the type of coordination with foreign groups in support of an illegal boycott of a United States ally that occurs in BDS Movement boycott activities, turning American citizens and businesses into pawns in a foreign dispute. Whether one sees the BDS Movement as a continuation of the Arab League Boycott or an altogether new anti-Israel boycott organization that is aligned with radical hate groups, the EAA Anti-Boycott Law is applicable to such boycott activities.

While Congress was concerned about Arab world discrimination against American Jews when it enacted the EAA Anti-Boycott Law in the 1970s, the scope of discrimination and the existential threats to the United States and its interests posed by radical Islamist groups has metastasized. As a result, the United States has been engaged in global military action to confront the radical Islamist threat, which is now in its second decade. The

313. *See id.* at 5; *see also infra* Part III.B (discussing the material support statute as a RICO predicate offense).

314. *Humanitarian Law Project*, 561 U.S. at 25.

315. *Id.* at 26.

316. *Id.* at 25–26.

BDS Movement's historical basis in the Arab League Boycott and its current ideological alignment with radical Islamist groups pose precisely the threat to vital United States' interests that were the impetus for the enactment of the EAA Anti-Boycott Law. As a matter of policy, enforcement of the law against the BDS Movement's activities is within the letter and the spirit of the EAA Anti-Boycott Law.³¹⁷

III. BEYOND THE EAA ANTI-BOYCOTT LAW:
THE BDS MOVEMENT, ANTI-TRUST LAWS, AND RICO

Though the EAA Anti-Boycott Law provides a comprehensive tool for the government to use against disruptive foreign boycotts, it is not the only federal law implicated by the BDS Movement's activities. Additional federal laws that were believed to be applicable to foreign boycotts were discussed in the 1976 House Boycott Report (the analytical foundation for the EAA Anti-Boycott Law) and the potential uses of these laws were discussed in detail by a Department of Justice attorney who would later become a Supreme Court Justice (House Legal Analysis).³¹⁸

Antonin Scalia, the late Supreme Court Justice who worked as an assistant attorney general at the Department of Justice at the time of the report, concluded that the Arab League Boycott violated anti-trust laws and anti-discrimination provisions of Title VII of the Civil Rights Act of 1964 and Executive Order 11246.³¹⁹

317. This is not to say that Americans cannot be critical of or protest against Israel, including by way of a primary boycott of Israeli goods. However, there is a long and established history in the United States of prohibiting support for organizations and ideology that are declared to be contrary to United States' interests. Just as a person in the United States can independently march in the street to protest American treatment of Muslims overseas, that conduct becomes unlawful under anti-terrorism laws if it is coordinated to provide material support for al-Qaeda's activities. The goal of the EAA Anti-Boycott Law was to prevent the American public and businesses from being drawn into, and used as weapons in, a war by radical elements against a friendly country. Nothing in this Article prevents Americans from protesting against Israel or engaging in individual primary boycotts of Israeli goods.

318. HOUSE BOYCOTT REPORT, *supra* note 144, at 47–55.

319. *Id.* at 48. Executive Order 11246 prohibits federal contractors, subcontractors and federally-assisted construction contractors that generally have contracts that exceed \$10,000 from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. It also requires covered contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment. *See* Exec. Order

In addition, there was a discussion of whether federal securities laws were violated by publicly traded companies that participated in the Arab League Boycott, though no definitive answer was reached on that question.³²⁰ Though providing an analysis of the potential anti-trust claims that is as exhaustive as was provided for the EAA Anti-Boycott Law is outside the scope of this Article, any discussion of the BDS Movement's activities and applicable federal laws would be incomplete without a general description of the framework for potential violations of such laws.

A. *Anti-Trust Laws and the BDS Movement*

The primary focus of the House Legal Analysis was the applicability of federal anti-trust laws (in particular, the Sherman Act,³²¹ a federal anti-trust statute applicable to boycotts and other anti-competitive activities) to anti-Israel boycotts that affected United States businesses. Justice Scalia noted that the tertiary boycott of Israel was the most likely candidate to be the basis for anti-trust prosecution by the government and explained the general principal that:

If two or more U.S. firms were to combine for the purpose either of not dealing with some other firm(s), or of preventing some neutral third-party firms from dealing with the object of the U.S. boycotter's activities, the combination could be termed a true "boycott" in the sense that that term has traditionally been employed in antitrust law.³²²

Justice Scalia's analysis continued to compare "horizontal boycotts (those involving the combination of firms at the same level of production, and generally in competition, with each other

No. 11246, 3 C.F.R. pts. 60-1, 60-2, 60-4, 60-50 (2014).

320. See HOUSE BOYCOTT REPORT, *supra* note 144, at 49.

321. Sherman Antitrust Act, 15 U.S.C.A. §§ 1-7 (Westlaw through Pub. L. No. 114-244). See Kenneth Glazer, *Concerted Refusals to Deal Under Section 1 of the Sherman Act*, 70 ANTITRUST L.J. 1 (2002) for an overview of Sherman Act principles, especially as they relate to group boycotts.

322. HOUSE BOYCOTT REPORT, *supra* note 144, at 50. Justice Scalia's analysis acknowledged that a "concerted refusal to deal" was distinct from a boycott in some ways, but for purposes of anti-trust law it was equivalent to a boycott, other than to the extent that with a case predicated upon an allegation of a concerted refusal to deal, the government would have to distinguish between unilateral action, which is permissible, and conspiratorial action, which is not permissible. *Id.*

but for the combination),” which, according to Justice Scalia, “are generally considered to be so pernicious that they constitute *per se* antitrust offenses”³²³ (that is, once it is established that there is a horizontal boycott in effect, no further inquiry is necessary) with “vertical boycotts (those involving restraints imposed by a firm at one level in the marketing chain upon the dealings of one or more firms at a lower level in the chain),” which require a review of “the context of the entire transaction.”³²⁴ In other words, if there is not a basis for finding a *per se* violation of the anti-trust laws, a court would have to employ a test to determine whether the subject boycott “poses such a pernicious effect on competition”³²⁵ that it constitutes a violation of the law (also known as the “rule of reason”).³²⁶

Notwithstanding the differences in proof required for establishing a Sherman Act case dealing with horizontal as compared to vertical boycotts, Justice Scalia’s analysis pointed to the objectives of the Sherman Act as the reason for the law’s applicability to the boycott of Israel. The Sherman Act was enacted to “vindicate public interest in a free market,”³²⁷ and case law has created a presumption that “any concerted refusal to deal is *per se* unlawful.”³²⁸ The House Legal Analysis also noted that a “concerted refusal to deal” (that is, a collaboration between firms to refuse to deal with a targeted entity) is “virtually indistinguishable from a boycott” and further noted that many instances of compliance with the Arab League Boycott in the United States were of the “concerted refusal to deal” variety.³²⁹

What the government was most concerned with was a scenario where, due to pressure from the Arab League, one United States entity would refuse to deal with another entity that was being targeted by the Arab League for having relations with Israel. Such a refusal to deal would not only have damaging effects on United States commerce and competition, it would, in

323. *Id.*

324. *Id.*

325. *Id.* at 51.

326. For a summary of the “rule of reason” in anti-trust law, see Michael Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009).

327. See HOUSE BOYCOTT REPORT, *supra* note 144, at 51.

328. *Id.* at 52.

329. *Id.* at 50 (alteration in original).

essence, be a private usurpation of the federal government's exclusive authority to regulate commerce. In the House Legal Analysis, Justice Scalia cited to *Fashion Originators Guild of America v. F.T.C.* (Fashion Guild)³³⁰ in support of his argument that such boycotts are *prima facie* illegal and must be justified by those engaging in them to survive court scrutiny.³³¹ That case, involved a trade guild's imposition of a boycott to prevent non-guild sales from occurring, included important dicta.³³² The Court concluded that the boycott was a violation of the Sherman Act because the boycott had potential for infringing upon commerce as well as competition. The Court, though, also noted that by interfering with commerce, the guild "[was an] extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.'"³³³ In the same way, the BDS Movement's activities put the regulation of commerce into private, indeed hostile, foreign hands.

In fact, at the time of the House Boycott Report, the United States Department of Justice was in the early stages of prosecuting the Bechtel Corporation for Sherman Act violations. The Department of Justice alleged that Bechtel had conspired with a number of other unnamed entities or individuals as part of the Arab League Boycott. The acts that were the principle focus of the claim were Bechtel's agreement to not do business with any entity that was on the Arab League Boycott's blacklist. The case against Bechtel was settled pursuant to a consent decree that "established the general principle that compliance with the tertiary boycott constituted a violation of US antitrust laws"³³⁴

Though the case against Bechtel was not fully litigated, what is interesting about the prosecution is that the Department of Justice apparently found that the conspirators consisted of Bechtel, on the one hand, and Arab companies or individuals who

330. 312 U.S. 457, 475 (1941).

331. HOUSE BOYCOTT REPORT, *supra* note 144, at 50.

332. *Fashion Originators Guild*, 312 U.S. at 465.

333. *Id.*

334. FEILER, *supra* note 15, at 164.

were not subject to the Court's jurisdiction, on the other hand.³³⁵ Analogizing to other antitrust prosecutions where parties that are exempt from prosecution under the applicable provisions of antitrust laws (such as unions) could be combined with non-exempt parties in order to find that there is the requisite combination of parties or a conspiracy among parties, the House Legal Analysis hinted at potential future anti-trust prosecutions aimed at a single non-exempt United States company or individual who conspired with exempt foreign boycott promoters.³³⁶

In other words, a boycott prohibited by the Sherman Act, which usually requires at least two participating entities, can be found even in a situation where only one domestic entity is involved in the boycott. In practical terms, this would mean that any United States company or individual cooperating with the BDS Movement could be part of an illegal boycott under the Sherman Act, and would be subject to the monetary and criminal penalties that may be imposed for such violations. The need to determine whether the boycott is horizontal, resulting in *per se* illegality, or vertical, requiring an inquiry into the objectives of the boycotting parties and the effect on United States Commerce as a threshold issue, would complicate the prosecution but would not vitiate potential liability for participation in the BDS Movement's activities.

1. *Sherman Act Liability for Dockworkers' Collaboration With the BDS Movement*

One entity that has taken part in BDS Movement activities in the United States is the dockworkers union. Though unions are generally exempt from the provisions of the Sherman Act, as the court held in *USS-POSCO Industries v. Contra Costa County Building & Construction Trades Council*, when a union acts in concert with a non-union entity to further an illegitimate objective, it loses its Sherman Act immunity.³³⁷ Furthermore,

335. HOUSE BOYCOTT REPORT, *supra* note 144, at 52–53.

336. *Id.* at 54–55.

337. 31 F.3d 800, 806 (9th Cir. 1994) (restating the analysis to determine whether union activities are exempt from anti-trust laws as announced in *United States v. Hutcheson*, 312 U.S. 219 (1941) as a two-prong test: “(1) Did the union combine with a non-labor group? [and] (2) Did the union act in its legitimate self-interest?”).

while it has been argued that anti-trust laws do not apply to “protest” boycotts, foreign boycotts of Israel are not considered to be “protest” boycotts and are, instead, better understood to be horizontal boycotts.³³⁸

Consequently, where a union such as ILWU Local 10 cooperates with the BDS Movement as part of a scheme to inflict economic injury on third parties, such as shipping companies affiliated with Israeli investors, Sherman Act immunity for ILWU Local 10 would not exist and the union may be prosecuted for criminal and civil penalties under the Sherman Act. The case against the union would be based on the fact that participation in the BDS Movement boycott has a negative effect on United States markets and competition (which the BDS Movement acknowledges as one of the goals of the boycott) and is not part of any collective bargaining or other permitted labor organizing activity.³³⁹

This is, of course, a simplified analysis of the case that would be made for the union’s Sherman Act liability in connection with

338. *Protest Boycotts Under the Sherman Act*, 128 U. PENN. L. REV. 1131, 1134 (1980) (“[A] consumer boycott protesting high prices would be a protest boycott, but the Arab League’s secondary boycott of foreign companies trading with Israel would not, despite its political motivations. Under the terms of the Arab boycott, companies wishing to deal with Israel or with Arab nations are prohibited from dealing with Israel or with any firm having commercial relations with Israel. This horizontal agreement is aimed not only at Israeli businesses but also at “Zionist sympathizers,” who may be competitors of the complying companies. Thus, firms participating in the Arab boycott cannot be said to lack a significant business interest in the boycott’s success.” (citing *The Arab Boycott: The Antitrust Challenge of United States v. Bechtel in Light of the Export Administration Amendments of 1977*, 92 HARV. L. REV. 1440, 1446 (1979))).

