

Delegitimization of Israel: The Legal Framework

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Introduction

One of the disturbing trends relating to the delegitimization of Israel is that ideas and messages questioning Israel's very legitimacy are gaining traction within the liberal public in Western countries. This public comprises the academic, political, economic, and cultural elites in most Western countries, and therefore any influences on this population have significant repercussions in all of these spheres. The key question is why and how this process is taking place. When the narrative presented against Israel is examined in depth, it becomes clear that one of the most significant tools employed in the negative labeling of Israel is the use of legal arguments to frame the discussion. Israel is thus portrayed as a constant lawbreaker that systematically violates international law and thus undermines global peace and order.

On the official website the BDS campaign is portrayed as a movement for freedom, justice, and equality. The background to its establishment is explained as Israel's decades-long denial of the Palestinians' fundamental rights and its refusal to comply with international law. Israel is accused of maintaining a regime of "settler colonialism, apartheid and occupation over the Palestinian people" made possible by governments that "fail to hold Israel to account." The goal of the campaign is defined as exerting pressure on Israel "until it complies with international law."¹ This portrayal of Israel as a systematic lawbreaker makes it possible to enlist the liberal public's support for the BDS campaign, because obeying the law and, particularly,

respecting human rights law are fundamental values underlying the liberal democratic concept.

These quotations from the BDS website highlight another aspect of the tactic of the delegitimization campaigners, namely, the use of extreme terms (for example, ethnic cleansing and apartheid) to depict Israel as a country that subverts the most basic norms of international law. This tactic relies on allegations against Israel – some factual and some legal – that are not necessarily completely unfounded but augments them with elements of malice and racism. The mixing of the two levels of allegations makes it difficult to distinguish between legitimate criticism aimed at pressurizing Israel to change its political policy without undermining its right to exist and illegitimate accusations that include defamation and demonization. This makes responding to these allegations even more complicated.

We first address the actual legal allegations and the way they are bolstered by relying on the decisions and rulings of official and non-official bodies in the international arena before turning to Israeli responses.

The Legal Allegations against Israel

The basic legal framing of the claims against Israel presented to liberal audiences around the world is that while Israel purports to be a democracy and a member of the group of developed Western countries, it is, in reality, a country that systematically and continuously violates the most basic rules of democracy. It is therefore incumbent on the Western world to intervene and demand that Israel cease its unacceptable behavior and to ensure this by exerting pressure through isolation, boycotts, and sanctions.

This way of framing the discussion undermines one of the most common counterarguments raised by Israel's supporters, namely, that the situation in Israel is far better than in all other countries in the Middle East and, in fact, in other parts of the world, where there are extreme ongoing violations of basic human rights. The response to such arguments is that because Israel conducts itself as a democracy and demands to be treated as such, it must therefore meet the high standards of legal compliance that are not expected from developing countries. Furthermore, Israel is deemed worse than these countries, because most rogue countries are subject to totalitarian rule, while Israel is a developed country whose leaders, those carrying out its reprehensible policy, were elected by the public.

There are two main groups of allegations made against Israel: the first focuses on violations of Palestinian human rights and the second on Israeli military conduct and use of force.

The Alleged Violation of the Rights of Palestinians

First and foremost, Israel is charged with occupying Palestinian land and is portrayed as the guilty party in a conflict in which the Palestinians are depicted as victims.² The legal claim is that Israel is violating the Palestinians' right to self-determination: the right to determine for themselves how to conduct their lives, free from occupation or rule by a foreign entity. The framing of the conflict thus shifts from a political conflict between two opposing parties over control of disputed territory to a case of human rights violations by Israel – the party committing the violations – against the Palestinians, the victim of the violations. When those in Israel who oppose a two-state solution gain more political power and measures are taken that are perceived as preventing the possibility of implementing this solution (such as expanding settlements in the West Bank), these allegations against Israel are significantly bolstered.

The common perception in the international arena is that the responsibility for the absence of a solution to the conflict lies mainly with Israel. Little attention is paid to arguments concerning the complexity of the conflict and Palestinian responsibility for prolonging it. Given the protracted occupation and the lack of any prospect for ending it, Israel finds it difficult to justify the measures required to tackle concrete security concerns, which often involve the infringement of Palestinians' rights, even when these are based on the authority that is conferred on Israel under the laws of occupation.

