UK Lawyers for Israel - Legal Review

Legal tools in fighting against BDS, antisemitism and against NGOs linked to terrorist and BDS supporting groups

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EXECUTIVE SUMMARY

This is a review of various legal tools available under UK and other national laws, EU and WTO rules, international sports rules and OECD Guidelines to fight against delegitimization and boycotts of Israel, and other anti-Israel activities.

The review identifies which provisions can be used and how they can be used to prevent BDS, to undermine organisations promoting BDS, to disrupt the funding of NGOs linked with terrorism, and to prevent online antisemitism.

Many of these tools are based on international regimes and can be used by members of the Network to address situations in other countries. Others are based on UK law but have equivalents under the laws of other countries.

Public authorities such as local councils or national governments regularly attempt to introduce legislation which would have the effect of boycotting Israel, or areas of Israel. In some cases the public authorities do not mention Israel by name, but speak about "occupied territories", but in fact frame the legislation so that only Israel would be affected. If such legislation is introduced it is likely to be illegal and impractical.

For example in England and Wales, Section 17 of the Local Government Act 1988 states that public authorities must only have regard to commercial considerations when deciding to whom public works contract should be awarded. Political considerations are not relevant.

If a local or national government attempts to exclude Israeli settlements in "occupied Palestinian territory" from tenders this would contravene World Trade Organisation Agreement on Government Procurement ("GPA").

Extensive Federal and State laws in the United States impose a variety of sanctions and liabilities on companies that participate in boycotts of territories under Israeli administration. If a local or national government imposed a boycott on Israel or Israeli settlements, then businesses which complied with the boycott would be exposed to serious sanctions and liabilities in the United States.

If a boycott is applied only to territories administered by Israel, and not to occupations by other countries such as Turkey, Morocco, Russia, Armenia (Nagorno Karabakh), India (Kashmir) and China (Tibet), this will constitute discrimination against Israelis in breach of anti-discrimination legislation.

EU and WTO free trade rules, prohibit restrictions on imports and discrimination in international trade so are the legal tools which pro-Israel NGOs can use to counter BDS against Israel. The BDS supporters have argued that the boycotts are permitted by exceptions in WTO and EU provisions for measures protecting public morality, public order or public policy. However, pro-Israel organisations can argue that these exceptions to WTO and EU law cannot be applied with regard to restrictions on trade with Israeli occupied territories.

As regards WTO agreements, the boycotters' argument that restricting trade with Israel on the grounds that doing so is "necessary" to protect public morals or maintain public order is likely to fail. If these measures are applied only or primarily to particular occupied territories, they are also likely to be caught by provisions which prevent discrimination.

Under EU law, a boycott of Israel or of "settlement areas" are unlikely to be regarded as justified on grounds of public morality or public policy. There is a general rule that the EU has exclusive control over foreign trade policy and prohibits any restrictions on cross-border trade in the internal market. In any case, the exceptions under the common commercial policy do not extend to restrictions on the supply of goods or services. In addition, conducting business in an occupied territory is not in itself "grave professional misconduct" justifying exclusion from tendering in public procurements.

When trustees of funds are targeted by BDS activists, who try to persuade them to divest from Israeli companies, there are several legal arguments that can be used by pro-Israel activists. The fiduciary obligations of trustees of funds, require trustees to act in the best interest of beneficiaries and not to take non-financial considerations into account if they would involve any significant risk of financial detriment to beneficiaries.

Rules of national and international sports bodies prohibit discrimination, being disrespectful of other competitors and racism. These rules can be used to ensure that Israel and Israelis are not boycotted and are treated equally as a State and nationality.

Students and staff at universities may face a multitude of problems including academic boycotts, discrimination, harassment, curbs to freedom of speech, events that promote BDS, BDS motions, hostility to Israel and other hostile motions. There are many legal tools that can be used to counter these problems: UK Education Law and Charity Law applicable to universities and student unions, include obligations of universities not to discriminate against students or staff. These laws can be invoked to prevent academic boycotts. Universities have a duties to protect students from harm, to secure freedom of speech, and to comply with public procurement laws. Student Unions also have duties not to act outside their charitable objects of promoting education at the university, so promoting a boycott of Israel or even of Israeli academics, students or products would not be allowed.

UK Education Law, applicable to schools, is framed to prevent political indoctrination and to ensure a balanced treatment of political issues. These legal provisions can be invoked, for example, if schools use politically unbalanced (anti-Israel) textbooks, or provide politically unbalanced lessons or lectures in school, whether as part of the curriculum or not.

There are counter-terrorism laws which apply to financial and other service providers, which ensure that they do not provide their services to designated terrorist individuals or groups. The powerful sanctions against terrorism covered by the US Office of Foreign Assets Control and the US PATRIOT Act can be invoked to disrupt the funding of terrorist-linked NGOs around the world.

OECD Guidelines for Multinational Enterprises were developed to ensure multinationals behave ethically, across all their global operations. Pro-Israel NGOs can file complaints about Multinationals who, for example, are providing services to terrorist linked NGOs.

Online antisemitism is an ever present and growing problem. Antisemitism online and holocaust denial online are not specific criminal offences in the UK but there is a host of general criminal legislation can cover this behaviour. We provide an overview of the different UK legislation that can be invoked to counter antisemitism online, and also suggest other

approaches. Both the individuals uploading the content and the websites and organisations hosting the content could be committing criminal offences.

CHAPTER 1 - PUBLIC PROCUREMENT RULES

Public authorities such as local councils or national governments regularly attempt to introduce legislation which would have the effect of boycotting Israel, or companies based in the West Bank, East Jerusalem or Golan Heights. In some cases the public authorities do not mention Israel by name, but speak about "occupied territories", but in fact frame the legislation so that only Israel would be affected.

If such legislation is introduced it is likely to be illegal and impractical, and could if implemented be overturned by Judicial Review. However, it is best to prevent the legislation being introduced at the earliest stage when it is still only a proposal. This can be achieved by writing to the legislators and pointing out the many ways in which such legislation would be illegal and impractical and how it could open the particular government or council to many expensive lawsuits.

The case studies below explain the legal tools that can be used.

Case Study

Welsh Government Procurement Advice Notice

The Welsh Minister for Finance and Trefnydd gave an answer in the Welsh Parliament on 11 August 2020 in which she stated that the Welsh Government intended to introduce a Procurement Advice notice advising all buyers from the public sector in Wales that they may exclude from the tendering process any company which "*conducts business with occupied territories either directly or via third parties, including with Israeli settlements in Occupied Palestinian Territory, on the grounds of grave professional misconduct under Regulation 57(8)(c), of the Public Contracts Regulations 2015."*

UKLFI wrote to the minister, explaining why the Advice would be illegal and how, if fully followed in relation to all occupied territories around the world, it would have far more extensive implications than the Welsh Government appeared to realise. If the Advice were only applied in relation to companies dealing with Israelis in territories occupied by Israel, this would be discriminatory and illegal for additional reasons.

Section 17 of the Local Government Act 1988

This section states that when public authorities must only have regard to commercial considerations when deciding to whom public works contract should be awarded.

"Non-commercial matters", which must **not** be taken into account. These are defined in section 17(5) as including, as regards the public supply or works contracts of a public authority, *"(e) the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors"*

Section 17(1) provides: *"It is the duty of every public authority to which this section applies, in exercising, in relation to its public supply or works contracts, any proposed or any subsisting such contract, as the case may be, any function regulated by this section to exercise that function without reference to matters which are non-commercial matters for the purposes of this section."*

If a public authority excludes any company from tenders that conducts business with occupied territories either directly or via third parties, this clearly contravenes

Section 17(1) of the Local Government Act. It takes a non-commercial matter into account and excluding and specifically takes into account "*the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors."*

Regulation 57(8)(c) of the Public Contracts Regulations 2015

Regulation 57(8)(c) of the Public Contracts Regulations 2015, referred to by the Welsh Minister to justify her proposed Advice, does **not** override the obligations in section 17 of the 1988 Act mentioned above.