339. Henry K. Lee, *Ship Hit by Protest Unloads, Leaves Oakland*, SF GATE (Aug. 21, 2014), <http://www.sfgate.com/bayarea/article/Protest-hobbled-ship-is-partially-unloaded-sails-5700706.php> (“Zim has undoubtedly suffered significant economic losses, and we have set a powerful precedent for what international solidarity with Palestine, through boycott, divestment and sanctions, can look like,” said Reem Assil of the Arab Resource and Organizing Center.); Renee Lewis, *Seattle protesters aim to block Israeli cargo ship over Gaza siege*, AL JAZEERA AMERICA (Aug. 25, 2014), <http://america.aljazeera.com/articles/2014/8/25/seattle-israel-boat.html> (Organizers said the action is *part of a wider Boycott, Divest and Sanction (BDS) movement*, modeled after a similar effort targeting South Africa under apartheid. In a press release, they describe the actions as economic sanctions imposed in response to the current siege of the Gaza Strip and the occupation of the Palestinian territories.) (emphasis added to highlight the affiliation between the local “Block the Boat” actions and the BDS Movement).

supporting the BDS Movement boycott. However, comparing the potential case against dockworkers to the Bechtel litigation, there are strong similarities. The United States dockworker's union, like Bechtel before it, can be seen as collaborating with foreign co-conspirators (the BDS Movement and the Arab League) to harm United States markets and competition. Of course, there would have to be a determination made as to the legitimacy of the union's boycott support, which would hinge on a facts and circumstances analysis. As the court in *USS-POSCO Industries* noted:

What, then, does it mean for a union to pursue an illegitimate purpose? In the broadest sense, everything a union does serves its self-interest. But *Hutcheson* requires that it act in pursuit of its legitimate self-interest. Whether the interest in question is legitimate depends on whether the ends to be achieved are among the traditional objectives of labor organizations. Thus, if a union forces employers to funnel money into a commercial enterprise from which the union derives profits; or if it forces the employer to hire the union president's spouse; or if a union is involved in illegal activities unrelated to its mission, such as dealing drugs or gambling, those would not be objectives falling within the union's legitimate interest. In such cases, the unions "cease to act as labor groups."³⁴⁰

Unions often engage in boycotts that are exempt from the anti-trust laws, but those boycotts are in support of "traditional objectives" of labor organizing, such as is the case when a union boycott is launched against a non-union employer in order to coerce that employer into hiring union workers.³⁴¹ Supporting a foreign boycott aimed at weakening and ultimately destroying a friendly foreign country is many things, but one cannot reasonably describe it as a traditional objective of American labor unions.

340. 31 F.3d at 808 (quoting *Jacksonville Bulk Terminals v. Int'l Longshoremen's Ass'n*, 457 U.S. 702 (1982)); *see also* *Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n*, 456 U.S. 212 (1982).

341. *Id.* at 809 (observing that the traditional tactics used by the unions, like handbilling, picketing, and encouragement of work stoppages at the project site, were protected because unions are entitled to encourage use of unionized labor).

The text and history of the EAA Anti-Boycott Law amply demonstrates that preventing foreign interference in American commerce and foreign policy was, and is, a paramount concern of the federal government. As a result, application of the anti-trust laws to either the BDS Movement or its supporters (including, but not limited to, unions) would be in keeping with the *Claiborne* Court's pronouncement that "the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association."³⁴² It would also be consistent with Justice Scalia's positions in the House Legal Analysis regarding the applicability of anti-trust laws to foreign boycotts of Israel affecting United States commerce.

Because the EAA Anti-Boycott Law explicitly provides that it does not supersede anti-trust laws, any individual, company, or union that participates in the BDS Movement's activities may be subject to civil and criminal prosecution and suits may be brought by the government as well as by private parties who are affected by the boycott participation.³⁴³ Justice Scalia's concluding remark in the House Legal Analysis noted that the preferred approach to combating the effects of anti-Israel boycotts would be legislative or through an executive order (due to the fact that using then-existing anti-trust laws might have had unpredictable outcomes as a result of novel theories that would have to be employed in the prosecutions),³⁴⁴ but the potential use of Section 1 of the Sherman Act, in particular, has been established by Congress and the legal analysis of a late United States Supreme Court Justice. Furthermore, since the House Boycott Report was published the underlying threat posed by anti-Israel boycotts has grown from one of a primarily commercial and competitive nature to one that directly implicates national security and foreign policy. The need for a multi-faceted response, encompassing combined legislative,

342. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982). Since individuals and organizations would still be free to protest against Israel independently, the prohibition on BDS Movement boycotts would not infringe upon core First Amendment rights. See *infra* Part III.B for a discussion of the *Humanitarian Law Project* case.

343. See generally Charles Koob & Peter Kazanoff, *Private Antitrust Remedies Under US Law*, SIMPSON, THACHER & BARTLETT LLP, <http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub484.pdf?sfvrsn=2> (last visited July 8, 2016).

344. HOUSE BOYCOTT REPORT, *supra* note 144, at 54.

executive and existing statutory resources, is greater today than it was in 1976.

B. RICO and the BDS Movement

The EAA Anti-Boycott Law and anti-trust laws are powerful and effective tools that may be used in response to those who participate in the BDS Movement's unlawful boycotts. But prosecuting those who participate in boycotts contrary to American policy is only half of the answer. The source of the boycotts must also be addressed, and one law in particular is especially well suited for this task—the Racketeer Influenced and Corrupt Organizations Act³⁴⁵ (RICO).

RICO had its origins in the government's need for a tool to fight organized crime, especially in respect of organized crime's involvement in labor movements, where the leaders of criminal organizations were generally immune from prosecution due to the attenuated connection they had to the criminal acts that were committed on their behalf and at their direction.³⁴⁶ Though a primary impetus for the creation of the RICO statute³⁴⁷ was organized crime, the true reach of the statute was intended to be any enterprise engaging in a pattern of unlawful behavior, whether organized crime or not, especially where the top level participants were not directly engaging in the criminal activities.³⁴⁸ In a RICO prosecution, once a pattern of criminal activity is connected to an organization, liability attaches to the members of the organization, even if the ringleaders have otherwise isolated themselves from being connected to individual criminal acts. RICO has been successfully used to prosecute everything from racketeering in professional sports to investment fraud. In the aftermath of the September 11th terror attacks, RICO was amended to broaden its scope significantly and to provide the government with a wide-ranging weapon to be used

345. Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C.A. §§ 1961-1968 (Westlaw through Pub. L. No. 114-244)).

346. See, e.g., Donald Rebovich, Kenneth Coyle & John Schaaf, *Local Prosecution of Organized Crime: The Use of State RICO Statutes*, U.S. DEPT OF JUSTICE (Oct. 1993), <https://www.ncjrs.gov/pdffiles1/Digitization/143502NCJRS.pdf>.

347. *Id.*

348. *Id.*

against global terrorist organizations.³⁴⁹

1. *The Elements of a RICO Prosecution*

A simplified overview of a RICO case shows that it is comprised of three basic elements: (1) a pattern of racketeering activity, (2) by or involving an “enterprise,” and (3) that affects interstate or foreign commerce.³⁵⁰ The first step in establishing a RICO case is establishing a pattern of racketeering activity (two or more offenses will generally suffice to prove that a pattern exists). The RICO statute specifies the activities that are racketeering “predicates” for RICO prosecution. These predicate offenses can be put into three general categories: (1) any act or threat that is chargeable as one or more of certain enumerated felonies under state law, (2) any act that is indictable under certain enumerated federal statutes, and (3) any offense involving three enumerated categories of federal law. Unless there is a predicate offense from the foregoing list, there can be no RICO claim.³⁵¹

If a racketeering predicate offense is found to exist, the next step is to determine whether it is connected to certain prohibited conduct. Professor Pamela Pierson provided a concise overview of this step in her recent article *RICO Trends: From Gangsters to Class Actions*:

The RICO statute is complex. It applies to a wide range of conduct and contains abstract terms not easily correlated with everyday experience. There are four types of conduct prohibited by RICO: (1) investing

349. Frank Marine, et al., *Criminal RICO: 18 U.S.C. §§ 1961–1968: A Manual for Federal Prosecutors*, U.S. DEPT OF JUSTICE 8–9 (5th ed. Oct. 2009), <http://www.justice.gov/criminal/foia/docs/2009rico-manual.pdf> [hereinafter DOJ RICO Manual].

350. Civil and criminal RICO cases are quite complicated and hinge on a number of determinations that are much more involved than the basic three steps outlined above. This Article is not intended to be a guide to preparing a RICO case. See Koob & Kazanoff, *supra* note 343, and the DOJ RICO Manual, *supra* note 349 for detailed guidelines on the preparation of private and government RICO cases, respectively.

351. See DOJ RICO Manual, *supra* note 349, at 20–49, for a comprehensive listing of the predicate offenses and citations to cases for each type of offense. Naturally, the predicate offense can be prosecuted on its own, but the penalties and reach of the RICO statute broadens the efficacy of a prosecution that involves a somewhat amorphous group, such as the BDS Movement or organized crime.

proceeds from a pattern of racketeering activity in an enterprise, (2) acquiring or maintaining control over an enterprise through a pattern of racketeering activity, (3) conducting or participating in the affairs of an enterprise through a pattern of racketeering activity, and (4) conspiring to do any of these types of conduct. Because RICO is both a crime and a civil cause of action, it may be prosecuted by United States Department of Justice prosecutors, criminally or civilly, or it may be brought as a civil suit by private individuals who have suffered damage to their business or property. Those convicted of RICO crimes face stiff penalties: a possible prison term of twenty years, forfeiture of property acquired or maintained in violation of RICO, and fines of \$250,000 per offense (\$500,000 per offense if the defendant is an organization). Those found civilly liable also face significant consequences: treble damages, and payment of attorneys' fees and costs.

RICO's civil cause of action, which is available to "[a]ny person injured in his business or property by reason of a violation" of RICO requires RICO plaintiffs to prove that the defendants committed crimes. Thus, in addition to proving "RICO elements" ("pattern" and "enterprise") private plaintiffs in civil RICO actions must prove the elements of the crimes they allege as "racketeering activity."³⁵²

As Professor Pierson notes, a RICO claim can be either civil or criminal.³⁵³ A civil claim can be brought by either the government or a private party who has been harmed by the RICO activity.³⁵⁴ The basic elements of civil and criminal RICO claims are substantially similar, though for a civil claim there need not be a showing of criminal intent and the burden of proof is also lower.³⁵⁵

352. Pamela Bucy Pierson, *RICO Trends: From Gangsters to Class Actions*, 65 S.C. L. REV. 213 (2013) (citations omitted), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179211.

353. *Id.* at 5.

354. *Id.* at 4.

355. In a civil RICO proceeding brought by a private party, the potential remedy is treble damages; in such a proceeding brought by the government, the potential remedies include equitable relief, such as injunctions, dissolution of an entity and government supervision of the offending party.

If a pattern of racketeering that affects commerce has been found, the final step is to determine whether the conduct is part of an “enterprise.” The RICO statute defines an enterprise to include “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”³⁵⁶ The statutory list is representative, rather than exclusive, and courts have shown great latitude in finding that an association is an “enterprise.”³⁵⁷ In addition,

it is not necessary to prove “that every member of the enterprise participated in or knew about all its activities.” Rather, “it is sufficient that the defendant know the general nature of the enterprise and know that the enterprise extends beyond his individual role.” Nor is it necessary to prove that the enterprise or its members acted with criminal intent.³⁵⁸

A more thorough summary of the elements of RICO claims and the standards that have applied in deciding these cases³⁵⁹ is outside the scope of this Article and is not necessary to understand how RICO can apply to the BDS Movement. Rather, a line of Supreme Court cases arising from abortion clinic protests prosecuted under RICO are illustrative of how RICO would be used against the BDS Movement’s activities in the United States.³⁶⁰

To set the stage, though, in a RICO prosecution against the BDS Movement the two predicate offenses that this Article will focus on are violations of the Hobbs Act ³⁶¹ and violations of

These remedies are mutually exclusive to the respective party bringing suit (i.e., the government cannot seek treble damages and the private party may not seek equitable relief). See Frank Marine & Patrice Mulkern, *Civil RICO: 18 U.S.C. §§ 1961–1968: A Manual for Federal Attorneys*, U.S. DEP’T OF JUSTICE 26–33 (Oct. 2007), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/civrico.pdf [hereinafter DOJ Civil RICO Manual].

356. 18 U.S.C.A. § 1961(4) (Westlaw through Pub. L. No. 114–244).

357. DOJ RICO Manual, *supra* note 349, at 70–74.

358. *Id.* at 82–83 (citation omitted).