While Israel's conduct might warrant a certain level of legitimate criticism, the advocates of delegitimization go much further and present the Israeli occupation as colonialist, racist, aggressive, inhuman, and motivated by revenge and arbitrariness aimed at humiliating and repressing the Palestinian population. Israel is accused of deliberately violating the human rights of innocent citizens with no justification, a depiction that completely ignores or belittles the context of Israel's security actions and needs. For example, measures restricting the Palestinians' freedom of movement, such as closures and roadblocks, are presented as attempts to frighten and humiliate the Palestinians and examples of an apartheid policy – discrimination and segregation on the basis of race – with no mention of their security context.

Alleged War Crimes and Crimes against Humanity

In all matters pertaining to Israeli warfare, especially in the West Bank and the Gaza Strip (although similar contentions have also been raised with regard to the conflict with Hezbollah in Lebanon), two main levels of allegations are made. The first is that Israel has violated the basic obligation to refrain from the use of force (*jus ad bellum*). Israel is accused of using force unjustifiably for the sole purpose of deliberately harming the civilian population. Such accusations, almost defamatory in their nature, consistently ignore the security challenges facing Israel and the difficulties of defending itself against an adversary that operates and takes shelter among civilians in densely populated areas.

The second level of allegations focuses on the way in which Israel operates during the fighting (*jus in bello*). These include accusing Israel of carrying out deliberate attacks on civilians and civilian objects and intentionally causing disproportionate harm. There are also claims that Israel uses banned or questionable weapons. While allegations of the failure to apply the rules of war are inevitable and challenge every military involved in armed conflict the world over, Israel is confronted with groundless charges of deliberately and maliciously committing wide-scale war crimes against innocent civilians. These include fabrications, such as accusing IDF soldiers of deliberately shooting innocent civilians for no reason, and the use of extreme terms, such as ethnic cleansing and even genocide.

Israel is not the only country, and not even the only Western country, to be accused of violating the rules of war. Why, therefore, is Israel perceived as so negative and evil, even in comparison to countries that conform far less or even totally ignore the rules of war? One answer to this question lies in the biased conception of Israel that is created by official and unofficial international organizations and bodies, including judicial and quasi-judicial agencies, which tend to focus on Israel to the exclusion of the rest of the world. An additional reason is the disproportionate international media attention given to Israel, an important aspect that is not, however, dealt with in the current discussion.

Reliance on Decisions and Resolutions by International Bodies

For many years, the various bodies in the international arena have been fertile ground for diplomatic, academic, media, and legal activity against Israel. By targeting Israel and obsessively and disproportionately focusing on its actions,

a narrative of Israel as a more systematic, deliberate, and grave violator of human rights than any other country in the world has been developed, entrenched, and marketed to the global liberal community. Accordingly, Israel is the subject of special supervisory and monitoring mechanisms and kept on the global agenda.³ This is done through endless condemnations of Israel, for example at the UN General Assembly⁴ and the UN Human Rights Council,⁵ which devote a significant number of their resolutions to the situation in Israel, while they are supposed to be discussing the state of human rights in the entire world. In addition, supervisory and monitoring mechanisms have been established specifically for the case of Israel, the most prominent and one-sided being the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967,⁶ as well as several international commissions of inquiry to examine Israel's military operations.⁷ These mechanisms are usually established by means of a one-sided mandate against Israel, which dictates the content of the reports in advance.⁸ The reports, which usually include harsh condemnations of Israel, serve as effective factual and legal infrastructure for attempts to adopt operative measures against Israel in the international arena.⁹

International Judicial Rulings against Israel

The most prominent international judicial body is the International Court of Justice (ICJ). While the ICJ is not authorized to issue rulings against countries without their consent, it has the authority to provide advisory opinions at the request of certain UN agencies. In 2004 it gave an advisory opinion on Israel's separation fence at the request of the UN General Assembly.¹⁰ The opinion, although formally non-binding, is to this day regarded as international confirmation from esteemed judges that Israel's presence in the territories, the founding of settlements there, and its policy toward the Palestinian population constitute illegal behavior, and it carries great weight in the legal campaign against Israel.