Although the 2015 Regulations set out a number of consequential repeals in their Schedule 6, these do not include section 17 of the 1988 Act. As Lord Falconer observed in the UK Parliament on 17 December 2001, section 17 remained in force and was consistent with EU Public Procurement Directives and UK implementing regulations. While the EU Directives and UK implementing regulations have since been replaced, there have been no changes to the legislation that affect this point.

Regulation 57(8)(c) states: *"Contracting authorities may exclude from participation in a procurement procedure any economic operator in any of the following situations … (c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable"*

This provision is in almost identical terms to Art. 57(4)(c) of EU Directive 2014/24. Under section 6 of the European Union (Withdrawal) Act 2018 it must be interpreted so far as possible to achieve the result envisaged by the EU Directive as interpreted in accordance with decisions of the EU Court of Justice prior to "Brexit" on 31 January 2020.

Recital 101 of EU Directive 2014/24 identifies the purpose of Art. 57(4) as being to enable authorities to exclude operators which have proven unreliable, as the EU Court of Justice observed in cases C-41/18 *Meca* at §§29-30 and C-267/18 *Delta* at §26. Art. 57(4)(c) is thus "*based on an essential element of the relationship between the successful tenderer and the contracting authority, namely the reliability of the successful tenderer, on which the contracting authority's trust is founded"* - C-41/18 *Meca* §30

Matters which have no bearing on a contractor's reliability should therefore be ignored. Conducting business directly or indirectly with occupied territories does not make a business unreliable. Indeed, many well-known and reliable businesses do conduct business directly with occupied territories.

Furthermore, interpreting the corresponding provision, Art. 45(2)(d), of the predecessor EU Public Procurement Directive 2004/18 in Case C-465/11 *Forposta*, the EU Court of Justice stated: *"the concept of 'grave misconduct' must be understood as normally referring to conduct by the economic operator at issue which denotes a wrongful intent or negligence of a certain gravity on its part. Accordingly, any incorrect, imprecise or defective performance of a contract or a part thereof could potentially demonstrate the limited professional competence of the economic operator at issue, but does not automatically amount to grave misconduct. In addition, in order to find whether 'grave misconduct' exists, a* ***specific and individual assessment*** *of the conduct of the economic operator concerned must, in principle, be carried out."*

That interpretation of the concept of "grave misconduct" equally applies to the current Directive 2014/24 and the current UK Regulations implementing it.

Advice that authorities "*may exclude from tendering any company that conducts business with occupied territories either directly or via third parties*" would appear to be inconsistent with the requirement of a "**specific and individual assessment**" of the conduct of the economic operator concerned.

As the UK Supreme Court observed in *Richardson v DPP* [2014] UKSC 8 at §17, a company does not necessarily commit any criminal offence by producing goods in or near an area of Israeli settlement in the West Bank; and still less does a connected company commit any criminal offence by purchasing those goods and retailing them in the UK. Similarly in Case 11/05331 *AFPS and OLP v Alstom and Veolia*, the Court of Appeal of Versailles held that companies did not breach any legal or ethical obligations by participating in a consortium to construct and operate a public transport system serving both Israeli and Arab neighbourhoods of East Jerusalem.

More generally, operating in and trading with occupied territories is a normal and widely accepted commercial practice, as Professor Eugene Kontorovich has demonstrated in his paper "Economic Dealings with Occupied Territories" 53 Columbia Journal of Transnational Law 584 (2015).

This information demonstrates that such activities do not constitute grave misconduct showing that a company is too unreliable to perform a public procurement in the UK.

Benefits to Palestinians

There are many benefits provided by Israeli businesses operating in the West Bank and East Jerusalem to Palestinians and to promoting peace and reconciliation.

Some 35,000 Palestinians are currently employed in Israeli businesses in the West Bank and East Jerusalem. Their average salary is over three times that of Palestinians employed by Palestinian businesses or organisations in areas of the West Bank under Palestinian administration.

Palestinians employed in Israeli businesses are also protected by Israeli employment laws, which require a minimum wage, a maximum 8-hour day, convalescence pay, pensions, and paid leave on Muslim and Jewish holidays. The salaries earned by the Palestinian employees

enable them to provide for extended families. Taking into account also their indirect contributions to the livelihoods of other Palestinians providing goods or services to these workers and their families, these jobs provide or contribute substantially to the livelihood of probably hundreds of thousands of Palestinians.

The employment of Palestinians in Israeli businesses in the West Bank also promotes peace and reconciliation through the good relations created between Israelis and Palestinians working together.

A book of essays published by the Jerusalem Center for Public Affairs under the title "Defeating Denormalization – Shared Palestinian and Israeli Perspectives on a New Path to Peace" describes these effects.

On any objective assessment there is no basis for regarding companies that conduct business directly or indirectly through third parties with Israeli businesses or individuals in the West Bank or East Jerusalem as being any more likely to be guilty of "grave professional misconduct" rendering them unreliable as contractors in the UK than companies that conduct business with any other territories. There is therefore no justification for advising that special consideration should be given to them under Regulation 57(8)(c).

World Trade Organisation Agreement on Government Procurement ("GPA").

Excluding from tenders organisations which "*conduct business with occupied territories either directly or via third parties, including with Israeli settlements in Occupied Palestinian Territory"* as proposed by the Welsh Government would also contravene GPA.

Art. VIII(1) of the GPA provides: *"A procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement."*

Art. VIII(4) provides:

"Where there is supporting evidence, a Party, including its procuring entities, may exclude a supplier on grounds such as:

a. bankruptcy;

b. false declarations;

c. significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;

d. final judgments in respect of serious crimes or other serious offences;

e. professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier; or

f. failure to pay taxes"

For the reasons set out above, dealing with an occupied territory does not in itself adversely reflect on the commercial integrity of a supplier and there is no justification for supposing that

companies dealing with occupied territories are more likely than others to lack commercial integrity.

Contravention of the GPA could result in its suspension by other countries in relation to UK companies under its Art. XX.3 and the WTO Dispute Settlement Understanding or by unilateral action. This risk could be significant if, for example, a US company is excluded from tendering on the ground that it conducts business with an occupied territory.

US counter boycott legislation and potential trade agreements

Extensive Federal and State laws in the United States impose a variety of sanctions and liabilities on companies that participate in boycotts of territories under Israeli administration. Advice as proposed by the Welsh Government would put businesses in a difficult position, in that compliance by companies with conditions for tendering imposed by Welsh public authorities would expose them to serious sanctions and liabilities in the United States.

When the company Airbnb took a decision to cease listing Israeli-owned properties in East Jerusalem and the West Bank, Florida adopted sanctions against the company, Illinois and Texas initiated procedures for implementing sanctions, and legal actions were brought against it in Delaware, California, New York and Jerusalem. The proceedings were settled on the basis that the decision was withdrawn and the listings resumed.

Government of Wales Act 2006 (as amended)

Under paragraph 10(1) of Schedule 7A to the Government of Wales Act 2006 as amended by the 2017 Act, international relations and the regulation of international trade are reserved matters. The Welsh Advice is clearly directed at international relations and the regulation of international trade, and it may have a significant impact on international trade and the UK's trading relationships with important international partners. UKLFI would submit that Welsh Ministers do not have legal competence to give such Advice.

Practical implications

Many major companies have dealings with occupied territories.