359. See JED RAKOFF & HOWARD GOLDSTEIN, *RICO: CIVIL AND CRIMINAL LAW AND STRATEGY* (Law Journal Press 2014) for what is arguably the definitive guide to RICO. See also DOJ RICO Manual, *supra* note 349 and DOJ Civil RICO Manual, *supra* note 355.

360. See *NOW I*, *NOW II*, and *NOW III*, *infra* note 363.

361. 18 U.S.C.A. § 1951 (Westlaw through Pub. L. No. 114–244). The Hobbs Act is a federal law that criminalizes extortion and robbery. The

federal laws dealing with providing material support to terrorists.³⁶² The category of prohibited conduct that would form the basis for a RICO case would be “conducting or participating in the affairs of an enterprise through a pattern of racketeering activity.” The BDS Movement’s status as a RICO enterprise would be established by showing coordination among the various BDS Movement affiliates and with outside organizations.

2. *The NOW Cases and the Hobbs Act*

In the *NOW* cases,³⁶³ abortion providers filed suit against individuals and organizations (Activists) who engaged in disruptive acts at or near abortion clinics.³⁶⁴ The Activists’ objectives included preventing women from having abortions and, ultimately, forcing the clinics to shut down.³⁶⁵ RICO was among the laws implicated in the attempt to stop the Activists.

The *NOW* cases proceeded through various stages of litigation for 20 years, resulting in three United States Supreme Court decisions that defined the contours of RICO in the context of protest activity. In *NOW I*, decided in 1994, the United States Supreme Court examined the claim that by disrupting the operations of abortion clinics the Activists had engaged in an act of extortion under the Hobbs Act,³⁶⁶ a predicate racketing offense under RICO.³⁶⁷ The applicable provision of the Hobbs Act³⁶⁸ prohibits, *inter alia*, any conduct that “obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion”³⁶⁹ Extortion is defined as “obtaining of property from another, with his consent, induced by wrongful use of actual or

history and provisions of the Hobbs Act are discussed in detail in *NOW I* and *NOW II*, *infra* note 363.

362. 18 U.S.C.A. §§ 2339A, 2339B (Westlaw through Pub. L. No. 114–244).

363. Nat’l Org. of Women v. Scheidler, 510 U.S. 249 (1994) (*NOW I*); Scheidler v. Nat’l Org. of Women, 537 U.S. 393 (2003) (*NOW II*); Scheidler v. Nat’l Org. of Women, 547 U.S. 9 (2006) (*NOW III*).

364. *NOW I*, 510 U.S. at 249.

365. See generally *NOW I*, 510 U.S. 249; *NOW II*, 537 U.S. 393; *NOW III*, 547 U.S. 9.

366. *NOW I*, 510 U.S. at 253.

367. 18 U.S.C.A. § 1961(1)(B) (Westlaw through Pub. L. No. 114–244).

368. 18 U.S.C.A. § 1951 (Westlaw through Pub. L. No. 114–244).

369. § 1951(a) (Westlaw).

threatened force, violence, or fear, or under color of official right.”³⁷⁰

What made the *NOW* cases unique is the efforts the plaintiffs went through to convince the Court that abortion clinic jobs and abortion services were a property right that could be extorted by a group that did not seek to obtain an economic benefit from such rights.³⁷¹ The Activists did not want to use the extorted property for their own purposes, nor did they seek to replace their targets as the provider of abortion services.³⁷² The Activists simply sought to reduce the availability of abortion services.³⁷³

The *NOW I* Court first explained that when considering the enterprise vehicle through which the extortion is performed, that enterprise need not have “an economic motive for engaging in illegal activity; it need only be an association in fact that engages in a pattern of racketeering activity.”³⁷⁴ The Court continued its analysis of the economic element of extortion to find that the effect of the extortion on the economy and businesses, rather than a financial benefit accruing to the protesters, is what brings the activity into the scope of the Hobbs Act.³⁷⁵

The *NOW I* defendants argued that their activities were political, not economic, and deserved a blanket protection under the First Amendment.³⁷⁶ In their concurrence, Justices Kennedy and Souter reiterated the principle that being a “protest organization” does not shield defendants from RICO liability under an extortion predicate and a First Amendment defense could certainly be raised, but it could not be said that the application of RICO to protest organizations is a *per se* First Amendment violation.³⁷⁷ *NOW I* established that so long as

370. § 1951(b)(2) (Westlaw).

371. *NOW II*, 537 U.S. 393, 401 (2003).

372. *Id.* at 405–06.

373. *Id.* at 406.

374. *NOW I*, 510 U.S. 249, 259 (1994).

375. *Id.* at 260 (responding to the lower courts’ logic that there was a need to prove that the protesters had a self interested economic motive: “Respondents and the two Courts of Appeals, we think, overlook the fact that predicate acts, such as the alleged extortion, may not benefit the protesters financially but still may drain money from the economy by harming businesses such as the clinics which are petitioners in this case.”).

376. *Id.* at 254.

377. *Id.* at 263–65. The practical effect of this is that a case brought against a protest organization would have to proceed on the merits, thus requiring a time consuming and expensive trial.

property was obtained, “RICO contains no economic motive requirement.”³⁷⁸ The question of whether the deprivation of property rights by the Activists constituted the requisite “obtaining” of property for purposes of the RICO predicates would not be definitely answered until nine years later.³⁷⁹

The *NOW I* Court remanded the case to the district court for further proceedings in 1994. On remand, the district court, and then the Seventh Circuit Court of Appeals answered the question of whether the Activists had obtained property. Both courts found that the Activists had obtained the subject property (abortion services) and thus had committed extortion under the Hobbs Act based upon the following conclusions: (i) the intangible rights to obtain and perform abortion services were property for purposes of the Hobbs Act and (ii) even if the Activists did not receive “money or anything else . . . [a] loss to, or interference with the rights of, the victim is all that is required” to constitute obtaining property from the victim.³⁸⁰

In 2003, the case once again returned to the United States Supreme Court. The *NOW II* Court took issue with the lower courts’ determinations and ruled that the Activists had not engaged in Hobbs Act extortion since they did not “obtain” the property that they were interfering with.³⁸¹ After acknowledging that the purpose of the Hobbs Act was to “use all the constitutional power Congress has to punish interference with interstate commerce” and to further that purpose the court was not to restrictively interpret the law,³⁸² the *NOW II* Court purported to distinguish the law of extortion from that of coercion. Deciding that what the Activists had done was more like coercion than extortion, the *NOW II* Court found no Hobbs Act violation in the case (since coercion, unlike extortion, is not prohibited under the Hobbs Act) and thus no predicate for RICO prosecution.³⁸³ The *NOW II* Court explained that there must be an acquisition of the subject property (which did not occur under its coercion theory), as well as a deprivation of it.³⁸⁴

378. *Id.* at 262.

379. *NOW II*, 537 U.S. 393, 397 (2003).

380. *Id.* at 399–400.

381. *See id.* at 402.

382. *Id.* at 408 (citing *Stirone v. United States*, 361 U.S. 212, 215 (1960)).

383. *Id.* at 409.

384. *Id.* at 405.

In making that argument, the *NOW II* Court created a conflict with precedent as well as the established purpose of the Hobbs Act. Some believe that the *NOW II* Court's determination that the protests were not a form of extortion under the Hobbs Act was *sui generis* to Supreme Court abortion protest cases;³⁸⁵ Justice Stevens' dissent in *NOW II* clearly indicates as much.³⁸⁶ Citing a long line of cases that applied Hobbs Act extortion provisions to other instances where property rights were infringed, though not necessarily acquired, by the extorting party, Justice Stevens pointed in particular to lower court cases that found Hobbs Act extortion liability to apply to abortion clinic protest activity under the theory that an extortionist's interference with property rights constituted "obtaining" property under the Hobbs Act.³⁸⁷

Justice Stevens summed up his disagreement with the majority in three points. First, he believed that if Congress disagreed with the Court's longstanding definition of extortion under the Hobbs Act it was up to Congress, and not the courts, to amend the law accordingly.³⁸⁸ Second, Congress intended for the Hobbs Act to have a broad reach and it was not for the courts to artificially restrict that reach.³⁸⁹ Third, and most importantly, Justice Stevens, as did Justice Ginsburg, noted that intervening 1994 enactment of a federal law imposing significant restrictions on abortion clinic protests³⁹⁰ had a *de facto* effect of rendering the RICO claim moot and the majority chose to create an extremely narrow, fact based distinction (that the case involved coercion and not extortion) rather than acknowledge that the claim was moot.³⁹¹ This choice, Justice Stevens argued, would have a

385. Emily Elman, *Defining the Scope of Extortion Liability After Scheidler v. NOW*, 14 N.Y.U. J. L. & PUB. POL'Y 213, 231 (2011) (citing *United States v. Enmons*, 410 U.S. 396 (1973) and *United States v. Debs*, 949 F.2d 199 (6th Cir. 1991) as examples of *sui generis* extortion definitions under the Hobbs Act and stating that *NOW II* should be read as *sui generis* to abortion protest cases).

386. *See NOW II*, 537 U.S. at 415.

387. *Id.* at 414–15 (Stevens, J., dissenting) (citing *United States v. Arena*, 180 F.3d 380 (2d. Cir. 1999)).

388. *See id.* at 415.

389. *Id.* at 416–17.

390. *See Freedom of Clinic Entrances Act of 1994*, Pub. L. No. 103–259, 108 Stat. 694 (1994) (codified at 18 U.S.C.A. § 248 (Westlaw through Pub. L. No. 114–244)) [hereinafter the "FACE Act"].

391. *NOW II*, 537 U.S. at 416–17 (Stevens, J., dissenting).

chilling effect on legitimate RICO prosecutions.³⁹²

The notion that the *NOW II* limitation on extortion-based RICO prosecutions is *sui generis* to Supreme Court abortion cases is one that has also been endorsed by other federal courts. Shortly after *NOW II* was decided, in a separate RICO case the Second Circuit reverted to precedent that extortion did not require the extortionist to acquire the property interest that it had deprived its victim of and explicitly stated that, “Supreme Court jurisprudence about abortion is *sui generis* . . .”³⁹³

This conclusion is supported by the *NOW II* majority’s affirmation that they did not reject “lower court decisions such as *United States v. Tropiano* . . .”³⁹⁴ In *Tropiano*, the Second Circuit found Hobbs Act extortion liability where a group forced a disposal company to give up its right to conduct business.³⁹⁵ As Justice Stevens noted in his *NOW II* dissent, *Tropiano* held that under the Hobbs Act, obtaining property “does not depend upon a

392. *Id.* at 416–17. Justices Ginsburg and Breyer, in their concurrence, stated that the FACE Act provided the legislative response to abortion protest issues and feared that if the court were to also find that RICO applied it could create an unintentional expansion of RICO’s scope. In other words, the *NOW II* majority was simply leaving the question of RICO extortion applicability for another day under circumstances where another statute did not already provide victims with a remedy. *See, e.g.,* Elman, *supra* note 385, at 238–39.

393. *United States v. Porcelli*, 404 F.3d 157, 162 (2d. Cir. 2005). Though this RICO case was based on a predicate act of statutory mail fraud, a predicate crime distinct from Hobbs Act extortion, the appeal was based on the *NOW II* Hobbs Act interpretation of the element of obtaining money or property. Both the mail fraud statute and the Hobbs Act require that money or property be obtained, but the *Porcelli* Court stated “[u]nder this Court’s analysis, the defendant does not need to literally ‘obtain’ money or property to violate the statute. The fact that the Hobbs Act and the mail and wire fraud statutes contain the word ‘obtain’ does not necessitate imposing Scheidler’s construction of a wholly separate statute onto this Court’s pre-existing construction of the mail fraud statute.” *Id.* This conclusory explanation followed the *Porcelli* Court’s statement that Supreme Court abortion cases are *sui generis*, so it logically follows that the decision to limit the *NOW II* Court’s definition of “obtain” solely to abortion cases was in keeping with what the Second Circuit understood Supreme Court precedent on the matter to be. As such, the more expansive definition of “obtain” (requiring only the deprivation of a property right, rather than a disposition of that right as well) from existing precedent should be applied in all cases other than Supreme Court cases relating to abortion.

394. *NOW II*, 537 U.S. at 402 n.6 (citing *United States v. Tropiano*, 418 F.2d 1069, 1076 (1969)).