Another central judicial body is the International Criminal Court (ICC), which was established in 2002 to prosecute war crimes and crimes against humanity. The prosecutor of the ICC is currently conducting a preliminary examination into possible war crimes by Israel,¹¹ following the decision that Palestine is entitled to join the ICC and to request an investigation of events that have occurred in its territory, i.e., the West Bank and the Gaza Strip. In addition, criminal proceedings can be initiated against Israeli officials and

members of the IDF in various countries under the principle of universal jurisdiction, if their legislation contains an appropriate source of authority.¹² It should be noted that criminal proceedings in the ICC and national courts are subject to the principle of complementarity, whereby proceedings should not be undertaken if the country involved is conducting genuine and effective investigations into the relevant potential war crimes.

Israeli Conduct in the International Legal Theater: Review and Recommendations

Having assessed the allegations made against Israel and the international bodies that serve to substantiate those allegations, we now consider the measures taken or available to Israel or the agencies working on its behalf in the context of the legal campaign being fought against it. We examine Israel's domestic conduct and its impact on international public opinion as well as Israel's actions in the international legal arena and outline recommendations for future action.

Internal Policy

The international legal campaign is directly affected by the policy of the Israeli government and those acting on its behalf. As explained above, the modus operandi of the advocates of delegitimization is to take claims that have a factual and legal basis and to exaggerate and distort the facts (and sometimes also the law) and add groundless defamation. Insofar as the factual basis for the allegations is lacking, it is all the more difficult to persuade the target audience of the truth of the baseless defamation.

The effect of policy decisions on the legal campaign: Policy decisions and steps regarded as genuine attempts to solve the conflict or, at least, to substantially improve the situation of the Palestinians will not necessarily end the campaign of slander and defamation against Israel but will have a direct impact on Israel's ability to deal with legal arguments concerning alleged violations of Palestinians' rights. The potential impact on Israel's legal justifications in the international arena should be one of the considerations taken into account when making policy decisions.

Statements made by public figures: Public statements by members of the government, governmental officials, and members of the security establishment, including senior IDF officers, play a significant role in the legal campaign against Israel. Statements expressing contempt or disregard

for the rule of law or legal restrictions bolster the perception of Israel as a lawbreaking country that does not observe the international rules and can be used against Israel in the framework of the legal debate, sometimes as proof of the intention to break the law. These statements are harmful even when they do not reflect what is actually taking place. For example, when the IDF operates in accordance with the requirements of the laws of war, declarations by senior officials that disproportionate action is justifiable or that the law of war is not relevant to the current reality – due either to political reasons or to a misunderstanding of the legal framework – cause significant harm, even if they do not reflect actual IDF policy. In this context, it appears that there is a need to deepen the knowledge of the public in general and of officeholders and officials in particular concerning specific aspects of the law.

Strengthening the legal system: The high international respect for the Israeli legal system and its advisory, enforcement, and judicial components is one of Israel's most valuable assets for confronting the delegitimization campaign. When the legal system weakens, this directly affects Israel's ability to cope with the international legal campaign against it. An important element in the struggle against delegitimization is the international prestige enjoyed by the Israeli Supreme Court. The access of Palestinians, NGOs, and other petitioners to the Supreme Court and its strict judicial oversight over governmental decisions are an important tool in the response to the legal criticism of Israel. If the Supreme Court was to bow to security or political pressures and approve legally questionable decisions, this would affect its prestige and significantly reduce the ability to rely on it in the international legal campaign.

A second element of great importance is the existence of a proper criminal investigative and enforcement system both in the IDF and outside. This system is essential in order to use the complementarity argument and thus prevent the possibility of any criminal proceedings against Israeli decision makers and members of the IDF in the ICC and in the national courts of other countries. Furthermore, the very existence of investigations against potential improper conduct – investigations that when appropriate lead to criminal or disciplinary measures – strengthen Israel's status as a law-abiding country and facilitate the response to allegations and slander in the international arena.

Managing anti-Israel Allegations and Initiatives in the International Legal Arena

Israel must not neglect the international legal arena and must be involved both during and after the event.

Presenting Israel's position: Regular publications presenting the factual and legal aspects of Israel's stance are important for dealing with the legal campaign in general and preparing for potential judicial proceedings in particular. It should be assumed that such publications are included in the materials examined by the office of the ICC prosecutor when making decisions about opening an investigation. They can also influence academic researchers who are examining relevant issues, such as the use of force or counter-terrorism operations, and are likely to be quoted in studies and articles, thus ensuring long-term representation of Israel's official standpoint.