They include Orange SA, Credit Agricole SA Group, Santander Group, Siemens, Engie, Agrium Inc, Potash Corp, Veolia, Eurochem AG, Cairn Energy PLC, San Leon Energy, Italcementi Group, Heidelberg Cement, Wartsila, Chint Group, Acwa Power, Shapoorji Pallonji Group, Norton Rose Fulbright, Green Giraffe, BNP Paribas, Lafarge Holcim, Vodafone, Aurubis AG, VEON, Telenor, Koc Holding, Sekerbank, Turkish Airlines, Altinbas Holding, Axa, Renault, CIM SA, PSA Group (Peugeot Citroen), Allianz, OMV, Adidas, Reinert-Ritz, Kalyon Group, Trelleborg AB, Auchan SA, Coca Cola, Norges Bank, Priceline Group, TripAdvisor, ThyssenKrupp, ENEL Group, INWI, Zain Group, Caterpillar, Biwater, Binter, Bombardier, Jacobs Engineering Group Inc, Western Union, Atlas Copco, Royal Dutch Shell, Italgen SPA – Italmobiliare group, Gamesa, AirBnB, FLSmidth & Co A/S, Ararat Bank, Tashir Group, Zurich Insurance Group AG, Danske Bank, Fedex, Ford Motor Company, Adana Cimento, Re/Max, Telia Company, Bosch Group,

Major Internet companies, such as Google, Facebook, Netflix and Amazon, also provide services and goods to businesses and individuals in occupied territories, and the products of

other major IT companies such as Microsoft, Apple, Samsung and Dell are supplied directly or indirectly to such businesses and individuals.

Advice given by the Welsh Government, applying to any business that has dealings directly or indirectly with any occupied territories, would therefore have a massive impact on public procurement in Wales. On the one hand, this would result in major difficulties and additional expense for Welsh public authorities. On the other hand, it may give rise to multiple legal claims by businesses that would be affected. The extent of the impact also makes it more likely that countries where these businesses are based will press their concerns.

If, however, the Advice were to target Israeli businesses or individuals in territories occupied by Israel, or if it were applied more vigorously to them than to others, then various additional legal provisions would be infringed.

These would include Regulation 18 of The Public Contracts Regulations 2015 and Art. IV of the GPA. In addition, businesses refusing to deal with Israelis in order to comply with the conditions of the Advice would be more exposed to sanctions and liabilities under US laws and would also be exposed to claims under e.g. section 29 of the UK Equality Act 2010, as well as laws on discrimination in a number of other countries.

Judicial Review

If the public authority goes ahead and adopts the boycott measures, then an NGO could apply for judicial review of the decision.

As a result the Welsh government deferred the decision on its boycott proposal, which had been "imminent" in September 2020, following UKLFI'S warning that their actions would be illegal. They wrote in October 2020 to UKLFI stating "We are seeking further independent legal advice on what is a contested issue to enable us to come to a balanced view. Hence, we will write to you in response to the concerns, as set out in your letter of 21 August, and detailing our intentions in early December before any advice is published".

Case Study – Oslo Council

The ruling coalition of the Oslo City Council, published a Procurement Policy on 22 October 2019. This included the intention stated on page 22 (translated to English) :

"The City Council will … Investigate the scope of action contained in the procurement regulations to not acquire goods and services produced in an area occupied in violation of international law by companies operating under the permission of the occupying power."

UKLFI assisted the Norwegian organisation Med Israel for Fred in writing to the Oslo Governing Mayor, and made the following points:

A. The provision of the Procurement Policy cited above applies to territories that are illegally occupied such as Northern Cyprus, Western Sahara, the Crimea and Eastern Ukraine, but does not apply to the West Bank or the Golan Heights.
B. Applying this provision to the West Bank or Golan Heights without also applying it to other disputed territories would contravene the Equality and Anti-Discrimination Act.

C. Public procurement legislation requires purchasing decisions to be based exclusively on economic and technical, not political, considerations. Even below the thresholds to which it applies, discrimination must be avoided.

A. Non-applicability of the provision to Israel

It has been suggested by some politicians and representatives of NGOs that this provision is directed against goods and services produced by Israeli businesses in the West Bank. However, it must be noted that the terms of the Procurement Policy do not in fact apply at all to the West Bank, since it is not *"occupied in violation of international law"*. The consensus view of international lawyers is that Israel's continued administration of parts of this area is lawful pending a final resolution of its status pursuant to the Oslo Accords.

The West Bank came under Israeli control in the Six Day War of 1967 when Israel responded in lawful self-defence to illegal attacks by Jordan from this area, which Jordan had occupied since 1948. Despite Israel's entreaties to stay out of the war, Jordanian forces advanced on the vulnerable flanks of West Jerusalem, as well as shelling Tel Aviv and bombing Netanya amongst other places. Numerous UN Security Council resolutions, including nos. 242 and 2334, have recognised that Israel's occupation of the West Bank is not in itself in violation of international law, as has the International Court of Justice in the "Wall" case.

Secondly, the operation of businesses in the West Bank with the permission of the Israeli authorities is also lawful, as has been recognised by the UK's Supreme Court in *Richardson v DPP* [2014] UKSC 8 https://www.supremecourt.uk/cases/docs/uksc-2012-0198-judgment.pdf and by the Cour d'Appel de Versailles in *AFPS v Alstom* https://www.france-palestine.org/IMG/pdf/decision_de_la_cour_d_appel.pdf.

Moreover, such businesses employ tens of thousands of Palestinians at salaries several times higher than those provided by Palestinian employers and with benefits guaranteed by Israeli law to all employees whether Israeli or Palestinian. These jobs provide the livelihood for hundreds of thousands of Palestinian dependents.

Israeli administration of the Golan Heights is also lawful until there is a peace agreement between Israel and Syria; this area came under Israeli control when it responded lawfully to illegal attacks by Syria in 1967. It follows that the provision of the coalition agreement cited above also does not apply to the Golan Heights.

By contrast, this provision of the Procurement Policy does apply to certain other territories which have been occupied in violation of international law, such as Northern Cyprus and Northern Syria (illegally occupied by Turkey), Western Sahara (illegally occupied by Morocco) and Crimea, Eastern Ukraine, Transnistria, Abkhazia and South Ossetia (illegally occupied by Russia).

B. Discrimination contrary to the Equality and Anti-Discrimination Act 2017

If the above provision of the Procurement Policy is applied only to territories administered by Israel, and not to occupations by other countries such as Turkey, Morocco, Russia, Armenia (Nagorno Karabakh), India (Kashmir) and China (Tibet), this will constitute discrimination

against Israelis in breach of Chapter 2 of the Equality and Anti-Discrimination Act of 2017 (https://lovdata.no/dokument/NL/lov/2017-06-16-51).

Such application would also breach the obligation of public authorities under section 24 of this Act that they *"skal arbeide aktivt, målrettet og planmessig for å oppfylle lovens formal" ("shall make active, targeted and systematic efforts to achieve the purpose of this Act"*).

C. Public procurement legislation

The provision of the Procurement Policy cited above contemplates an investigation of the scope of action contained in the procurement regulations. The Norwegian regulations apply to procurements of NOK 100,000 upwards and the regulations implementing EU Directive 2014/24 apply to procurements of NOK 1.3 million upwards. Procurements above these thresholds must be based on economic and technical considerations, not political positions.

However, even below these limits, fundamental principles of EEA law apply in line with the EU Commission's Interpretative Communication of 1 August 2006 https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1398246549340&uri=CELEX:52006XC0801%2801%29#ntr9-C_2006179EN.01000201-E0009.

These fundamental principles include the principle of non-discrimination enshrined in Article 4 of the EEA Agreement. Discriminatory treatment of Israeli businesses by comparison with (for example) Turkish, Moroccan, Indian or Chinese businesses in comparable situations would contravene this requirement.

Art. 57(4)(c) of EU Directive 2014/24 permits a contracting authority to exclude an economic operator where the authority can demonstrate that the operator is *"guilty of grave professional misconduct, which renders its integrity questionable".* The condition *"which renders its integrity questionable"* has been added to this provision by comparison with the corresponding provision Art. 45(2)(d) of the predecessor Directive 2004/18. This addition is evidently intended to confirm that the provision only permits exclusion of operators who, due to their conduct, cannot be trusted to perform the contract, as explained in recital 101 and the judgments of the EU Court of Justice in cases C-267/18 *Delta* at para 26 and C-41/18 *Meca* at paras 29-30.