395. *Tropiano*, 418 F.2d at 1071, 1082–83.

direct benefit being conferred on the person who obtains the property.”³⁹⁶ Importantly, in *Tropiano*, it did not matter whether or not the extortionist was the entity that directly received the financial benefits from the extortion.³⁹⁷

To the extent that *NOW II* is *sui generis* to Supreme Court abortion cases, that distinction relates solely to the application of extortion principles to abortion clinic protests. The principle that protest activity can be subject to extensive government regulation is not within the purportedly *sui generis* nature of *NOW II*, and the federal law that severely restricts protest activity at abortion clinics, the FACE Act, has survived all challenges brought against it.³⁹⁸ Since the *NOW II* Court did not reject *Tropiano*, the *NOW II* holding must be seen as exceedingly narrow for Hobbs Act purposes, limited to the facts of the *NOW* cases. A RICO prosecution against the BDS Movement with a Hobbs Act extortion predicate, therefore, would be properly decided under *Tropiano* with regard to the definition of “obtaining of property” under the Hobbs Act. Several years after *NOW II* was decided the final *NOW* case came before the Supreme Court. Because *NOW III* was a case relating to the very narrow question of whether violence unrelated to extortion could be a RICO predicate, it is not substantively relevant to this Article.³⁹⁹

a. *Reconciling NOW I and NOW II*

How are we to resolve the Supreme Court’s apparent about-face between *NOW I* and *NOW III*? While it may be true that Supreme Court abortion cases are *sui generis* in some aspects, the better explanation is that two months after the Court decided *NOW I* Congress provided a specific remedy to abortion clinic

396. *Id.* at 414–15 (citing *United States v. Green*, 350 U.S. 415 (1956)) (Stevens, J. dissenting).

397. There were a number of individuals and companies involved in the extortion, some of whom did in fact obtain the direct financial benefits from the extortion and others who did not. The court did not distinguish between the two in finding a violation of the Hobbs Act, as it focused on the fact that the property rights were being deprived.

398. See *United States v. Bird*, 279 F. Supp. 2d 827 (S.D. Tex. 2003), rev’d, 401 F.3d 633 (5th Cir. 2005) (upholding the constitutionality of the FACE Act).

399. The *NOW III* Court found that violence not related to extortion would not be a Hobbs Act violation that could function as a RICO predicate. *NOW III*, 547 U.S. 9, 23 (2006).

protests in the form of the FACE Act. The Supreme Court is well known for deciding cases on the narrowest of grounds. The enactment of the FACE Act allowed the Court to avoid a potential expansion of RICO while still upholding the principle in *NOW I* that protected abortion clinics from disruptive protests and leaving in place *Tropiano* extortion precedent.

As the *NOW II* Court stated, “[w]hatever the outer boundaries [of extortion liability under the Hobbs Act] may be, the effort to characterize [the Activists’] actions here as an ‘obtaining of property from’ [abortion providers and those seeking abortions] is well beyond them.”⁴⁰⁰ The Court left open the possibility that under other circumstances there could indeed be Hobbs Act extortion liability “based on obtaining something as intangible as another’s right to exercise exclusive control over the use of a party’s business assets.”⁴⁰¹ Since the BDS Movement’s activities are directed at disrupting interstate and international commerce and depriving a target of its property rights to conduct business, they are comfortably within these “outer boundaries” of RICO predicates, including the Hobbs Act.

3. After *NOW*: RICO Predicates and the BDS Movement

The *NOW* cases demonstrate there can be no question that RICO may apply to what is otherwise seen as political or protest activity. In ultimately finding that the Activists were not liable under RICO for their abortion clinic protest activity, the United States Supreme Court decided the case on the merits.⁴⁰² This is critically important, as the Court did not find that political or protest speech was absolutely immune from RICO prosecution.⁴⁰³ In fact, in *NOW I*, Justices Souter and Kennedy acknowledged that First Amendment concerns could only be raised as a defense in particular cases.⁴⁰⁴

The import of this should not be overlooked. A RICO case can

400. *NOW II*, 537 U.S. at 402.

401. *Id.*

402. In other words, the Court did not decide the case on procedural grounds, so the legal principle that regulation of abortion clinic protests does not violate First Amendment protections is precedential. Had the Court decided the case on other grounds, such as a finding that a party did not have standing, the precedential value of the case would have been nil.

403. *NOW II*, 537 U.S. at 402.

404. *NOW I*, 510 U.S. 249, 264–65 (1994).

be brought against the BDS Movement and it will be up to the courts to determine whether the underlying activity is protected speech. By way of example, if the BDS Movement were simply to march in public holding signs critical of American support for Israel, such action, absent any other factors (such as violence emanating from the protesters) would likely be protected and the RICO prosecution would fail. But the BDS Movement's typical activities are not focused on protected First Amendment speech; rather, they are geared at promoting secondary and tertiary boycotts to inflict economic harm on Israel and its supporters while providing support to Israel's foes. This objective was originally announced as part of the Arab League Boycott Declaration of 1945, reiterated at the NGO Durban Conference and memorialized in the BDS Manifesto.⁴⁰⁵

The BDS Manifesto first bemoans the rise of Israel's economy in the post-Oslo period, noting that, "Israel benefited considerably [post-Oslo], particularly in diplomatic and economic terms. Financially, it resulted in a six-fold increase in direct foreign investment, a jump from \$686 million to about \$3.6 billion. In 1994, Israel's GDP grew by 6.8% and its exports by 12.6%."⁴⁰⁶ The BDS Manifesto next devotes fifteen pages to a detailed analysis of each major sector of Israel's economy, from agriculture to technology to military to tourism,⁴⁰⁷ and concludes with a directed call for a global attack on Israel's commercial interests:

The effectiveness of any programme of sanctions aimed at a country's foreign trade will depend upon the degree of dependence of its economy on trade with the rest of the world. Israel . . . has a vulnerable and volatile economy that could feel the impact of coordinated BDS campaigns.⁴⁰⁸

One need only look at recent BDS Movement activities at American ports to see that they are primarily focused on interfering with commerce and depriving Israel of its property rights in foreign trade. After preventing a cargo ship with partial Israeli ownership from unloading cargo at American ports, local affiliates of the BDS Movement proudly hailed the financial harm

405. BDS Manifesto, *supra* note 59, at 22.

406. *Id.*

407. *Id.* at 138–53.

408. *Id.* at 161.

they had inflicted upon Israel: “the Zim boat was delayed from coming to port in Tacoma, costing the company approximately \$500,000. Blocking the boat puts a dent in the profits being sent to power Israel.”⁴⁰⁹ In fact, a leader in the dockworker’s union that facilitated the BDS Movement’s interference with Israeli trade in the United States justified the union’s participation by stating: “[a]s a longshoreman, **I know how critical international trade is to the economy . . .** I think it is an appropriate action against those who have prevented the self-determination of the Palestinian people and to show solidarity with the people of Gaza.”⁴¹⁰ There can be no question that the goal of the BDS Movement is interference with commerce, the very thing that the Hobbs Act and RICO were enacted to combat.

The *NOW* plaintiffs had to trace an attenuated logical path to establish that abortion protests impermissibly interfered with commerce, yet the Supreme Court found the linkage to be sufficient. The *NOW* plaintiffs alleged that the protest activity deprived the abortion clinic workers and clients of their property rights to perform or obtain abortion services. The Activists stated that their primary goal was to prevent the abortions from being performed.⁴¹¹ There was no evidence adduced that the Activists sought to otherwise interfere with the property rights of either the service providers or recipients. The *NOW I* Court found that an economic motive was not necessary to find a Hobbs Act violation since the purpose of the Hobbs Act (to prevent interference with interstate commerce) was to prevent any interference with commerce (and in particular, property rights).

The BDS Movement, on the other hand, is first and foremost a

409. Jill Mangaliman & Katrina Pestaño, *Why block the boat? Resistance from Ferguson to Palestine to the Philippines*, THE SEATTLE GLOBALIST (Aug. 25, 2014), <http://www.seattleglobalist.com/2014/08/25/block-the-boat-palestine-philippines-bds-israel-tacoma/28647>. See also Charlotte Silver, *Protestors block and delay Israeli ships up and down US West Coast*, ELEC. INTIFADA (Aug. 28, 2014), <http://electronicintifada.net/blogs/charlotte-silver/protestors-block-and-delay-israeli-ships-and-down-us-west-coast> (“The action originated in Oakland, California, which set a high bar for others to follow. Protestors there successfully prevented the unloading of the Zim Piraeus container ship for nearly four full days. But other cities’ more modest demonstrations were nevertheless successful in temporarily delaying the Zim ships from unloading, costing the company hundreds of thousands of dollars . . .”) (emphasis added).

410. Mangaliman & Pestaño, *supra* note 409.

411. *NOW II*, 537 U.S. 393, 402 (2003).

movement that seeks to interfere with all commerce that involves its target (Israel) through acts that directly and significantly interfere with American and international commerce. Economic motive and interference with commerce in the United States are at the heart of the BDS Movement's existence. Consequently, a Hobbs Act claim against the BDS Movement under RICO would be colorable (if BDS Movement activities are not seen as a *prima facie* violation of the Hobbs Act) and, under the *NOW* cases and other RICO principles, should easily survive attempts to dismiss the claims at a preliminary stage.

Additionally, the property rights that the BDS Movement obtains from Israel provide a benefit to the BDS Movement in two distinct ways. First, since the BDS Movement's goal is to harm Israel in any way possible, the deprivation of revenue and commercial markets available to Israel provides the BDS Movement with a direct realization of its objectives, which leads to more success in recruiting supporters and raising funds, especially among more radical constituencies.⁴¹² Furthermore, the public relations benefit of using American unions and individuals, rather than foreign provocateurs, to interfere with commerce involving Israel helps the BDS Movement to grow in mainstream influence and, therefore, enhances its ability to raise funds globally. BDS Movement fundraising is estimated to be in excess of tens of millions of dollars annually.⁴¹³ At the same time, Israel's public

412. Ahmad Moussalli, a professor at the American University of Beirut who specializes in the dynamics of Islamist groups, found that there is a tangible benefit from Islamist groups' extreme actions. Professor Moussalli stated that exceeding societal norms to attack perceived enemies of the Islamist movement "gets [the Islamist groups] money, support and recruits from around the world." Yaroslav Trofimov, *Taliban Attack Reflects Barbarity Competition Among Jihadists*, WALL ST. J. (Dec. 17, 2014), <http://www.wsj.com/articles/taliban-attack-reflects-barbarity-competition-among-jihadists-1418841416>.

413. See, e.g., Silver, *supra* note 299 ("Elia says that while organizers are content with the victory they set out to achieve, they hope to build their coalition: 'At this point what we want to work on is getting labor on board—getting the union to realize this is an issue of social and global justice.' Meanwhile, down the coast in Southern California's Long Beach port, organizers were moved to mobilize an action in the span of only two and a half days after witnessing Oakland's action. 'Oakland was so amazingly successful and it really inspired a lot of people,' Garrick Ruiz of BDS-Los Angeles told The Electronic Intifada. 'We in Los Angeles wanted to do something along the same lines and that's when the larger coalition came together.'"). In the absence of the collaboration between the BDS Movement,

standing is wrongfully harmed and its opportunities in commercial, academic, scientific and other endeavors are negatively impacted.

Second, in the eyes of the BDS Movement there are two types of commercial enterprises extant: those that support Israel and those that oppose (either directly or implicitly) Israel. By depriving Israeli businesses or businesses supportive of Israel of commercial opportunities, the BDS Movement rewards other businesses with an opening to obtain those newly available commercial opportunities. By doing so, the BDS Movement expands its reach and reputation and treats business opportunities as a currency that can be showered upon those who abide by its anti-Israel agenda. Unlike the Activists in the *NOW* cases, the BDS Movement both deprives its target of a property right and acquires those property rights.⁴¹⁴ This type of activity

its United States affiliates and dockworkers' unions, the costs to the BDS Movement of itself creating such levels of interference with Israeli cargo handling would have been significant. The BDS Movement's funding is veiled in secrecy, but it is clear that the more notoriety they achieve and the more supporters they gather, the more funding they'll receive. See, e.g., Edwin Black, *Financing Mideast Flames—Confronting BDS and the New Israel Fund*, HUFFINGTON POST (Feb. 28, 2014), http://www.huffingtonpost.com/edwin-black/financing-mideast-flamescb_4874795.html; *NGOs and the BDS Movement: Background and Funding*, NGO MONITOR (Dec. 16, 2009), http://www.ngo-monitor.org/article/ngos_and_the_bds_movement_background_funding_and_strategic_options; Gerald Steinberg, *Confronting European funding for BDS*, SCHOLARS FOR PEACE IN THE MIDDLE EAST (Jan. 29, 2014), <http://spme.org/boycotts-divestments-sanctions-bds/confronting-european-funding-bds/16783/> (“NGO Monitor research has exposed tens of millions of Euros provided annually to NGOs via the EU and European governments. For more than ten years, this highly politicized NGO funding has been allocated for discriminatory anti-Israel warfare through secret processes under frameworks for humanitarian aid, democracy and human rights, and other universal moral principles. This money enables the network of ostensibly “non-political” organizations to flood the media, universities, parliaments and other platforms with a steady flow of anti-Israel demonization.”). Each “successful” BDS Movement activity thus results in further funding for the group’s activities.

