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The Anti-Semitic Nature of Boycotts Singling Out Israel

*Written testimony of Prof. Eugene Kontorovich before the House
Committee on Homeland Security and the Subcommittee on
Intelligence & Terrorism*

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Terrorism”

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Chairman Rose, Ranking Member Walker, and honorable members of the subcommittee, thank you for inviting me here today to discuss the unhappy topic of anti-Semitism in America. My comments will focus on practices and campaigns that legitimize anti-Semitism. In particular, I will focus on the anti-Semitic nature of boycotts against individuals and entities because of their connection to Israel, an effort that styles itself as the “Boycott, Divestment and Sanctions” Movement, or BDS.

In the context of the jurisdiction of this subcommittee, it is important to note that such discriminatory boycotts do not in themselves call for violence (though some of the main organizations involved have ties to groups that do). Yet, BDS promotes inherently anti-Semitic ideas, such as the singularly evil and pariah status of Jews. Furthermore, BDS is particularly dangerous, given that, like some of the history’s most virulent anti-Semitic ideologies, it seeks to normalize anti-Semitism as an acceptable “attitude” in polite society. Any policy approach to anti-Semitic violence must be informed by an understanding of the ideologies that give anti-Semitism a patina of legitimacy.

The campaign to “boycott Israel” in reality seeks to legitimize discriminatory refusals to deal with people or companies simply because of their connection to the Jewish State. This is a legitimization of bigotry, just as boycotts of people because of their race, sexual orientation, or national origin would be discriminatory.

Today, it is no secret that BDS is anti-Semitic. This has been the conclusion of the German¹ and Canadian parliaments², as well as courts in Spain³ and France.⁴ Moreover, it is the conclusion of more than two dozen states that have passed laws the treat such boycotts the same way most states and the federal government treat LGBT boycotts:⁵ as a form of discrimination that entails consequences for the ability of companies engaged in such conduct to contract with the state or federal government.⁶

It makes no difference that these calls to boycott are aimed at Israel, rather than at Jews per se. Israel is the largest Jewish community in the world and is home to the plurality—and soon the majority—of the world’s Jews. Refusals to deal that target Israel alone and not any other country offer a clear proxy for engaging in anti-Semitism under the cloak of political legitimacy. Partial boycotts are boycotts. Furthermore, discrimination need not be 100% congruent with the targeted class to be discrimination. Anti-discrimination laws make it clear that the use of proxies for race, sexual orientation, and so forth can be discriminatory.⁷

Those who support anti-Semitic economic discrimination sometimes claim that they are engaged in “boycotting” for political reasons, rather than “discrimination” for mean-spirited reasons. But there is no magic distinction between these words;⁸ boycotts can be

¹ Katrin Bennhold, *German Parliament Deems B.D.S. Movement Anti-Semitic*, New York Times (May 17, 2019), <https://www.nytimes.com/2019/05/17/world/europe/germany-bds-anti-semitic.html>.

² JTA, *Canada’s Parliament Rejects BDS Movement*, Times of Israel (Feb. 23, 2016), <https://www.timesofisrael.com/canadas-parliament-rejects-bds-movement/>.

³ Lidar Grave-Lazi, *Major Victory Against BDS as Spanish Court Bans Citywide Israel Boycott*, Jerusalem Post (June 2, 2016), <https://www.jpost.com/Diaspora/Major-victory-against-BDS-as-Spanish-court-bans-citywide-Israel-boycott-455752>.

⁴ JTA, *France Court Upholds ‘BDS Is Discrimination’ Ruling*, The Forward (October 23, 2015).

⁵ Eugene Kontorovich, *For the ACLU, Antipathy to Israel Trumps Antidiscrimination*, Wall Street Journal (Feb. 11, 2019), <https://www.wsj.com/articles/for-the-aclu-antipathy-to-israel-trumps-antidiscrimination-11549928620>.

⁶ See, e.g., Remarks by President Obama at Signing of Executive Order on LGBT Workplace Discrimination, referring to Exec. Order No. 13672, 41 C.F.R. 60 (July 21, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/07/21/remarks-president-signing-executive-order-lgbt-workplace-discrimination>.

⁷ “Proxy discrimination is a form of facial discrimination.” *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1160, n.23 (9th Cir. 2013) (citing *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) (gray hair as proxy for age)). Proxy discrimination occurs when a policy “treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group.” *Id.* Israel’s association with Jewishness is undoubtedly close enough to make it a proxy.

⁸ Eugene Kontorovich, *For the ACLU, Antipathy to Israel Trumps Antidiscrimination*, Wall Street Journal A17 (Feb. 12, 2019).

a form of discrimination.⁹ Indeed, most discrimination is driven by some political or ideological hostility to the target group. Yet refusal to deal on the basis of sexual orientation or other grounds does not escape the label of discrimination if it is simply dubbed a boycott and accompanied by an explanation of how it is justified by the target group's conduct or favored policies.¹⁰

More generally, it is an illusion that anti-Semitism only manifests itself as pure, unreasoned Jew-hatred. The most effective anti-Semites have always sought to justify their bigotry by what the Jews do. The Jews were hated for inventing monotheism. Then they were hated for giving the world Jesus; and later, hated for not accepting Jesus. They were hated for promoting capitalism and also for promoting communism. In every age, the oldest hatred clothes itself in the justifications that appeal to contemporary values and public policy considerations. Today, it is no accident that anti-Semitism tries to don the mantle of human rights.

Supporters of Israel boycotts point to Americans' "proud history of participating in boycotts to advocate for human rights abroad,"¹¹ referring in part to the 1980s boycott of Apartheid South Africa. So are boycotts good or bad? A combination of several contextual factors helps to identify when refusals to deal on a group basis constitute invidious discrimination.