Moreover, as stated in para 31 of the judgment of the EU Court of Justice in the earlier case C-465/11 *Forposta*, decided under Directive 2004/18, *"in order to find whether 'grave misconduct' exists, a specific and individual assessment of the conduct of the economic operator concerned must, in principle, be carried out."*

D Treatment of Palestinians

Israeli businesses in the disputed West Bank treat their Palestinian staff equally with their Israeli staff, pay them salaries several times higher than Palestinian employers, and provide social security benefits. At these businesses Palestinians work alongside Israelis, promoting peaceful coexistence by enabling Israelis and Palestinians to appreciate each other. For further details, we respectfully refer you and your colleagues to the book *"Defeating Denormalization – Shared Palestinian and Israeli Perspectives on a New Path to Peace"*

published by the Jerusalem Center for Public Affairs at http://jcpa.org/pdf/Defeating_Denormalization_Final_22_january.pdf.

In these circumstances, Oslo City Council could only find *"grave misconduct"* on the part of an Israeli business operating in the disputed West Bank as a result of a specific and individual assessment of the business concerned that demonstrated particular malpractice rendering its integrity questionable. We predict that no such evidence will be found.

In any event, this condition must be applied without discrimination, not only in relation to businesses operating in other disputed territories, but also more generally. We predict that any non-discriminatory assessment will find that Israeli businesses in the West Bank treat their staff much more favourably and operate far more responsibly than most businesses around the world.

UKLFI and MIFF asked the Oslo Mayor to confirm that Oslo Council would ensure the correct application of public procurement legislation in accordance with the points made above, and that the Council would also avoid discrimination either in the application of the legislation or in relation to contracts which fall below its thresholds.

UKLFI asked the Oslo Mayor to confirm that any implementation of the above provision of the coalition agreement will only apply to territories such as Northern Cyprus, Western Sahara and Crimea, that are illegally occupied, and will not apply to the West Bank or the Golan Heights, which are not illegally occupied.

A few months after the letter was sent, there was another boycott initiative in Norway, but the Director of the Government Procurement Centre in Norway stated that "We have no right and no obligation to reject companies involved in Israeli settlements".

Case Study – Dublin City Council and Hewlett Packard boycott

In April 2018 Dublin City Council was to vote to boycott HP in support of BDS. The motion put forward by Cllr John Lyons of the "People Before Profit Alliance " party, was as follows:

"Since its violent establishment in 1948 through the ethnic cleansing of more than half of the indigenous people of Palestine, the state of Israel has denied Palestinians their fundamental rights and has refused to comply with international law; noting also that Israel continues to illegally occupy and colonise Palestinian land, discriminate against Palestinian citizens of Israel, imposes an inhumane blockade and siege of Gaza and denies Palestinian refugees the right to return to their homes, this City Council fully supports and endorses the Palestinian-led Boycott, Divestment and Sanctions movement for freedom, equality and justice and commits itself to discontinue all business contracts it has with Hewlett-Packard, both HP Inc. (PCs and printers), and Hewlett Packard Enterprise for business and government services, as HP provides and operates much of the technology infrastructure that Israel uses to maintain its system of apartheid and settler colonialism over the Palestinian people. "

UKLFI assisted Irish4Israel in drafting a letter to Minister Coveney making the following points:

As well as containing a series of false statements regarding Israel the proposed Dublin City Council motion was flagrantly contrary to

(a) EU public procurement legislation,

(b) the World Trade Organisation Government Procurement Agreement (GPA), and

(c) Articles 34 and 56 of the Treaty on the Functioning of the EU (TFEU).

(d) If adopted it would expose Dublin Council and Ireland to claims for damages by HP and withdrawal of benefits accorded by the USA under the GPA to Irish and other EU goods, services and contractors.

EU public procurement legislation

Under EU Directive 2014/24, which is implemented in Ireland by the European Union (Award of Public Authority Contracts) Regulations 2016, contracting public authorities are required, when procuring goods or services, to *"treat economic operators equally and without discrimination"*: see Article 18(1) of the EU Directive and Regulation 18(1) of the implementing Regulations. This applies to procurements above certain thresholds; in the case of contracts awarded by sub-central contracting authorities such as Dublin Council, the threshold is €209,000: see Art. 4(c) of the EU Directive / Reg. 5(c) of the Regulations. There are provisions preventing a single procurement being split up into several smaller procurements to avoid the application of the Directive / Regulations.

By excluding HP from any procurement as provided in the motion, Dublin City Council would plainly breach the requirement to treat economic operators equally and without discrimination. As well as being a breach of Irish law under the implementing regulations, this would constitute a serious breach of EU law by both Dublin Council and the Irish State. Both Dublin Council and the Irish Republic would therefore be liable to substantial damages claims in accordance with the *Francovich* decision of the EU Court of Justice (Case C-6/90) if the motion is passed and applied.

World Trade Organisation Agreement on Government Procurement ("GPA").

The EU and the USA are parties to the GPA. Its Art. IV states: *"With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to:*

a. *domestic goods, services and suppliers; and*

b. *goods, services and suppliers of any other Party."*

"Covered procurement" is specified in annexes to the GPA pursuant to its Art II.2; these cover procurement by Dublin City Council above the threshold specified in the EU Directive.

Clearly, the fundamental obligation in Art. IV is intended to apply to all relevant goods, services and suppliers of another Party. A Party must accord *"treatment no less favourable"* to all such goods, services and suppliers, not just some of them. Accordingly, the Dublin City Council resolution would put Ireland and the EU in breach of the GPA.

Art. 25 of the EU Directive and Reg. 25 of the Irish implementing regulations require compliance with the GPA. Thus by breaching the GPA, Dublin City Council would be breaching Irish law and would be putting Ireland in breach of EU law as well.

Non-compliance with the GPA is subject to the WTO Dispute Settlement Understanding in accordance with Art. XX of the GPA, which may lead to withdrawal by the affected party (eg the USA in this case) of the benefits of the GPA to Irish and other EU goods, services and contractors.

Treaty on the Functioning of the European Union (TFEU) Arts. 34 and 56

Art. 34 of the TFEU prohibits restrictions on imports and measures of equivalent effect between EU member states. Art. 56 prohibits restrictions on the freedom of a person established in an EU state to provide services in another EU state. In so far as the Dublin Council motion is applied to goods and services supplied from other EU member states, it breaches these provisions.

While there is an exception in Arts. 36 and 52(1) for public policy, the EU Court of Justice has interpreted this very narrowly, in order to secure the fundamental principle of free trade and movement of persons in the internal market. A measure is justified on grounds of public policy only where there is a *"genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society"*: see Case 30/77 *Bouchereau* (1977) ECR 2000.

Arts. 34 and 56 apply even if the contracts in question are below the thresholds specified in the EU Public Procurement Directive. Indeed it is well established that they apply to any restriction on cross-border trade, however small: see eg Cases 177-8/82 *Van de Haar* in the EU Court of Justice. Furthermore, according to longstanding guidance of the EU Commission, they are not displaced or excluded by the adoption of the Public Procurement Directives.

Arts. 34 and 56 are directly applicable and Dublin Council would be liable for damages for breaching them. In addition by breaching them it would put Ireland in breach of its obligations as a member state of the EU, exposing the Irish State to legal claims.

The outcome was that Dublin City Council voted in support of a boycott and economic sanctions against Israel on 9 April 2018, and in particular called for the council to discontinue business contracts with Hewlett Packard. However, Dublin Council's chief executive confirmed that the Council will NOT be implementing any boycott of Hewlett Packard and of Israeli goods, since such a boycott is illegal.

Case Study – Belfast City Council

A proposed resolution to support BDS against Israel was going to be made at Belfast City Council on 1 July 2019. UKLFI wrote

UKLFI heard about a proposed resolution at Belfast City Council to support boycott, divestment and sanctions against Israel. We did not have details of the text of the resolution, but nevertheless wrote to the chief executive of the council to draw attention to its possible illegality, so Council officers could consider the position in advance of the meeting and advise Councillors accordingly.