414. The *NOW II* Court used a two-part test to determine whether property had been obtained. First, there must be a deprivation. Next, there must be an acquisition of the property. *NOW II*, 537 U.S. 393, 405 (2003). In the *NOW* cases, there was no question that the Activists had deprived the medical staff and the patients of a property right, but since the Activists did not exercise any form of control over the property other than to deprive the targets of it (in fact, the Activists’ goal was to ensure that no one utilized the targeted property rights), the Court saw the activity as more akin to coercion than extortion. In the case of the BDS Movement, however, the property

is squarely within the parameters of *Tropiano's* Hobbs Act extortion calculus and clearly differentiates the BDS Movement's activities from those of abortion clinic protesters under the *NOW* cases. While the viability of a RICO case with a Hobbs Act predicate⁴¹⁵ is obvious and strong based on, *inter alia*, the *NOW* cases, there is another RICO predicate that could be asserted against the BDS Movement's activities: providing material support to terrorists in contravention of federal law.⁴¹⁶

4. *Material Support to Terrorists as a BDS Movement RICO Predicate Offense*

In the mid-1990s, after a deadly increase in the frequency and magnitude of terrorist acts, Congress enacted two laws in an attempt to interrupt terror support coming from within the United States. These laws, 18 U.S.C. §§ 2339A and 2339B (Material Support Laws), were subsequently strengthened after the September 11th terror attacks to enhance the penalties for violations of the laws and to make enforcement of the laws more effective. In their current formulation, the Material Support Laws make it a federal offense to "provide material support or resources" in support of terrorist activities or to specific terrorist groups.⁴¹⁷ As a congressional report succinctly explains:

rights are intrinsically commercial and under any recognized theory of commercial markets, eliminating one participant from a market necessarily allows for another participant to either enter the market or expand its existing share of the market. In *Tropiano*, defendant Pellegrino was found liable of Hobbs Act extortion even though his activities were for the benefit of separate businesses, not his own. In the same way, the BDS Movement can be seen as engaging in extortion from Israeli companies and their supporters for the benefit of BDS Movement supporters.

415. See *United States v. Porcelli*, 404 F.3d 157 (2d. Cir. 2005). In addition to the potential for a RICO prosecution based on a Hobbs Act extortion predicate, the *Porcelli* case shows that, to the extent the BDS Movement uses communications via mail, a RICO prosecution could be brought based on a predicate crime involving mail fraud. See 18 U.S.C.A. § 1341 (Westlaw through Pub. L. No. 114-244). Since the *Porcelli* court disclaimed the *NOW II* Court's more restrictive formulation of "obtaining property," a mail fraud predicate would likely result in a more certain prosecution of the BDS Movement's activities. See *id.*

416. 18 U.S.C.A. § 1961(1)(G) (Westlaw through Pub. L. No. 114-244). Section 1961(1)(G) incorporates the "material support to terrorists" prohibitions of § 2332b(g)(5)(b)(i) as a predicate racketeering act. The two material supports to terrorist prohibitions are contained in 18 U.S.C. §§ 2339A, 2339B.

417. 18 U.S.C. § 2339A prohibits material support for terror activities,

The precise scope of the term “material support or resources” for purposes of Section 2339B has been a source of controversy almost from the beginning. The section uses the definition found in Section 2339A(b) and thus covers “any property, tangible or intangible, or service,” 18 U.S.C. 2339B(g)(4). The term excludes medicine and religious materials, but includes currency or monetary instruments or financial securities, financial services, lodging, training (i.e., instruction or teaching designed to impart a specific skill, as opposed to general knowledge), expert advice or assistance (i.e., advice or assistance derived from scientific, technical, or other specialized knowledge), safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation.

Section 2339B also has a more explicit description of personnel covered by its proscription, which confines the term to those provided to a foreign terrorist organization to direct its activities or to work under its direction or control.⁴¹⁸

In 2010, the United States Supreme Court was called upon to examine the constitutionality of one of the Material Support Laws in *Holder v. Humanitarian Law Project*.⁴¹⁹ This case was a pre-enforcement challenge to the Material Support Laws filed on behalf of a group of individuals and institutions (HLP Plaintiffs) that sought to provide humanitarian aid to two separate foreign groups that had been designated as “foreign terrorist organizations” (Named HLP Groups) under 18 U.S.C. § 2339B.⁴²⁰

while § 2339B prohibits material support to terror groups. As a congressional research service report explains, “[w]here Section 2339B outlaws support of terrorist organizations, Section 2339A outlaws support for the crimes a terrorist has or may be planning to commit. Section 2339B designates terrorist organizations; Section 2339A designates terrorist crimes.” CHARLES DOYLE, CONG. RESEARCH SERV., R41334, TERRORIST MATERIAL SUPPORT: A SKETCH OF 18 U.S.C. 2339A AND 2339B 1–2 (2010), <http://fas.org/sgp/crs/natsec/R41334.pdf>.

418. *Id.* at 1–2.

419. *See generally* 561 U.S. 1 (2010).

420. The two groups were “the Kurdistan Workers’ Party (also known as the Partiya Karkeran Kurdistan or PKK) and the Liberation Tigers of Tamil

The HLP Plaintiffs sought to provide the Named HLP Groups with monetary and other tangible aid (presumably, materials and equipment), legal training, and political advocacy. In particular, the HLP Plaintiffs intended to provide the following support: (1) “train[ing] members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes”; (2) “engag[ing] in political advocacy on behalf of Kurds who live in Turkey”; and (3) “teach[ing] PKK members how to petition various representative bodies such as the United Nations for relief.” With respect to the other plaintiffs, those activities are: (1) “train[ing] members of [the] LTTE to present claims for tsunami-related aid to mediators and international bodies”; (2) “offer[ing] their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government”; and (3) “engag[ing] in political advocacy on behalf of Tamils who live in Sri Lanka.”⁴²¹

The HLP Plaintiffs alleged that the Material Support Laws infringed, *inter alia*, their First Amendment rights to speech and association. In upholding the Material Support Laws, the United States Supreme Court first noted that the law prohibits activity in support of an organization that a person knows is a terror organization.⁴²² It is not relevant whether the person intended to provide support to that organization’s terror activities. In practical terms, this means that as long as a person knows that an organization is a terror organization, any material support that the person provides to any part of that organization will subject him or her to prosecution, even if the support was intended to help the organization’s non-terror activities.⁴²³ Just as providing advocacy and other support to the non-terror arm of the PKK subjected the HLP Plaintiffs to prosecution under the Material Support Laws, providing those types of support to Hamas’ non-terror arm (the BDS Movement) would subject BDS Movement supporters to the same type of prosecution.

Eelam (LTTE). The PKK is an organization founded in 1974 with the aim of establishing an independent Kurdish state in southeastern Turkey. The LTTE is an organization founded in 1976 for the purpose of creating an independent Tamil state in Sri Lanka.” *Humanitarian Law Project*, 561 U.S. at 3 (citation omitted). This case dealt specifically with 18 U.S.C. § 2339B. The same principles should apply to 18 U.S.C. § 2339A, but the Court did not explicitly rule on that section of the law.

421. *Humanitarian Law Project*, 561 U.S. at 9 (citations omitted).

422. *Id.* at 6.

423. *Id.* at 11.

The *Humanitarian Law Project* court was careful to differentiate permissible activities in relation to terror groups from impermissible activities. Citing to the statute, the Court noted that independent advocacy was not implicated by the Material Support Laws: “Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.”⁴²⁴ The Court reached a similar conclusion with regard to the prohibition on provision of “services” under the Material Support Laws:

The other types of material support listed in the statute, including “lodging,” “weapons,” “explosives,” and “transportation,” § 2339A(b)(1), are not forms of support that could be provided independently of a foreign terrorist organization. We interpret “service” along the same lines. Thus, any independent advocacy in which plaintiffs wish to engage is not prohibited by § 2339B. On the other hand, a person of ordinary intelligence would understand the term “service” to cover advocacy performed in coordination with, or at the direction of, a foreign terrorist organization.⁴²⁵

Thus, to the extent a service is provided without coordination or without benefit to the terror group, it would be outside of Material Support Law’s restrictions. On the First Amendment free speech claims overall, the Court dismissed the HLP Plaintiff’s allegations and concluded:

Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK and LTTE, the governments of Turkey and Sri Lanka, human rights, and international law. They may advocate before the United Nations. As the Government states: “The statute does not prohibit independent advocacy or expression of any kind.” Section 2339B also “does not prevent [plaintiffs] from becoming members of the PKK and LTTE or impose any sanction on them for doing so.” Congress has not, therefore, sought to suppress ideas or opinions in the

424. *Id.* at 18.

425. *Id.* at 19.

form of “pure political speech.” Rather, Congress has prohibited “material support,” which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.⁴²⁶

Moving on to the issue of support for humanitarian activities of designated terror groups, the Court concluded that Congress had a legitimate reason to not make a distinction in the Material Support Laws on this point. Congress found that “[f]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”⁴²⁷ In particular, the Court reasoned:

Material support meant to “promot[e] peaceable, lawful conduct,” can further terrorism by foreign groups in multiple ways. “Material support” is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. *It also importantly helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks.* “Terrorist organizations do not maintain organizational ‘firewalls’ that would prevent or deter . . . sharing and commingling of support and benefits.”⁴²⁸

Using the BDS Movement’s affiliate and benefactor, Hamas, as an example of how non-terror related support cannot be separated from terror-related support,⁴²⁹ the *Humanitarian Law*

426. *Id.* at 20–21 (citations omitted).

427. *Id.* at 24 (citing the Congressional Findings and Purpose of the Material Support Laws).

428. *Id.* at 25 (emphasis added to show that Congress intended to prevent terror groups from doing public relations outreach in the United States) (citations omitted).

429. *See id.* at 26. The United States Supreme Court was prescient in examining how support for Hamas’ non-terror work constituted materially supporting terrorism. Even though Hamas had nothing to do with the *Humanitarian Law Project* case, the Court’s use of Hamas as an example sets important guideposts for applying of the Material Support Laws to Hamas

Project Court went on to explain:

Investigators have revealed how terrorist groups systematically conceal their activities behind charitable, social, and political fronts. Indeed, some designated foreign terrorist organizations use social and political components to recruit personnel to carry out terrorist operations, and to provide support to criminal terrorists and their families in aid of such operations. Muddying the waters between its political activism, good works, and terrorist attacks, Hamas is able to use its overt political and charitable organizations as a financial and logistical support network for its terrorist operations.⁴³⁰

The Material Support Laws were enacted with a dual purpose. First, they were designed to deny terror groups the tangible and intangible support that is needed to carry out terror attacks. Second, and just as important, the laws were enacted for policy and diplomatic reasons. American support for foreign terror groups provides those groups with a public relations coup and stymies American efforts to coordinate with foreign nations who are also fighting against terror. The *Humanitarian Law Project Court* explained:

Providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks. We see no reason to question Congress's finding that "international cooperation is required for an effective response to terrorism . . ." The material-support statute furthers this international effort by prohibiting aid for foreign terrorist groups that harm the United States partners abroad: "A number of designated foreign terrorist organizations have attacked moderate governments with which the United States has vigorously endeavored to maintain close and friendly relations," and those attacks "threaten [the] social, economic and political stability" of such governments.⁴³¹

and other Islamic terror organizations.

430. *Id.* at 25–26 (alteration in original) (citations omitted).

431. *Id.* at 27.

In enacting the Material Support Laws, as well as the EAA Anti-Boycott Law, the United States clearly set out a dividing line between the rights of Americans to speak freely on their own accord and the right of the United States government to be the sole determinant of the country's foreign policy objectives and commercial relations. This type of reservation of powers to the sovereign is one of the foundations of any democratic government.

a. *Do BDS Movement Activities Violate the Material Support Laws?*

The BDS Manifesto acknowledges that the BDS Movement does not disclaim terrorism against Israel.⁴³² Rather, the BDS Manifesto proclaims that the BDS Movement is simply one arm of the Palestinian Arab "resistance" and it is but one part of the overall "resistance" strategy employed against Israel.⁴³³ Hamas, an organization named under the Material Support Laws as a foreign terrorist organization, is reportedly connected to the establishment of the BDS Movement, shares numerous objectives and philosophies with the BDS Movement and is properly seen as coordinating and affiliating with the BDS Movement.⁴³⁴ Whether or not there are formal operational and financial ties between Hamas (or other named foreign terrorist organizations) and the BDS Movement is something that can only be determined through

432. BDS Manifesto, *supra* note 59, at 14 ("BDS movements, no matter how powerful, cannot and should not look to replace the resistance and struggle of those people they are trying to support."). Resistance is a synonym for violence, as the BDS Manifesto implicitly acknowledges that, "the Palestinian struggle has evolved over the decades as an expression of the Palestinians, who challenge the occupation and use the means available to a subjugated people to seek the attainment of their rights. The Palestinian struggle cannot be so simply defined as violent or non-violent; it brings together a variety of strategies in its path of resistance." *Id.* at 11. In fact, the name "Hamas" is an acronym for "Islamic Resistance Movement" and Hamas itself has become a synonym for terrorism directed at Jews and Israel.