Cooperating with investigations and examinations by international bodies: In principle, it is in Israel's interest to cooperate with international bodies and certainly worth avoiding a situation in which Israel boycotts them. Israel can thus influence the findings and conclusions of their proceedings. On the other hand, such cooperation might be regarded as Israeli recognition of the legitimacy of the organization making the inquiry and as acceptance of their allegations and findings, especially in cases when it is clear from the outset that the organization and its examination of Israel will be biased and one-sided. The question of whether and to what extent to cooperate with such investigations and inquiries should therefore be decided on a case-by-case basis, balancing the cost of cooperation against the possible benefits. The relevant factors in this decision include the nature of the organization and of the inquiry.

Ways of Influencing the Development of International Law and the International Legal Discourse

One of the important ways of countering the international legal campaign is to affect the creation and interpretation of international legal norms. International law is a dynamic normative system that is constantly adapting to the changes in reality. Its development is influenced inter alia by official state reports, publications by legal experts in public service and in academia, rulings by international tribunals, and important legal articles. This means that Israel can exert influence, directly or through its allies, on the formulation and interpretation of the provisions of international law. This is particularly

important when the existing legal norms are ambiguous or disputed, such as in the case of warfare against non-state actors or cyberwarfare. Such influence can be generated through active participation in meetings of experts and in forums that produce reports and documents purporting to reflect applicable law and also through professional publications in these areas. Official state publications clarifying its position on the applicable law are especially important and can directly impact the development and interpretation of the law, because customary international law, which is one of the main sources of international law, is based on state practice and on *opinio juris*, namely, the belief that an action was carried out by the state as a legal obligation. The latter is deduced from the way states explain the legal aspects governing the situation.

Initiating Legal Measures and Proceedings against BDS

Another field of action, relevant to the legal campaign being waged against Israel, is the initiation of legal measures and proceedings against the BDS movement and its activists. These include executive and legislative measures against actions involving boycotts of Israel and legal proceedings in national courts using local laws. For example, in France, legal proceedings based on French law that outlaws discrimination, hatred, and violence against a person or group due to their origin, race, nationality, or religion have been initiated against parties advocating boycotts of Israeli goods.¹³ Likewise, in the UK, rules and regulations have been published that ban public authorities from imposing boycotts in the framework of contractual obligations for procurement and investments.¹⁴

Such measures are not usually initiated directly by the Israeli government but rather by pro-Israel entities including members of the Jewish community or various NGOs. This allows for greater freedom and flexibility in their actions that have the potential to hamper BDS activities, restrict the movement legally, and make its actions have a potential cost.

Conclusion

The effective handling of the delegitimization campaign against Israel requires an understanding of the legal framework of the discourse, which constitutes one of the main parts of this campaign. It is important to recognize the role played by actors in the international legal arena and the way they use the law to portray Israel as a systematic violator of international law

and human rights against which tough measures should be taken in order to prevent it from undermining global peace and order. An understanding of the legal aspects and the adoption of the right policy, both internally and externally, could help to stop the spread of anti-Israel messages distributed by BDS activists among important Western audiences and also reduce the risk of legal proceedings against Israeli officials.

Notes

- 1 "What is BDS," BDS, <http://bdsmovement.net/bdsintro>.
- 2 See, for example, how the issue is framed by John Dugard, UN Special Rapporteur on human rights in the territories on behalf of the UN: "The Palestinian Territory, including the West Bank, East Jerusalem and Gaza, remains occupied territory, occupied by Israel. Insofar as there is a 'victim' party, it is Palestine as inevitably an occupied party has such a status vis-à-vis the occupier," Document A/62/275, Section III, August 17, 2007, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N07/463/16/PDF/N0746316.pdf?OpenElement>.
- 3 The 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) in Durban signaled, more than anything else, the emergence of a focused strategy against Israel. More than 1500 NGOs organized to create a campaign depicting Israel as a racist country that habitually violates international human rights and to promote its isolation from the liberal law-abiding democracies. See the WCAR NGO Forum Declaration, September 3, 2001, http://www.humanrightsvoces.org/assets/attachments/documents/durban_ngo_declaration_2001.pdf.
- 4 The number of UN General Assembly resolutions concerning Israel is disproportionate to the number of resolutions relating to any other country in the world. For example, against an average of four or five resolutions at each session against various countries, an average of twenty resolutions per session are passed against Israel. Most of the resolutions against Israel are passed under a special permanent item adopted for the General Assembly agenda in 1974 ("the question of Palestine") and other permanent items pertaining to the Israeli-Palestinian conflict. In addition, many extreme resolutions against Israel are passed by the special committees established under the sponsorship of the General Assembly.
- 5 The focus of the Human Rights Council on Israel is reflected in the large number of emergency meetings held, almost a third (seven of twenty-four) of which are devoted to assessing Israel's actions. Furthermore, Israel is marked at Human Rights Council meetings through a permanent item inserted into the Council's agenda dealing with the state of human rights in Palestine and the territories, while the state of human rights in the rest of the world is discussed under a separate general item.