The points UKLFI made were as follows:

A. Council Standing Order 13(b) requires that *"Every notice of motion shall be relevant to some matter in relation to which the Council has powers or duties or which directly affects the City and its citizens".*

Careful consideration should be given to whether the proposed motion complies with this requirement, and the assessment of compliance with this requirement must be consistent with the assessment of compliance with other legal requirements. Thus, if the motion is merely a political expression, it would not be relevant to some matter in relation to which the Council has powers or duties and would not directly affect the City and its citizens, and therefore would not be compliant with this Standing Order. On the other hand, if it affects procurement by the Council, it will be relevant to a matter in relation to which the Council has powers or duties and thus compliant with this Standing Order, but it would then be likely to breach public procurement rules as mentioned at E and F below.

B. Under Standing Order 13(l) a notice of motion that seeks to commit the Council to expenditure not previously agreed through the Committee process shall stand referred to the appropriate Committee for consideration and report, unless the Lord Mayor in consultation with yourself rules that the matter is one of emergency or of such urgency that it would be impractical or prejudicial to the Council's interests to require compliance. We doubt that such a ruling could be made honestly in this case, and if it appears to us that such a ruling is made dishonestly, we will seek to invoke disciplinary procedures in respect of such lack of integrity.

C. The motion may breach section 75(2) of the Northern Ireland Act 1998, which requires a public authority to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group. As specified in section 75(5) of the Act, "racial group" has the meaning provided by the Race Relations (Northern Ireland) Order 1997, and thus covers nationality and ethnicity (see article 5 of the Order).

BDS campaigns against Israel promote antisemitism. Boycotting has a powerful effect of dehumanising its targets and those associated with them, and making them fair game for other attacks. This has been demonstrated repeatedly by history and confirmed by modern research. For example, a study at US universities found that *"The best statistical predictor of anti-Jewish hostility, as measured by actions that directly target Jewish students for harm, is the amount of BDS activity"*.

D. Implementation of the motion may involve discrimination on the ground of religious belief or political opinion contrary to section 76(1) of the Northern Ireland Act 1998, in the same way that the implementation of a campaign of boycott, divestment and sanctions targeted against the Republic of Ireland would involve discrimination against Catholics and those who support the government of the Republic of Ireland.

It is unlawful to discriminate against a nation even if criticisms of that country's policy are justified. However, there is a further serious element of discrimination, indeed racism, in boycotting Israel without boycotting the many other countries whose policies can be criticised with far more justification.

E. Boycotting Israeli products in the Council's procurement would infringe Article 19 of The

Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1992, which requires councils to select suppliers without reference to non-commercial matters. Non-commercial matters are defined in Article 19(4) as including *"(e) the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors"* and *"(f) any political, industrial or sectarian affiliations or interests of contractors or their directors, partners or employees".*

F. Boycotting Israeli products in the Council's procurement would also infringe Regulation 67 of the Public Contracts Regulations 2015, which requires contracting authorities to base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority. A boycott targeting Israel would additionally infringe Regulations 25 and 90, since Israel is a party to the WTO Agreement on Government Procurement (GPA).

The UK Government's Procurement Policy Note 01/16 emphasises at §7 that

"Public procurement should never be used as a tool to boycott tenders from suppliers based in other countries, except where formal legal sanctions, embargoes and restrictions have been put in place by the UK Government. There are wider national and international consequences from imposing such local level boycotts. They can damage integration and community cohesion within the United Kingdom, hinder Britain's export trade, and harm foreign relations to the detriment of Britain's economic and international security. As highlighted earlier, it can also be unlawful and lead to severe penalties against the contracting authority and the Government."

Although public procurement is a devolved matter, the EU and UK legislation apply in Northern Ireland as in England and Wales, and should be interpreted the same way.

G. Pension fund trustees have a fiduciary duty to invest in the best interests of the members and beneficiaries of the fund and to invest prudently. Divestment of or refusal to make a financially worthwhile investment on the grounds that a company or group operates in Israel is likely to be unlawful.

These case studies show that there is a multitude of legislation that pro-Israel NGOs can use in order to oppose BDS motions by public authorities, and that these have been successfully utilised in many different jurisdictions.

CHAPTER 2 - FREE TRADE RULES

In recent years, anti-Israel protestors have pressed legislators, governments and other public authorities in European and other countries to prohibit or restrict trade with Israel's disputed territories that they consider to be "occupied". However, such measures are liable to conflict with WTO and EU free trade rules that prohibit or limit restrictions on trade. These free trade rules are the legal tools which pro-Israel NGOs can use to counter BDS against Israel.

The BDS supporters have argued that the boycotts are permitted by exceptions in WTO and EU provisions for measures protecting public morality, public order or public policy.

This section also examines the legal arguments pro-Israel organisations can use to argue that these exceptions to WTO and EU law cannot be applied with regard to restrictions on trade with Israeli occupied territories.

As regards WTO agreements, the boycotters' argument that restricting trade with Israel on the grounds that doing so is "necessary" to protect public morals or maintain public order is likely to fail. If these measures are applied only or primarily to particular occupied territories, they are also likely to be caught by provisions which prevent discrimination.

Under EU law, a boycott of Israel or of "settlement areas" are unlikely to be regarded as justified on grounds of public morality or public policy. There is a general rule that the EU has exclusive control over foreign trade policy and prohibits any restrictions on cross-border trade in the internal market. In any case, the exceptions under the common commercial policy do not extend to restrictions on the supply of goods or services. In addition, conducting business in an occupied territory is not in itself "grave professional misconduct" justifying exclusion from tendering in public procurements.

Overview of the rules

The WTO's General Agreement on Tariffs and Trade (GATT) eliminates quantitative restrictions, (Art XI) limits tariffs (Art I), and requires most favoured nation (MFN) treatment to be accorded (Art I) in respect of goods originating in the territories of other parties, including territories for which they have *"international responsibility"*. (Arts XXIV.1, XXVI.5)

Although interpretative notes had suggested that earlier versions of the relevant provisions might not include territories under military occupation, these provisions were significantly amended and the interpretative notes were deleted in 1957. It is submitted that they should now be interpreted in accordance with the ordinary meaning of their terms, and are capable of covering occupied territories.

The WTO's General Agreement on Trade in Services (GATS) requires MFN treatment (Art II), national treatment (Art XVII) and market access (Art XVI) to be accorded to suppliers constituted or organised under the law of other parties, if they have a presence in the country where the service is supplied (Arts I.2(c) and (d), XXVIII(d), (j)-(n)).

The WTO Agreement on Government Procurement (GPA) requires MFN and national treatment to be accorded to goods, services and suppliers of another party (Art IV).

As for the EU, the Treaty on the Functioning of the EU (TFEU) allocates exclusive competence in the area of trade with countries outside the EU (the common commercial policy) to the EU and prohibits its member states from legislating or adopting legally binding acts in this area, such as prohibiting trade with particular territories, except where empowered to do so by the EU or for implementing EU acts (Arts 2(1), 3(1)(e) and 207).

EU Regulation 2015/478 on common rules for imports and related EU Regulations further provide that *"Imports into the Union … shall take place freely and accordingly shall not be subject to any quantitative restrictions …."(* Art 1(2))

The TFEU also prohibits customs duties, quantitative restrictions and measures of equivalent effect on the movement of goods between EU member states, including goods originating in third countries that are in free circulation in the EU (Arts 28-30, 34-36).

The EU's Public Procurement Directive 2014/24 (Art 25) and Utilities Directive 2014/25 (Art 43) require public authorities of all EU member states to accord to works, supplies, services and economic operators of parties to the WTO's GPA that are covered by its provisions treatment no less favourable than that accorded to those of the EU. That treatment is itself closely regulated by these Directives to ensure that procurement decisions are taken fairly on the basis of economic and technical considerations.

Exceptions to EU Free Trade Rules

Amongst other exceptions to these rules, measures based on requirements of public morality or public policy are permitted if they satisfy certain conditions. Thus, Art XX of the GATT provides

"Subject to the requirement that such measure are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals; …".