433. *See id.* at 11.

434. *See* Dan Diker, *Unmasking BDS: Radical Roots, Extremist Ends*, JERUSALEM CTR. FOR PUB. AFFAIRS, <http://jcpa.org/unmasking-bds/> (last visited July 6, 2016); *see also* *Israel Imperiled: Threats to the Jewish State, Joint Hearing Before H. Foreign Affairs Comm., H. Subcomm. on Terrorism, Nonproliferation, and Trade, and H. Subcomm. on the Middle East and North Africa*, 114th Cong. (2016) (statement of Jonathan Schanzer, Vice President, Research Foundation for Defense of Democracies, detailing ties between supporters of Hamas and supporters of the BDS Movement).

the legal discovery process, as neither organization is forthcoming about their respective inner workings, but the threshold connections between the two are manifest and support the presumption that the two organizations coordinate with each other for purposes of the Material Support Laws.⁴³⁵

Indeed, there is precedent for both the government and private parties filing suit against Hamas front organizations that are purportedly focused solely on humanitarian or charitable objectives. In a series of cases brought by the United States and individuals who were harmed by Hamas's terrorist acts, a Hamas front organization was permanently disbanded, monetary fines were imposed and the responsible individuals were sentenced to long prison terms.⁴³⁶ Though this case was brought under a

435. In addition to the explicit Hamas endorsement of the BDS Movement's activities, the website of Hamas's armed faction (Ezzedein Al-Qassam Brigades) has published frequent calls to support the boycott of Israel. See, e.g., *Khudari calls for activating international boycott of Israel*, AL-QASSAM (Feb. 10, 2014), http://www.qassam.ps/news-8037-Khudari_calls_for_activating_international_boycott_of_Israel.html; *Resheq: Expand the boycott of Israeli goods campaign*, AL-QASSAM (May 1, 2012), http://www.qassam.ps/news-5655-Resheq_Expand_the_boycott_of_Israeli_goods_campaign.html ("Member of Political Bureau Hamas, Ezzat Resheq called to expand the boycott Zionist products campaign . . ."); *Hamas urges states to boycott Israel, end siege*, AL-QASSAM (June 1, 2010), http://www.qassam.ps/news-2918-Hamas_urges_states_to_boycott_Israel_end_siege.html; *Boycotting Israeli and American Goods*, AL-QASSAM (Nov. 28, 2006), http://www.qassam.ps/news-17-Boycotting_Israeli_and_American_Goods.html (issuing a fatwa to "organize cells to build a boycott" against Israel and the United States).

436. In what are known as the "*Holy Land Foundation*" cases, the United States first designated a Hamas front group named the Holy Land Foundation as a "Specially Designated Global Terrorist," froze its assets and ultimately obtained criminal convictions against its principals, resulting in decades-long prison sentences. *Holy Land Found for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 160 (D.C. Cir. 2003) (relating to the asset freeze). See generally *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011) (relating to the criminal prosecution of individuals). See also *Federal Judge Hands Downs Sentences in Holy Land Foundation Case*, U.S. DEPT OF JUSTICE (May 27, 2009), <http://www.justice.gov/opa/pr/federal-judge-hands-downs-sentences-holy-land-foundation-case> (two of the *Holy Land Foundation* principals each received sentences of 65 years). After the government's action commenced, American citizens who were harmed by Hamas's terrorist activities filed suit against certain Hamas front organizations in the United States, including the Holy Land Foundation, under 18 U.S.C. § 2333(a) (providing a civil cause of action for American victims of global terrorism), alleging that the front groups aided and abetted Hamas through their charitable and humanitarian activities in the United States. The plaintiffs were awarded damages of \$156,000,000. *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885, 890 (N.D.

different anti-terrorism law, the precedent of finding a front group liable for aiding and abetting the parent terrorist group's activities, especially a Hamas front group operating in the United States, should not be overlooked.

Under the Material Support Laws, material support is defined as the provision of "any property, tangible or intangible, or service . . . except medicine or religious materials."⁴³⁷ The BDS Movement's activities are easily classified as a service to Hamas, as Hamas has called for a boycott of Israel and the BDS Movement coordinates with Hamas for the implementation of that boycott. By providing this service to Hamas, the BDS Movement frees Hamas's assets from being used for boycott promotion, allowing them to be used for its terror activities instead, in exactly the way that the *Humanitarian Law Project* Court described the HLP Plaintiffs providing advocacy and other services material support to the two named terror groups allowed those terrorist organizations to free up resources for violent acts.

Moreover, since the BDS Movement's terror affiliations have not yet become known to the public in the United States, there is likely greater public acceptance of the boycott under the BDS Movement name than would be possible if a direct tie to Hamas were known. Providing an untainted cover for Hamas' activities and enrolling new supporters for Hamas' anti-Israel propaganda campaign are properly characterized as services to Hamas. Put another way, if Hamas were to hire public relations and lobbying firms to do exactly what the BDS Movement does with regard to anti-Israel advocacy in the United States, there is no question that the firms' activities would be considered a service to Hamas.

Furthermore, since the BDS Movement's activities result in a deprivation of property rights from Israeli companies and their supporters, the corresponding shift in commercial activity⁴³⁸ to

Ill. 2004), *vacated sub nom.* Boim v. Holy Land Found. for Relief & Dev., 511 F.3d 707 (7th Cir. 2007), *vacated*, 549 F.3d 685 (7th Cir. 2008) (en banc), *cert. denied*, 130 S. Ct. 458 (2009). See generally Laura B. Rowe, *Ending Terrorism with Civil Remedies: Boim v. Holy Land Foundation and the Proper Framework of Liability*, 4 SEVENTH CIR. REV. 372 (2009) (providing more information on the *Holy Land Foundation* civil cases); Adam N. Schupack, *The Arab-Israeli Conflict and Civil Litigation Against Terrorism*, 60 DUKE L.J. 207 (2010) (also providing more information on the *Holy Land Foundation* civil cases).

437. 18 U.S.C.A. § 2339A(b)(1) (Westlaw through Pub. L. No. 114–244).

438. See BDS Manifesto, *supra* note 59, at 105–07 (discussing the

non-Israeli companies or companies that support the boycott is a transfer of property rights. In this way, those who participate in the boycott create commercial rewards for companies that are either sympathetic to anti-Israel terrorism or that are favored by such terror groups. Thus, it can also be said that the BDS Movement is providing property in support of Hamas.

Because Hamas is a designated foreign terrorist organization,⁴³⁹ the foregoing analysis of the types of material support the BDS Movement provides to Hamas demonstrates that there is a colorable case to be made that the BDS Movement's activities are in violation of § 2339B of the Material Support Laws. It is also likely that the BDS Movement's formative connection to Iran⁴⁴⁰ (and Iran's terrorism proxy in Lebanon, Hezbollah, which is also a designated foreign terrorist organization) and other designated foreign terrorist organizations would provide the basis for prosecution under § 2339B.

While it is clear that the inspiration for the BDS Movement originated in Iran,⁴⁴¹ the ongoing ties between Iran and the BDS Movement have been obfuscated by the parties. Indeed, the ties between Iran and the BDS Movement are likely much deeper than the fact that the BDS Movement originated at the Tehran regional meeting as part of Durban I. In November 2014, Iran's Supreme Leader,⁴⁴² Ayatollah Ali Khameni, published a document that was

financial impact of the boycott).

439. Hamas was added to the foreign terrorist organization list in 1997. *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, <http://www.state.gov/j/ct/rls/other/des/123085.htm>.

440. See BDS Manifesto, *supra* note 59, at 105.

441. The BDS Manifesto does acknowledge that the BDS Movement originated at Durban I. BDS Manifesto, *supra* note 59, at 40 ("The first important move from global civil society came in August–September 2001, during the NGO Forum of the UN World Conference against Racism, Racial Discrimination and Related Intolerances in Durban, South Africa. Tens of thousands of people converged for the meeting, with Palestine one of the most prominent causes. A resolution was passed pressing for the isolation of Israel and denouncing its racist nature and policies."). Durban I's anti-Israel agenda is documented to have been devised at the regional meeting held in Iran prior to Durban I. See *Durban III Conference Opens in New York Amid Allegations of anti-Israel Bias*, HAARETZ (Sept. 22, 2011), <http://www.haaretz.com/israel-news/durban-iii-conference-opens-in-new-york-amid-allegations-of-anti-israel-bias-1.386116>.

442. The "Supreme Leader" is the most powerful religious and political office in the Republic of Iran and is responsible for appointing the leaders of the military, judiciary and civil government.

unsettlingly similar to the BDS Manifesto's core principles. The document was titled "9 Key Questions About Elimination of Israel" (sic) and was posted on Khameni's government website.⁴⁴³ Though Khameni's position paper was significantly less verbose than the BDS Manifesto, the essence of his call to action is the same as the BDS Manifesto's. Khameni first brands Israel as a criminal regime, then asserts that any Jewish state is illegitimate and must be eliminated and replaced by a state that is controlled by the "original people of Palestine."⁴⁴⁴ Just like the BDS Manifesto, Khameni's paper proclaims that Jews who were in the diaspora prior to the founding of the modern state of Israel should be ethnically cleansed from the new Palestinian Arab state that will replace Israel, with such Jews to be "return[ed] to their home countries."⁴⁴⁵ Until such time that Israel can be eliminated as a

443. The document was also posted to Khameni's twitter account on November 9, 2014. *Why should & how can #Israel be eliminated? Ayatollah Khamenei's answer to 9 key questions*, TWITTER (Nov. 9, 2014), https://twitter.com/khamenei_ir/status/531366667377717248 [hereinafter Khameni Manifesto]. See also Antonia Molloy, *Iran's supreme leader Ayatollah Khamenei outlines plan to 'eliminate' Israel*, INDEPENDENT (Nov. 10, 2014), <http://www.independent.co.uk/news/world/middle-east/irans-supreme-leader-ayatollah-khamenei-outlines-plan-to-eliminate-israel-9850472.html>.

444. Khameni Manifesto, *supra* note 443, at point 3.

445. *Id.* at point 4. The desire to ethnically cleanse Israel of all Jews is made clear by Khameni's description of who the "original people of Palestine" are. The modern state of Israel exists on a portion of what was historically the "Land of Israel" as described in the Bible. Over the course of centuries, the Jewish residents of that land were either massacred or forcibly dispersed across the globe into what was known as the Jewish Diaspora (i.e., Jews from the Land of Israel who were relocated to other countries or regions). Khameni lists the original people of Palestine to include "Muslims, Christians[,] and Jews," but he then excludes any Jew who emigrated to Palestine. *Id.* at point 3. Since Christianity was founded in approximately 33 A.D. and Islam was founded in approximately 622 A.D., the original people of Palestine, as between the three peoples listed, must be Jews, since Judaism predates both other religions (having been founded in approximately 1300 B.C., roughly 2,000 years earlier than Islam). Yet Khameni allows for Muslims who lived outside of modern Israel to be considered an original people of Palestine, yet excludes Jews who lived outside of Palestine. A review of historical demographic data of the land that is now modern Israel explains why Khameni cherry picks in this way. Prior to the founding of Christianity, the estimated population of the land that is modern Israel was between 1 million and 2.5 million, with a vast majority of the inhabitants being Jewish and none being Christian or Muslim. Only after the founding of Christianity, and then Islam, and the corresponding purges of Jews from the land, did Jewish populations represent less than a majority. See Sergio DellaPergola, *Demographic Trends in Israel and Palestine: Prospects and*

Jewish state, Khameni calls for “powerful confrontation” and “resolute” resistance.⁴⁴⁶ Like the BDS Movement, Khameni refuses to accept a two-state solution, insists upon a Muslim state replacing Israel⁴⁴⁷ and embraces both violent and non-violent “resistance” to undermine and weaken Israel. The BDS Manifesto’s objectives parallel those of not just Iran but of virtually every other radical Islamist organization. The coordinated agendas of these organizations and countries cannot be mere coincidence.