The first factor is history. Boycotts of Jewish businesses have been a staple of anti-Semitic campaigns, most notoriously, under Nazi Germany. Such boycotts are no one's "proud history." Boycotts of Israel, promoted by Arab states, date back to the country's founding in 1948, when said boycotts were used to starve and isolate the fledgling Jewish state from its inception, long before it retook the West Bank from Jordan in 1967.¹² The same practices are now being retrofitted with new and spurious reasons.

The second factor is focus. The invocation of ostensible international law norms to demonize and isolate just one country – which happens to have the plurality of the world's Jews but just 0.1% of the world's population – is a sure sign of discrimination. Human rights are a powerful argument because they apply to all humans, and likewise, international law arguments are potent because they apply *internationally*. That is precisely why the working definition of anti-Semitism adopted by the International Holocaust Remembrance Association (IHRA) lists as a "contemporary example" of anti-Semitism the "applying of double standards" to Israel.¹³ This definition has been

⁹ *Economic Discrimination*, *Black's Law Dictionary* (8th ed. 2004) ("Any form of discrimination within the field of commerce, such as boycotting a particular product or price-fixing.").

¹⁰ Brief for Appellants, *Amawi v. Paxton, Pluecker v. Board of Regents of the University of Houston System* (2019) (No. 19-50384), 2019 WL 4390995, at *25-26.

¹¹ H.R. Res. 496, 116th Cong. (2019).

¹² *Impact of the Boycott, Divestment, Sanctions Movement: Hearing Before the Subcomm. on National Sec. of the H. Comm. On Oversight and Govt. Reform*, 114th Cong. 2-6 (2015) (written testimony of Prof. Eugene Kontorovich, Northwestern Univ. School of Law).

¹³ International Holocaust Remembrance Alliance, *Working Definition of Antisemitism* (June 27, 2016) <https://www.holocaustremembrance.com/stories/working-definition-antisemitism>.

formally adopted by many democracies around the world. It is used by the United States¹⁴ and has most recently been incorporated into President Trump's Executive Order on Combatting Anti-Semitism.¹⁵

Calls for boycotting Israel almost always apply a unique standard to the Jewish State. Those who say they favor a boycott of the Jewish State because of "occupation" or "settlements" are at best silent about similar issues across the world when they do not involve Jews.¹⁶ But the singling out of Israel is often even more blatant than IHRA's "double standards." Some of the most prominent supporters of such boycotts are themselves involved with groups active in occupied territories, not just ignoring but actively *contradicting* the principles they advance in justifying a Jew-focused boycott.

For example, as I reveal in an article in today's *Wall Street Journal*, one of the most energetic campaigners for boycotting companies with any ties to Israel in the Golan Heights or West Bank is Human Rights Watch. Yet the director of its Middle East and African division herself publicly advocates for groups that support Armenian settlements in occupied Azerbaijani territory. To take another example, the European Council on Foreign Policy, one of the main forces behind the European Union's imposition of discriminatory labels and other restrictions on Israeli products, is itself funded by companies doing business in occupied Western Sahara and other occupied territories.¹⁷ These prominent actors' calls for boycotting Israeli businesses are not about international law – they are about creating a unique aura of illegitimacy, of "untouchableness," around the Jewish State.

The third factor in identifying discriminatory boycotts is the people behind it. Leading pro-boycott groups have numerous documented links to terror organizations.¹⁸ This

¹⁴ U.S. State Department, Office of International Religious Freedom, *Defining Anti-Semitism*, (May 26, 2016) <https://www.state.gov/defining-anti-semitism/>.

¹⁵ Exec. Order No. 13,899, 84 Fed. Reg. 68,779 (Dec. 11, 2019).

¹⁶ This shows the inaptness of analogies to the boycott of apartheid South Africa. Apartheid was a unique policy of Pretoria (as indicated by its Afrikaans name); the policy covered 100% of states with official apartheid policies. I discuss this precise concept in my piece in Issue 15 of *The Tower* titled *The Apartheid Libel: A Legal Refutation*, published in June of 2014. (<http://www.thetower.org/article/the-apartheid-libel-a-legal-refutation/>).

¹⁷ Lahav Harkov, *EU think tank advocating for West Bank boycotts funded by occupied territories worldwide*, *Jerusalem Post* (Dec. 10, 2019), <https://www.jpost.com/Middle-East/EU-think-tank-advocating-for-West-Bank-boycotts-funded-by-occupied-territories-worldwide-610404>.

¹⁸ *Examining Current Terrorist Financing Trends and the Threat to the Homeland: Hearing Before H. Homeland Sec. Comm. and Counterterrorism and Intelligence Subcomm.* 114th Cong. (2016) (written testimony of Jonathan Schanzer, Vice President for Research at the Foundation for Defense of Democracies); Armin Rosen and Leil Lebovitz, *BDS Umbrella Group Linked to Palestinian Terrorist Organizations*, *Tablet Magazine* (June 1, 2018), <https://www.tabletmag.com/scroll/263409/bds-umbrella-group-linked-to-palestinian-terrorist-organizations>; Israeli Ministry of Strategic Affairs, 4IL, *BDS Loses Its Crowdfunding Account Over Ties to Terror Organizations* (Apr. 9, 2019), <https://4il.org.il/1256/>.

overlap is not coincidental. Founders and leaders of the boycott movement have openly called for the end to Israel as a Jewish state.¹⁹

When all these three factors coincide, the anti-Semitism becomes undeniable.

Mr. Chairman, thank you for giving me an opportunity to address these issues, and I welcome your questions.

¹⁹ See sources cited in 2018 WL 6011426, at *4-6. Brief for Defendants-Appellants, *Jordahl v. Arizona* (2018) (No. 18-16896), 2018 WL 6011426, at *4-6.