The GATS has a similar provision, but the initial proviso refers to *"countries where like conditions prevail"* (rather than *"the same conditions"*) (Art XIV(a)) and it extends to measures *"necessary … to maintain public order"* (as well as *"to protect public morals"*), with a footnote stating that *"The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."*

The GPA (as revised in 2014) has a similar provision which allows measures *"necessary to protect public morals, order or safety" (*Art III.a*).*

Similarly, Art 36 of the TFEU provides that its prohibitions of quantitative restrictions and measures of equivalent effect in trade between EU member states

"shall not preclude prohibitions or restrictions … justified on grounds of public morality, public policy or public security … Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between [EU] Member States".

EU Regulation 2015/478 on common rules for imports and related Regulations also provide:

"Without prejudice to other Union provisions, this Regulation shall not preclude the adoption or application by Member States of: (a) prohibitions, quantitative restrictions or surveillance measures on grounds of public morality, public policy or public security …".(EU Regulation 2015/478, Art 24(2); EU Regulation 2015/936, Art 33(2); EU Regulation 2015/755, Art 17(2)).

Recital 41 of the EU Public Procurement Directive 2014/24 and Recital 57 of the EU Utilities Directive 2014/25 state that

"Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality … provided that those measures are in conformity with the TFEU."

However, these Recitals are not directly reflected in substantive provisions of the Directive. Art 57(4) of Directive 2014/24 provides more narrowly that

"Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator … where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable".

Member States may also apply this provision to utilities under Art 80(1) of Directive 2014/25.

The public morality and public order exceptions in WTO agreements

The public morality and public order exceptions in WTO agreements have been considered by WTO Panels and the WTO Appellate Body in a number of cases. The following issues have been identified:

(a) What is covered by the terms "public morals" and "public order"?

(b) Is the measure in issue *designed* to protect public morals or maintain public order?

(c) Is the measure in issue *necessary* to protect public morals or maintain public order?

(d) Does the measure in issue constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail?

(e) Is the measure in issue a disguised restriction on international trade?

Arbitrary or unjustifiable discrimination

If a measure is provisionally justified by satisfying all of the conditions discussed above, it is then necessary to consider whether justification is precluded by either of the provisos in the heading or "chapeau" of the proviso.

The first proviso in the GATT is that the measure is not

"*applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail."*

The corresponding proviso in the GATS is in identical terms, except that *"same conditions"* is replaced by *"like conditions".* In either case,

"only 'conditions' that are relevant for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue and the circumstances of a particular case should be considered under the chapeau."

Case study – EC – Seal Products

The EU wanted to prohibit the importation and placing on the market of seal products (for example from Canada and Norway) but with certain exceptions, including for seal products derived from hunts conducted by Inuit or indigenous communities and hunts conducted for marine resource management purposes.

The Appellate Body held in *EC – Seal Products* that conditions prevailing in Canada and Norway (where most seal hunts were commercial) were not relevantly different from those prevailing in Greenland (where most seal hunts were indigenous community hunts), since the same animal welfare considerations prevailed in all countries where seals were hunted and the same animal welfare concerns existed in indigenous community hunts as arise in commercial hunts. (DS401 *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products,* Appellate Body §5.317)

The Appellate Body held that the EU's general ban on the sale of seal products, coupled with exceptions for products from seals killed in indigenous community seal hunts, constituted arbitrary and unjustified discrimination against Norway and Canada by comparison with Greenland.

The EU's explanation, that the exemption mitigated adverse effects on indigenous communities, was not rationally related to the moral concern regarding the welfare of seals. In addition, the EU legislation was ambiguous and conferred excessive discretion on regulatory bodies, while access of Canadian Inuits to the exemption had not been facilitated with the same effort as given to Greenland Inuits. (DS401 *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products,* Appellate Body §§5.318-5.)

In accordance with the decision in the *EC – Seals* case, only conditions relevant to the measure in issue should be considered in determining whether the same (or similar) conditions prevail in different countries.

If the concern is the transfer of population of an occupying power into occupied territory, it would seem that the same conditions prevail for this purpose in all occupied territories where there has been settlement of nationals of the occupying power. (For examples of such territories and international reaction to such settlement, see Eugene Kontorovich, *Unsettled: A Global Study of Settlements in Occupied Territories,* The Journal of Legal Analysis 2017, Northwestern Public Law Research Paper No. 16-20)

In reality, extensive trade is conducted with the involvement of many major companies in different occupied territories around the world. Perhaps recognising the difficulties and opposition that would face a proposed ban on trade with all occupied territories, those proposing such measures have generally singled out a particular country, usually Israel in relation to its administration of the West Bank, East Jerusalem and the Golan Heights. This singling out appears to be both arbitrary and unjustifiable.

Case Study – **Irish BDS Bill**

The Control of Economic Activity (Occupied Territories) Bill, introduced into the Irish Parliament in 2018, defined *"relevant occupied territory"* as

"a territory which is occupied within the meaning of the Fourth Geneva Convention, and which has been … confirmed as such in a decision or advisory opinion of the International Court of Justice [or] … in a decision of the International Criminal Court … [or] … [another international criminal tribunal] or designated … by the Minister".

At the time the Bill was presented the only territory satisfying this definition automatically was the West Bank and East Jerusalem. However, it seems clear that the *"same conditions prevail"* in other occupied territories, whether or not there has been a decision to that effect by an international tribunal. Accordingly, if it had been implemented, it seems that this Bill would have been caught by the provisos to the exceptions and in breach of WTO agreements.

In the event, the Irish government prevented the completion of its passage through the Irish parliament on the ground that it would contravene EU law and require a "money message" from the Taoiseach: see the speech in the Dail of Tanaiste Simon Coveney TD https://www.oireachtas.ie/en/debates/debate/dail/2019-01-23/25/ (accessed 11/11/2020)

Case Study – EU Labelling of "Settlement" goods

The EU's approach has been to require special labelling of goods produced in the West Bank, East Jerusalem and the Golan Heights. Ostensibly, the same EU legislation applies to all territories, but interpretative guidance adopted by the EU Commission and upheld by the EU Court of Justice (CJEU) refers only to the above territories and may have resulted in its application in a different way to these territories as compared with other occupied territories. This, too, would appear to constitute arbitrary or unjustifiable discrimination and in breach of WTO agreements.

The EU's Common Commercial Policy

The EU has exclusive competence for the "common commercial policy", i.e. the regulation of trade between EU member states and countries outside the EU. It is well established under EU law that EU member states are not permitted to adopt national or local measures within the scope of the common commercial policy unless specifically authorised by the EU.

Art 207(1) of the TFEU further provides that the *"the common commercial policy shall be based on uniform principles …"*

The common commercial policy covers international trade in services (except in the field of transport) as well as goods. On this basis it seems clear that measures intended to restrict trade in goods or services with occupied territories outside the EU would come within the scope of the common commercial policy.

The Bouchereau Test

The EU provisions have exceptions for measures justified on grounds of public morality or public policy. However, these exceptions are interpreted strictly, since they derogate from a fundamental principle of the TFEU. In particular, the CJEU has repeatedly held in *Bouchereau (*30/77 *Bouchereau* §35 (ECLI:EU:C:1977:172);) and subsequent cases that restrictions on the free movement of persons or services within the EU can only be justified on the ground of public policy where there is a

"genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society" ("the *Bouchereau* test").

If an individual member of the EU (such as Ireland) attempted to introduce a national prohibition on the import into the EU of goods produced in an occupied territory it is unlikely

to satisfy the *Bouchereau* test. In addition, unless adopted by the EU as part of the common commercial policy, such a measure would directly contradict the allocation of exclusive competence over foreign trade policy to the EU, since it would be a measure of national trade policy specifically restricting foreign trade with the aim of influencing the actions of a foreign state.

For both these reasons, it seems that such a prohibition would not be permitted under Art 24(2) of EU Regulation 2015/478 or corresponding provisions of related EU Regulations, and would therefore contravene EU law.

The EU's Internal Market

One of the fundamental principles of the EU is an internal market comprising

"an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties"

Pursuant to this principle, Art. 34 of the TFEU provides:

"Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

This provision applies to products coming from third countries which are in free circulation in EU member states, as well as products originating in EU member states (TFEU Arts. 28(2) and 29). Related provisions prohibit restrictions on the free movement of persons (TFEU Arts 20(2), 21, 45 and 49) and on the provision of cross-border services. (TFEU Art 56).