- 6 The Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967 was established by a February 19, 1993 resolution of the UN Commission on Human Rights (Resolution 1993/2, UN Doc. E/CN.4/RES/1993/2). There have been six Special Rapporteurs so far. This function of the UN institution has adopted a comprehensive and one-sided attitude toward Israel.
- 7 More commissions of inquiry and commissions to determine the facts about Israel's military actions have been appointed over the past decade by the UN Commission on Human Rights, the UN Human Rights Council, and the UN Secretary General than about any other country.
- 8 The mandate given to the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967 is: "To investigate Israel's violations of the principles and bases of international law, international humanitarian law and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, in the Palestinian territories occupied by Israel since 1967." The duration of this mandate is given as "until the end of the Israeli occupation of those territories." See <http://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/PS/Pages/SRPalestine.aspx>. The various commissions of inquiry established by the Human Rights Council are also defined in one-sided and biased terms. For example, the mandate for the commission of inquiry for the Second Lebanon War in 2006 was: "(a) To investigate the systematic targeting and killings of civilians by Israel in Lebanon; (b) To examine the types of weapons used by Israel and their conformity with international law; and (c) To assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment," Human Rights Council Resolution A/HRC/S-2/L.1 (August 11, 2006), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G06/133/02/PDF/G0613302.pdf?OpenElement>.
- 9 To these reports are added the critical reports of non-governmental human rights organizations, such as Amnesty International and Human Rights Watch, which also carry great weight in the international arena.
- 10 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 IJC 1331, at 136 (July 9, 2004), <http://www.icj-cij.org/en/case/131>.
- 11 The Rome Statute, which established the ICC, also includes a clause designed to turn settlements in the West Bank into a war crime of transferring a population of the occupying country, directly or indirectly, to the occupied territory.
- 12 In some countries, it is possible to institute criminal proceedings in respect to war crimes and crimes against humanity even in the absence of a connection to the country through adoption of the notion of universal jurisdiction into national legislation. In other countries, the authority is limited to proceedings in which some connection to the country exists, such as victims who are citizens or residents of the country. It is also possible to initiate civil proceedings in certain countries in accordance with national legislation.

- 13 The lawsuits were filed by pro-Israel organizations (the National Bureau of Vigilance against Anti-Semitism – BNVCA, Lawyers Without Borders, and Alliance France Israel). For further discussion, see “French BDS Activists Lose High Court Appeal Over Racism Convictions,” *Jewish Telegraph Agency (JTA)*, April 4, 2016, <http://www.jta.org/2016/04/04/news-opinion/world/french-bds-activists-lose-high-court-appeal-over-racism-convictions>. In a verdict handed down on March 30, 2016, the French Appeals Court of Cassation upheld the conviction of seven BDS activists and fined each of them for calling and taking actions outside supermarkets to boycott Israeli goods during demonstrations conducted in 2010. Another verdict by the Court of Cassation upheld the conviction of twelve BDS activists for spreading incitement and discrimination in demonstrations in 2009-2010 outside a supermarket in France and for calling for the boycott of Israeli goods. See “French High Court Confirms BDS Activists’ Discrimination Convictions,” *JTA*, October 23, 2015, <http://www.jta.org/2015/10/23/news-opinion/world/frances-highest-court-confirms-bds-activists-discrimination-convictions>.
- 14 Procurement Policy Note: Ensuring Compliance with Wider International Obligations when Letting Public Contracts, Information Note 01/16 (February 17, 2016), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/500811/PPN_on_wider_international_obligations.pdf. There is also intensive activity against BDS in the United States. For example, legislators in the US House of Representatives and Senate sponsored the Combating BDS Act of 2016, which grants the states federal legal authority to take concrete action against economic warfare directed against Israel, such as cancellation of investments or contracts with agencies boycotting Israel, advocating Israel’s elimination, or imposing sanctions. The law is presently being discussed by various Congressional committees.