Again, only a thorough legal discovery process can definitively conclude whether the BDS Movement is a front for these illegal terrorist organizations and their sponsors, but one recent report has shown that the BDS Movement’s own list of organizations that were responsible for its formation included:

[I]llegal associations, terror organizations, and their affiliates, such as the Council of National and Islamic Forces in Palestine, which is a coordination forum for all Palestinian terror organizations in their ongoing fight against Israel. This forum includes Hamas, the Popular Front for the Liberation of Palestine, the Democratic Front for the Liberation of Palestine, the Palestinian Liberation Front (acknowledged as a terrorist organization by the U.S., EU, and Canada) and Palestinian Islamic Jihad (acknowledged as a terrorist organization by the U.S., EU, UK, Japan, Australia, and Canada).⁴⁴⁸

Policy Implications, 103 AMERICAN JEWISH YEARBOOK 3, 10, 11 (2003), <http://www.bjpa.org/Publications/details.cfm?PublicationID=14672>.

446. Khameni Manifesto, *supra* note 443, at point 6.

447. Neither the BDS Manifesto nor the Khameni Manifesto is forthright with its call for replacing Israel with a Muslim state, but if their objectives are achieved, *a fortiori*, that is exactly what would result. Muslims make up over 80% of the current Arab population of Israel, so it follows that any Palestinian Arab state would have a similar constituency.

448. Adam Shay, *Manipulation and Deception: The Anti-Israel “BDS” Campaign (Boycott, Divestment, and Sanctions)*, JERUSALEM CTR. FOR PUB. AFFAIRS (Mar. 19, 2012), <http://jcpa.org/article/manipulation-and-deception-the-anti-israel-bds-campaign-boycott-divestment-and-sanctions/#sthash.E4nS2Rcf.dpuf>. Further ties between the BDS Movement and designated foreign terrorist organizations were outlined in a 2014 report:

Letters of support [for the BDS Movement’s formation] were accepted from senior figures in various PLO factions, such as Abu

Even if the ties between the BDS Movement and designated foreign terrorist organizations are not sufficiently demonstrable for a § 2339B prosecution, prosecution under § 2339A could proceed based on the types of support the BDS Movement provides with respect to terrorism generally.⁴⁴⁹ The BDS Movement is thus susceptible to government prosecution under either § 2339A or § 2339B without regard to RICO and, using violations of either of these laws as RICO predicates, both private plaintiffs (since there is a private right of action under RICO) as well as the government may bring civil or criminal (in the case of the government) RICO actions against the BDS Movement and its supporters.⁴⁵⁰ Potential remedies as a result of a successful case

Maher Ghneim, a member of Fatah's Central Committee; Ahmed Saadat, Secretary-General of the Popular Front for the Liberation of Palestine (PFLP); Rakad Salem, Secretary-General of the Arab Liberation Front (ALF); and Jamil Shahada, Secretary-General of the Palestinian Arab Front (PAF); as well as from many trade unions in Europe, South Africa, Canada, Australia, and the United States. Finally, the conference called for the continuation of the BDS campaign until the three obligations mentioned above were fulfilled.

In September 2011, following President Abbas' speech at the United Nations, Dr. Sabri Saydam, the president's adviser on high-tech affairs, revealed Palestinian plans for the coming months: to use weapons that were made available by modern technology—recruit and develop social networks in order to organize campaigns for boycotts of Israeli goods; apply more pressure on the Israeli academy by asking universities in countries supporting the Palestinian cause to cut their ties with these institutions; organize demonstrations with more attendees; and strengthen the relations between various solidarity groups, so they can better communicate and listen to each other and not fall under specific factions.

Ehud Rosen, *What is the Real BDS Endgame? The Elimination of Israel*, JERUSALEM CTR. FOR PUB. AFFAIRS (Feb. 12, 2014), <http://jcpa.org/article/what-is-the-real-bds-endgame/#sthash.zhZ0b4fS.dpuf>.

449. Because § 2339A requires the defendant to have an intention to further specific terrorist activities, prosecution of the BDS Movement under this section would be more complicated and less certain. *See* 18 U.S.C.A. § 2339A(a) (Westlaw through Pub. L. No. 114–244). Section 2339B only requires that the defendant provide material support to a designated terrorist organization, without regard to whether the defendant intended for a terrorist act to be committed. *See* 18 U.S.C.A. § 2339B(a)(1) (Westlaw). Section 2339A does not require that a designated foreign terrorist organization be involved, which in some cases may make a prosecution under that section more certain (where there is ample evidence that the defendant intended to provide support to a terrorist attack by individuals not affiliated with a designated foreign terrorist group). *See* § 2339A(a) (Westlaw).

450. To the extent they have RICO statutes, individual states may also be

or prosecution include monetary fines (including treble damages and legal fees), injunctive relief, forfeiture, and imprisonment.

C. NOW, Policy, and the BDS Movement

The NOW cases demonstrate that protests and boycotts like those of the BDS Movement are not *per se* protected speech. To the extent such activities interfere with commerce and involve property deprivation, which is the proclaimed purpose of the BDS Movement's actions, those activities may be prosecuted as Hobbs Act and RICO violations. In addition, since the BDS Movement's activities are intended to provide material support to terrorist organizations, they may constitute RICO offenses under the Material Support Laws, in accord with the Supreme Court's ruling in *Humanitarian Law Project*. Read in conjunction with the *Holy Land Foundation* cases,⁴⁵¹ *Humanitarian Law Project* and the NOW cases provide a solid foundation on which to make a case that the activities of the BDS Movement are not protected by the First Amendment and are indeed actionable in cases brought by either the United States government or private individuals under extortion statutes (including the Hobbs Act) and the Material Support Laws, individually, and as predicates for a RICO prosecution.

IV. CONCLUSION

The objective of the BDS Movement, as set forth in the BDS Manifesto and its countless public statements, is to disrupt commerce in the United States as a means of inflicting economic harm on a United States ally. The purpose of the EAA Anti-Boycott Law, anti-trust laws and RICO (and its predicates) is to protect American commerce and to prevent Americans from being coerced into participating in foreign conflicts in contravention of United States' policy. While the First Amendment generally protects the right to engage in a wide variety of protest activities, as the *Claiborne* Court explained generally,⁴⁵² and the

able to bring RICO actions against the BDS Movement.

451. See generally *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003); *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885 (N.D. Ill. 2004), *vacated sub nom. Boim*, 511 F.3d 707, *vacated*, 549 F.3d 685, *cert. denied*, 130 S. Ct. 458 (2009); *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011).

452. 458 U.S. 886, 928 (1982).

Humanitarian Law Project and *NOW Courts* held specifically, the First Amendment is not absolute.⁴⁵³

It may be the case, as others have argued,⁴⁵⁴ that the federal government sometimes acts in ways that are outside of its constitutional authority. Yet, even in light of such complaints, the general authority of the federal government to regulate commerce and conduct foreign affairs has never been successfully questioned.⁴⁵⁵ The primacy of federal government authority in these two areas can be traced back to the founding documents of this nation, where James Madison opined that: “[the power to regulate commerce and relations with foreign nations] forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect of other nations.”⁴⁵⁶

Madison’s point was that the rights of individuals under the nascent American system may be sacrosanct in virtually all other matters, but for the United States to operate as a sovereign nation among other sovereign nations the control of foreign policy had to be vested exclusively in the hands of the federal government.⁴⁵⁷

453. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010); *NOW III*, 547 U.S. 9, 17 (2006).

454. *See, e.g.*, MARK R. LEVIN, *THE LIBERTY AMENDMENTS: RESTORING THE AMERICAN REPUBLIC* (1st ed. 2013). In arguing for a series of constitutional amendments to return the government to the founding principles of limited power, Levin chronicles the gradual expansion of the federal government from “[w]hat was to be a relatively innocuous federal government, operating from a defined enumeration of specific grants of power . . . [to] . . . an ever-present and unaccountable force.” *Id.* at 6. The enumerated grants of power that Levin refers to are contained in Article I of the Constitution and include the power to regulate commerce and the power to regulate affairs with foreign nations. These powers are the ones that are directly implicated by the BDS Movement’s activities. *Id.*

455. U.S. CONST. art. I, § 8, cl. 3.

456. *THE FEDERALIST NO. 42*, at 260 (James Madison).

457. There is some tension between the rights of individual states and the supremacy of the federal government’s role in foreign affairs, but even to the extent states may have some residual powers to act in the periphery of foreign affairs, it has never been the case that individuals or non-governmental entities have had any power superior to the federal government’s in the realm of the conduct of foreign affairs. The Constitution vests the government, not individuals, with the power to conduct foreign affairs. *See, e.g.*, *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413–14 (2003) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 427 n.25 (1964)):

There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government’s policy, given the “concern for uniformity in

Individuals and groups, particularly those with ties to foreign concerns agitating against American interests, may not undermine this exclusive federal power. By acting on its own in contravention of United States' foreign policy to impose foreign boycotts and other sanctions in the United States, the BDS Movement undermines United States foreign policy and interferes with the functioning of domestic commercial markets.

Humanitarian Law Project can be seen as outlining the contours of constitutional government powers in the context of inherent individual rights that are protected by the First Amendment: at the intersection of a legitimate government interest in regulating an area of foreign affairs and the desire of individuals or non-governmental entities to advocate in that area in a way that interferes with the government's interests, the government's interest must prevail.

The United States government has enacted a number of laws, including the EAA Anti-Boycott Law and the Material Support Laws, that evince its intention to be the sole arbiter of American tolerance for foreign boycotts involving American businesses and individuals as well as what kinds of support, if any, may be provided to foreign organizations that may be connected to

this country's dealings with foreign nations" that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.

See also Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381–82 n.16 (2000) ("[T]he peace of the whole ought not to be left at the disposal of a part.") (quoting THE FEDERALIST NO. 80, pp. 535–36 (J. Cooke ed. 1961) (Alexander Hamilton)); THE FEDERALIST NO. 44, p. 299 (James Madison) (emphasizing "the advantage of uniformity in all points which relate to foreign powers"); THE FEDERALIST NO. 42, p. 279 (James Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations"). *See also* Medellín v. Texas, 552 U.S. 491, 511 (2008) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments.") (citing *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918)); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (negative Foreign Commerce Clause protects the National Government's ability to speak with "one voice" in regulating commerce with foreign countries (alteration in original)); *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 769 (1972) (plurality opinion) (act of state doctrine was "fashioned because of fear that adjudication would interfere with the conduct of foreign relations"); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.").

terrorism. If American commerce is to be used as a weapon against foreign countries, it is up to the United States government, not an organization affiliated with and controlled by foreign nations and terrorists, to make that decision and then to outline the methodology for its implementation. The BDS Manifesto asserts that the BDS Movement is an anti-apartheid movement and on this basis the National Lawyers Guild assures the BDS Movement that it is on firm legal ground to operate in the United States. Based on these overt and other implied assurances, a number of individuals and organizations, including unions, have been lured into supporting the BDS Movement without fully understanding the potential liability for their participation.

As Mark Twain famously said, “a lie can travel halfway around the world while the truth is putting on its shoes.” The BDS Movement and its supporters have certainly tried to legitimize their agenda by repeating the lie that Israel is an apartheid state, but repeating an unfounded and self-serving accusation does not make it so. Richard Goldstone, author of a critical United Nations’ report on Israel and a former justice of the South African Constitutional Court during the apartheid era, dismantled the apartheid libel in a 2011 *New York Times* editorial:

In Israel, there is no apartheid. Nothing there comes close to the definition of apartheid under the 1998 Rome Statute: “Inhumane acts . . . committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.” Israeli Arabs—20 percent of Israel’s population—vote, have political parties and representatives in the Knesset and occupy positions of acclaim, including on its Supreme Court. Arab patients lie alongside Jewish patients in Israeli hospitals, receiving identical treatment.⁴⁵⁸

The fact that the BDS Movement’s actions against Israel are based on a libel discredits the movement as a whole. Indeed, the

458. Richard J. Goldstone, *Israel and the Apartheid Slander*, N.Y. TIMES (Oct. 31, 2011), http://www.nytimes.com/2011/11/01/opinion/israel-and-the-apartheid-slander.html?_r=0.

BDS Movement's connections to global terrorist organizations provide ample reason to deny it the opportunity to further its objectives with American support. Yet, when it comes to the application and enforcement of United States laws, more important than opinions and accusations are precedent and policy. United States policy was opposed to South African apartheid and Congress enacted a law imposing sanctions on South Africa until such time as the apartheid system was dismantled.⁴⁵⁹ Not only has the United States not declared Israel to be an apartheid state or imposed sanctions on Israel, the EAA Anti-Boycott Law explicitly announced that, "[i]t is the policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States or against any United States person."⁴⁶⁰ This law was specifically enacted in opposition to the Arab boycott of Israel and the policy statement reflects American policy in support of, not in opposition to, Israel.