It seems unlikely that a general prohibition of the import or supply of goods or services produced in an occupied territory could be justified in accordance with the *Bouchereau* test and hence permitted to derogate from the free movement of goods and services within the EU required by EU law.

In the first place, the production of goods and services in an occupied territory does not in itself threaten any fundamental interest of society and is several steps removed from any actions that might be alleged to be harmful to society in the occupied territory, let alone in the EU. Secondly, as mentioned above, the production of goods or services in an occupied territory is not inherently illegal. Thirdly, such production may well be beneficial to the protected population. Fourthly, if the measure in question arbitrarily discriminates against a particular country or territory, this is likely to contradict any claimed justification and/or bring it under the proviso in Art 36 of the TFEU.

Therefore, a national or local measure in an EU member state restricting the supply of goods or services from another member state on the ground that they were produced in an occupied territory is likely to breach the prohibitions of restrictions on cross-border trade in arts 34 and 59 of the TFEU.

EU Public Procurement Rules

The EU's Public Procurement Directive 2014/24 (Art 25) and Utilities Directive 2014/25 (Art 43) require public authorities of all EU member states to accord to works, supplies, services and economic operators of parties to the WTO's GPA that are covered by its provisions

treatment no less favourable than that accorded to those of the EU. That treatment is itself closely regulated by these Directives to ensure that procurement decisions are taken fairly on the basis of economic and technical considerations.

However, art 57(4) of Directive 2014/24 provides that:

"Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator … where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable".

Member States may also apply this provision to utilities under art 80(1) of the EU Utilities Directive 2014/25.Recital 101 of EU Directive 2014/24 identifies the purpose of art 57(4) as being to enable authorities to exclude operators that have proven unreliable. Art. 57(4)(c) is thus

"based on an essential element of the relationship between the successful tenderer and the contracting authority, namely the reliability of the successful tenderer, on which the contracting authority's trust is founded"(Art 25).

It seems to follow that matters which have no bearing on a contractor's reliability do not justify exclusion on this ground.

Conducting business with occupied territories does not make a business unreliable. Indeed, many well-known and reliable businesses do conduct business with occupied territories. Furthermore, a general rule or policy of excluding tenders by businesses that operate in occupied territories would not constitute the *"specific and individual assessment"* required by the CJEU's *Forposta* decision.

It seems, therefore, that measures by public authorities of EU member states excluding tenders on the grounds that the tenderer conducts business in an occupied territory would not be permitted under art 57(4) of the EU Public Procurement Directive 2014/24 on the ground that this constitutes *"grave professional misconduct"*. In so far as such measures would disadvantage works, supplies, services or economic operators of a party to the GPA, they would appear to breach art 25 of Directive 2014/24 and art 43 of Directive 2014/25.

CHAPTER 3 – FIDUCIARY OBLIGATIONS OF TRUSTEES OF FUNDS

Trustees of funds can be targeted by BDS activists, who try to persuade them to divest from Israeli companies, or other organisation of whom they disapprove.

There are several legal arguments that can be used to persuade these Trustees not to comply with the demands of the BDS activists. These are explained in the case studies below.

Case Study: Letters to Local Government Pension Scheme

The Palestinian Solidarity Campaign sent a letter to all the UK Local Government Pension trustees, to persuade them to divest from Israeli Companies. UKLFI subsequently wrote to the same trustees, advising them of the following points:

1. Scheme administrators should act in the best interests of their members, not in the best interests of unregulated organisations (such as PSC), which have their own agendas.

2. The letter sent by PSC contained a number of claims regarding the State of Israel that were inaccurate in fact and in law. PSC's claims did not constitute reliable information or independent research. As such, no reasonable scheme administrator or investment manager could, in the discharge of its contractual, legal and regulatory duties, reasonably rely on the information PSC provided when making an investment or disinvestment decision.

3. According to the Supreme Court judgment dated 29 April 2019 in the case of R (on the application of Palestine Solidarity Campaign Ltd and another) (Appellants) v Secretary of State for Communities and Local Government (Respondent) non-financial considerations can be taken into account by trustees of funds, provided that doing so satisfies a two limbed test:

   Limb (1) allows non-financial considerations to be taken into account only if they would not involve significant risk of financial detriment to the scheme.

   PSC stated that your failure to act "could be of [*sic*] the financial detriment to [*sic*] the scheme". This is an inversion of the test. The risk of financial detriment, as articulated by PSC, implies that the issues raised by PSC are believed to be *financial*, rather than *non-financial* considerations. In fact PSC is not a financial adviser and the claims it made in its letter did not constitute reliable or independent research.

   Furthermore, the decision of the Supreme Court in *DPP v Richardson* [2014] UKSC 8, illustrates that a particular company should not be assumed to be responsible for acts of the governing authorities of a location in which it or a connected company operates.

   Limb (2) requires that the scheme administrator must have "good reason" to think that scheme members would support the decision.

   PSC was asking the trustees to communicate with pension holders in the hope that they will formulate a world view aligned with PSC. PSC appeared to be seeking to use trustees as its proxy. Views based on the PSC version of the facts and law would be formed on inaccurate and misleading information.

   Even if the overwhelming majority of pension holders adopted the PSC view, the scheme administrator would still not have "good reason". If the scheme administrator has reason to believe that the support of scheme members is based on false or misleading information, it could not reasonably be said to have "good reason" in the sense of having properly reached that conclusion based on an honest or genuine view. The decision would then be at risk of challenge.

4. According to PSC, their letter has been sent to all LGPS Committee Chairs. If so, it appears to be a concerted effort to move the market based on false or misleading information. This could be a matter for the Financial Conduct Authority (FCA) as it was a brazen attempt to exploit ESG policies, adopted as part of an investment management mandate, as a weapon for activists with no interest in the scheme. Scheme administrators and scheme members

cannot be allowed to be their delivery system. To do so would threaten the integrity of the markets and the investment management industry.

Case Study: Falkirk Council Divestment from Bank Hapoalim

Scottish Palestine Solidarity Campaign (SPSC) and UNISON Scotland both announced on their website, in July 2018, that the Falkirk Council Pension Fund had divested itself of Bank Hapoalim shares.

UKLFI wrote to the Responsible Officer of the Falkirk Council Pension Fund which had a substantial funding deficit, to warn him that the decision to divest these shares may have been made improperly and unlawfully. UKLFI made the following points:

The decision to sell the holding in Bank Hapoalim

At the time of the disposal of the Fund's shares in Bank Hapoalim, all bank investment analysts rated them as "buy", "outperform" or "hold", and none as "underperform" or "sell": https://www.reuters.com/finance/stocks/analyst/POLI.TA. The shares had a good yield and increasing share price in a currency that has itself been rising against the £.

On the other hand, according to the 2017-18 draft accounts posted on the Fund's website, the Fund had a very substantial deficit at 31 March 2017, with assets of only £2.289 billion as compared with the present value of promised retirement benefits of £2.959 billion, leaving a deficiency of £670 million or 22.6% of the total.

SPSC claimed on its website that the shares were sold *"following an assessment by the Fund Manager that concluded the political and reputational risks associated with Israeli Bank Hapoalim were significant"*; and that *"The Fund management had earlier 'challenged the Bank on several occasions regarding their activities in the Occupied Territories and their approach to human rights' and reported that Bank Hapoalim 'admits that it provides mortgages to customers in the occupied territories' despite, as Falkirk Pension Fund notes, 'business activity in the occupied territories is generally considered a breach of international law".*

Similar statements are made on the website of UNISON Scotland which also says that *"UNISON Scotland International Committee would wish to congratulate Falkirk Council on their decision to divest from the Israeli Bank Hapoalim, but also the rationale for reaching that decision".*

UNISON Scotland has an active policy of promoting Boycotts, Disinvestment and Sanctions (BDS) directed against Israel, particularly divestment by pension funds of investments in companies allegedly *"involved or complicit in Israel's illegal occupation, in the torture, oppression and dispossession of Palestinians"*. The policy overtly seeks to exploit the representation of UNISON Scotland on the Boards of Scottish Council pension funds.