The BDS Movement, however, in its short history has proven to be adept at getting issues wrong, and it has erred monumentally in asserting that its activities are legal by virtue of its own hijacking of the anti-apartheid label and history. The United States opposes, rather than supports, sanctions against Israel. Israel is a longstanding and important ally of the United States. United States law and policy supports unfettered commercial relations with Israel. And, as this Article has demonstrated, the BDS Movement's activities against Israel are in violation of United States laws.

Far from being an anti-apartheid movement, the BDS Movement seeks to impose a form of ethnic cleansing in the Middle East by eliminating the sole exception to Arab and Islamic hegemony in the region. In all regards, United States law and policy is in opposition to the objectives and activities of the BDS Movement. To illustrate how strong the case against the BDS Movement is, it is worth returning to the quote from *Claiborne* that appeared at the beginning of this Article: "Secondary boycotts and picketing by labor unions may be prohibited, as part of Congress' striking of the delicate balance between union

459. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (1986) (codified at 22 U.S.C. § 5001 (repealed Nov. 1993)).

460. 50 U.S.C.A. § 4602(5)(A) (Westlaw through Pub. L. No. 114-244).

freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.”⁴⁶¹ If “coerced participation in industrial strife” was a basis for countenancing the government’s prohibition on secondary boycotts, coerced participation in international strife should be no less of a basis for the prohibition of cooperation with the BDS Movement.

The EAA Anti-Boycott Law, antitrust laws, and RICO are all common sense, reasonable and narrow regulations of speech that further the important goal of promoting American foreign policy objectives and commerce. As Justice Stevens noted in *Claiborne*, a boycott, especially one that is secondary, loses its First Amendment protections when it is “designed to secure aims that are themselves prohibited by a valid state law.”⁴⁶² Congress and various states have made it clear that foreign boycotts of Israel cannot be tolerated. Enforcement of these laws clearly supersedes any First Amendment rights that may be claimed in connection with participation in the BDS Movement.⁴⁶³

In fact, in some cases, such as labor union participation in the BDS Movement’s activities, government enforcement of the laws is essential. Labor unions often have a de-facto monopoly on the supply of labor in critical industries, such as cargo handling, granted with the government’s imprimatur.⁴⁶⁴ In other cases, unions are allowed to represent public sector employees, such as university employees. In the case of unions whose members are employed by government entities, such as universities, there is clearly a conflict between public funding of the underlying employers and employee participation in illegal foreign boycotts. This, in effect, compels all taxpayers to fund (and thus participate in) a campaign that not only may be against an individual taxpayer’s beliefs, is contrary to American foreign policy. Having given unions unparalleled power over broad segments of labor activity,⁴⁶⁵ government acquiescence to union contravention of

461. 458 U.S. 886, 912 (alteration in original).

462. *Id.* at 915.

463. See, e.g., *Trane Co. v. Baldrige*, 552 F. Supp. 1378, 1387–88 (D.W.D. Wis. 1983) (finding that the EAA Anti-Boycott Law advanced a substantial government interest and was narrowly drawn, thus it did not violate First Amendment rights).

464. See Morgan O. Reynolds, *Labor Unions*, THE CONCISE ENCYCLOPEDIA OF ECON., <http://www.econlib.org/library/Enc/LaborUnions.html>.

465. See Edward S. Mason, *The Monopolistic Power of Labor Unions*, 79

United States foreign affairs and commercial policy would be a breach of public trust and potentially a violation of the Constitutional non-delegation doctrine.⁴⁶⁶

MONTHLY LAB. REV. 161 (1959) (giving an overview of how unions monopolize labor markets under government authority); see also Robert H. Lande & Richard O. Zerbe, Jr., *Reducing Unions' Monopoly Power: Costs and Benefits*, 28 J.L. & ECON. 297 (1985). See also Marla Dickerson, Louis Sahagun & Dan Weikel, *Ports Get Back to Business*, L.A. TIMES (Oct. 10, 2002), <http://articles.latimes.com/2002/oct/10/business/fi-ports10> (giving an example of the dockworkers unions domination of the labor market for cargo handling and describing union officials as hand-selecting those who are allowed to work at ports and preventing anyone outside of the union's favor from being allowed to work). "[U]nion bosses, and the security guards who blocked the iron gates of the hiring hall, dissuaded the longshore hopefuls. The only workers allowed in were those with 'casual cards' designating them as members of the formal pool of laborers who take the dock jobs unfilled by union members. Most hope to join the union when there is an opening. 'People without a casual card, go home. You're not going to get a job today,' came a voice over a loudspeaker. 'For the rest of you guys, welcome back.'" *Id.*

466. The non-delegation doctrine proscribes congressional delegations of power outside of the boundaries set by the Constitution. See *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989). "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,' U.S. CONST. art. I, § 1, and we long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." *Id.* In the case of unions using a government granted monopoly to exercise foreign and commercial policy powers reserved exclusively for the government, the delegation of power would have been to a non-government entity, rather than another branch of government. Such a delegation to an unaccountable, private entity would clearly violate non-delegation doctrine principles. See, e.g., *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013) ("We open our discussion with a principle upon which both sides agree: [f]ederal lawmakers cannot delegate regulatory authority to a private entity. To do so would be 'legislative delegation in its most obnoxious form.'" (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936))). See generally Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931 (2014) (making an argument that the issue in a case such as this should be governed by the Due Process Clause, rather than under non-delegation doctrine). Under either Due Process or non-delegation doctrines, the delegation of foreign policy and commercial regulatory authority to not only a private entity, but a foreign private entity, would be uncontrovertibly a violation of fundamental notions of federalism and constitutionalism. If there are to be boycotts of or sanctions against a foreign country promoted in the United States, that is a matter for the federal government, and only the federal government, to decide, as it has

The EAA Anti-Boycott Law, in particular, provides a broad remedy for domestic propagation of illegal foreign boycotts. By its terms, the EAA Anti-Boycott Law prohibits any individual from acting with an “intent to comply with, further, or support any boycott fostered or imposed by a foreign country.” Individual Americans who act to further or support the BDS Movement’s activities, even if they do not comply with the boycott dictates themselves, are subject to the prohibitions of the EAA Anti-Boycott Law. As a result, those who encourage others to participate in BDS Movement boycotts can be found to be in violation of the EAA Anti-Boycott Law without need to show that such individuals participated in any boycott activity on their own.

Claims that the EAA Anti-Boycott Law does not apply to the BDS Movement due to the fact that the BDS Movement is not an official government are simply without basis and contrary to the text and objectives of the law. The EAA Anti-Boycott Law was enacted to provide a broad defense against foreign boycotts of friendly nations. To assert that a popularly selected representative of Palestinian Arab civil society is not a representative of that nation is to deny the existence of a Palestinian Arab nation. Unless and until there is a unified Palestinian Arab political system, the fragmentation of the Palestinian Arab nation into multiple governing and representative units, such as Hamas, Fatah, and the BDS Movement, dictates that each of these entities can be considered parts of the Palestinian Arab “country.” The BDS Movement is no less capable of imposing and fostering a boycott of Israel than the Arab League, Hamas, Fatah or any other organization that represents national interests.

As was the case in *Humanitarian Law Project*, nothing in this Article has argued for limitations on individuals exercising their independent First Amendment rights. An American citizen is free to take to the streets to criticize Israel and no American citizen would be prevented from engaging in a truly grass roots, independent primary boycott of Israeli goods. However, when Americans join with foreign operatives to further an external campaign against Israel that is contrary to United States policy and law, and arguably is coordinated with the objectives of global

on numerous other similar situations (such as in the case of South Africa, Cuba, Vietnam, Russia, Iran and numerous other instances). *Id.*

terrorist organizations, the First Amendment provides no protections. The rationale for anti-boycott prosecution announced in the House Boycott Report's is as applicable today as it was in 1976:

[T]he secondary and tertiary boycotts are tantamount to blackmail and of concern to every American . . . [t]he United States has always been committed to the protection of businesses, large and small, against unfair practices. The Arab boycott is a direct attack on these values, harmful . . . to all American businesses Congress must now act to uphold this tradition by outlawing compliance with boycott practices which intrude on American domestic concerns and on business relations between American companies and Israel, a nation with which we maintain close and friendly relations . . . [t]his kind of intrusion into our domestic order . . . directed against any country with which we maintain friendly and close relations, is an invasion of our national sovereignty.⁴⁶⁷

Indeed, enforcement of laws prohibiting cooperation with the BDS Movement would not deny Americans the choice to not support Israel; rather, by preventing foreign interlopers from unilaterally preventing Israeli goods and services from entering American markets, enforcement would simply preserve the right of American consumers and businesses to choose whether or not they will engage in commercial relations with Israel.

The risks of a continued failure to enforce existing laws against foreign boycotts are best demonstrated by reference to the current European experience with the BDS Movement. European consumers, companies and academia are being denied access to Israeli goods, services and academic resources as a result of a highly coordinated and largely unopposed BDS Movement campaign.⁴⁶⁸ The European BDS campaign is not simply a secondary boycott of Israel; it is part of a coordinated offensive against Israel, pairing a facially non-violent economic attack with

467. HOUSE BOYCOTT REPORT, *supra* note 144, at 98.

468. See Christa Case Bryant & Sara Miller Llana, *European boycotts begin to bite, catching Israel's attention*, CHRISTIAN SCI. MONITOR (Feb. 16, 2014), <http://www.csmonitor.com/World/Middle-East/2014/0216/European-boycotts-begin-to-bite-catching-Israel-s-attention-video>.

troubling and pervasive support for the radical Islamist movements, including Hamas and Hezbollah, which wage war on Israel.⁴⁶⁹

While it may not be the policy of European nations to prohibit foreign boycotts of Israel, this Article has shown that the BDS Movement's activities in the United States violate the letter and the intent of not only the EAA Anti-Boycott Law but also the Hobbs Act, Material Support Laws and federal anti-trust laws. These violations are substantive, inflict harm on important national interests, deny American consumers and businesses the choice to deal in Israeli goods and services and contribute to the rise and spread of extremist ideology and violence. Private parties that have been economically harmed by the BDS Movement and its supporters have multiple avenues of recourse and should avail themselves of the remedies available under RICO and applicable anti-trust laws, which can provide for treble damages and legal fees.

BDS Movement activities in or affecting the United States unquestionably violate American law and policy. The BDS Movement and its supporters can and should be prosecuted under the EAA Anti-Boycott Law, Material Support Laws, RICO, and anti-trust laws. To the extent the decision to prosecute BDS Movement activities is at discretion of political appointees and agency personnel, the President should require that those responsible for exercising prosecutorial discretion either commence prosecution or explain why a blanket non-prosecution policy is in place.⁴⁷⁰ Prosecution of BDS Movement activities in

469. Matthew Levitt, *Islamic Extremism in Europe: Beyond al-Qaeda-Hamas and Hezbollah in Europe*, WASH. INST. FOR NEAR EAST POLICY (Apr. 27, 2005), <http://www.washingtoninstitute.org/policy-analysis/view/islamic-extremism-in-europe-beyond-al-qaedahamas-and-hezbollah-in-europe>; see also Steven Erlanger, *Europe Tries to Stop Flow of Citizens Joining Jihad*, N.Y. TIMES (Sept. 30, 2014), http://www.nytimes.com/2014/10/01/world/europe/isis-europe-muslim-radicalization.html?_r=0 (documenting the large number of citizens from European Union nations who have joined with radical Islamist terror organizations to fight against western interests in the Middle East); Ben Winsor, *Hundreds Of Westerners Have Joined ISIS—Here's Where They Came From*, BUS. INSIDER (Aug. 27, 2014), <http://www.businessinsider.com/isis-is-recruiting-westerners-countries-2014-8#ixzz3MebNqkU8>.

470. While a President and his or her agencies have a right to make case by case decisions on how and when to apply a law in specific cases, this discretion does not allow a wholesale abdication of the constitutional requirement that the Executive "take Care that the Laws be faithfully

the United States would have ample precedent. Moreover, it would be a necessary and proper governmental action undertaken to preserve the federal government's exclusive power over the conduct of foreign affairs, prevent American support from being provided to terrorist organizations and protect the integrity and efficient functioning of American commercial markets.

executed." U.S. CONST. art. 2, § 3. *See generally* Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985). Congress, through its power of the federal budget, also has a role to play in ensuring that agencies enforce laws.