While various of the allegations quoted by SPSC are incorrect, it seems clear from the above that the Fund's decision to divest the shares was made on political grounds.

Grounds for suspecting impropriety and illegality

The decision to sell the Bank Hapoalim shares appears to us to have been made improperly and unlawfully for the following reasons:

A. Both the Pensions Committee and Pensions Board include UNISON Scotland representatives. As mentioned above, the Fund's investment in Bank Hapoalim was a specific agenda item at the joint meeting of the Pensions Committee and Board on 21 June 2018, shortly before the disposal. We infer that a proposal to divest from Bank Hapoalim was discussed at that meeting.

   The UNISON Scotland representatives had an unresolvable material conflict of interest in relation to this proposal, between their duties to all members of the pension scheme (whether members of UNISON Scotland or not) and their loyalty as members and/or officials of UNISON Scotland to support its policy of promoting divestment by local government pension funds of their shares in Bank Hapoalim.

   So far as we are aware, no proper steps were taken to ensure that UNISON Scotland representatives on the Pensions Committee and Pensions Board had no input into the decision to divest from Bank Hapoalim.

B. Section 12 of the Local Government Pension Scheme (Management and Investment of Funds) (Scotland) Regulations 2010 ("the Investment Regulations") requires the administering authority to maintain and publish a written statement of investment principles (SIP) governing its decisions about the investment of fund money covering, inter alia, *"the extent to which social, environmental or ethical considerations are taken into account in the selection, retention and realisation of investments"*.

   In this regard the SIP for the Fund dated 24 August 2017 states:

   "Environmental, social and corporate governance ('ESG') issues can have a material impact on the long term performance of its investments *- the Committee recognises that ESG issues can impact the Fund's returns and the Committee aims to be aware of, and monitor, financially material ESG-related risks and issues through the Fund's investment managers. The Committee commits to an ongoing development of its ESG policy to ensure it reflects latest industry developments and regulations …*

   "Ongoing engagement is preferable to divestment *- The Committee believes that, in relation to ESG risks, ongoing engagement with investee companies is preferable to divestment. This engagement may be via our managers or alongside other investors (e.g. LAPFF). Where, over a considered period, however, there is no evidence of a company making visible progress towards carbon reduction, we believe that divestment should be actively considered."*

   The decision to divest from Bank Hapoalim appears to conflict with the SIP in at least three respects:

   (a) The SIP states that ESG issues are taken into account only where they are likely to have a financially material impact on the Fund's investments. It appears to us that the

decision to divest Bank Hapoalim shares was based on political considerations without any proper assessment as to whether any ESG issues had a financially material impact.

(b) The SIP states that divestment will be considered only where there is no evidence of a company making visible progress towards carbon reduction. There is no suggestion that divestment from Bank Hapoalim was justified on this ground.

(c) The SIP states that ongoing engagement is preferable to divestment and that divestment will only be considered if there is no evidence of a company making visible progress over a considerable period (we assume that "considerable" rather than "considered" was intended here). We have been told that there was only one discussion about ESG issues with Bank Hapoalim. If this information is correct, we do not regard it as "ongoing engagement", still less ongoing engagement over a considerable period.

C. Even if, contrary to the SIP, the investment manager was entitled to take non-financial considerations into account, he was still required to assess, when making the decision, whether there was a risk of significant financial detriment, and not to proceed if there was such a risk: *Harries v Church Commissioners* [1992] 1 WLR 1241. We doubt whether such an assessment was or could have been made, bearing in mind that

(a) The liquidation of a holding worth some £6 million, or 0.4% of the equities sub-portfolio, was a not insignificant disposal;

(b) The consensus of the market analysts was that this was a share to buy or hold;

(c) The Fund had a serious deficiency when there is a need for it to be fully funded; and

(d) The Fund has not published any specific explanation of the rational for the disposal, despite the claims made (and no doubt expected to be made) by SPSC and UNISON Scotland that the decision was based on political considerations.

D. The investment manager was obliged to exercise independent and impartial judgment in the interest of all beneficiaries of the scheme: *Martin v Edinburgh DC* [1988] SLT 329. It appears, however, that he failed in his duty not to fetter his investment discretion for reasons extraneous to the scheme purpose, including reasons of a political or moral nature. He also appears to have failed in his duty to exercise fair and impartial judgement in the interest of the beneficiaries by relying on information provided by UNISON Scotland and/or others without independently checking its accuracy and objectivity.

In this regard, we note, for example, that the Fund apparently proceeded on the basis that "*business activity in the occupied territories is generally considered a breach of international law".* This is not correct, as has been observed by the UK Supreme Court in *Richardson v DPP* [2014] UKSC 8 (para 17) and by the Tribunal de Grande Instance de Paris in *SAS OPM France v AFPS* (Case No. 13/06023, Judgment of 23 January 2014).

Therefore it can be seen that it is possible to refer to the duties of trustees, and to legal precedents to show that it would be illegal for trustees to bow to the pressures of BDS activists.

CHAPTER 4 – NATIONAL AND INTERNATIONAL SPORTS RULES

Sports only exist because of their rules; one team playing baseball against another playing cricket would be chaos – it's the rules that make two teams playing the same sport work. Perhaps that is why sporting organisations are tied up in rules stretching to cover every aspect of their sport and far beyond. It makes a very constructive arena for combatting instances of anti-Israeli discrimination.

Badminton

A good way to illustrate how it can work is to use a case study of how we engaged with the Badminton World Federation to secure suspensions for players and their coach involved in an Israel boycott.

At an international badminton tournament at Dnipro in Ukraine in 2018 two junior players walked onto the court; a Ukrainian and an Israeli. Their doubles partners walked onto the court, took part in the coin toss and then immediately, without saying a word, packed up and left.

The Ukrainian teenager had no idea what was going on. The Israeli player knew exactly what was going on. Their opponents were from Saudi Arabia – it was a boycott of an Israeli player.

From off-court, behind a pillar, the Saudi coach filmed the event; he proudly passed the footage to Saudi media.

Where to Start

The place to start, when trying to work out how to approach an instance of anti-Israeli discrimination is the website of the sport's governing body. There will be all sorts of useful information there.

1. Address
   Where are they based? It might be important. In this case it was Malaysia; not a country known for its Israel-friendliness. There have been other cases where it has mattered much more, because legal jurisdiction may present other avenues which I'll discuss after the Badminton case study.

2. National and Regional Associations
   It may be worth additionally/alternatively approaching the more local bodies. They may be able to instigate action themselves, and they are insiders who can bring weight to bear within the organisation along with your pressure from outside. You may even find you have an indirect connection on a local committee who could be useful at understanding the lie of the land and perhaps internal lobbying.

3. Ethos
   Usually their homepage is where they sum up what they feel stand for; it's usually something to do with inclusivity and fair play. You will want to remind them of that. For Badminton it's "giving every child a chance to play for life". That's not every child except Israeli ones.

4. Rules
   This is the key resource; the rules and regulations governing the sport. This allows you to get beyond ethical outrage and present them with all the reasons they need to do something. They are often called by different names; rules, regulations, statutes, codes, principles, law, policy.

The Rules

These are not always easy to find. Heading for the Badminton World Federation Homepage (https://bwfbadminton.com) you won't see anything that seems relevant. You have to go all the way down to the bottom, where, amongst dozens of other links in tiny typecase, is nestled 'BWF Corporate' (https://corporate.bwfbadminton.com) and on that page is the menu item 'Statutes' (https://corporate.bwfbadminton.com/statutes/). On this page is everything you will need to mine to find the useful regulations.

But the useful elements may be tiny nuggets hidden in hundreds of pages text. Prepare for it to take a while. If you are in a hurry then better to just head to the obvious clauses dealing with discrimination and base your letter around that.

In the case of Badminton, as well as discrimination there were several other aspects that opened the team to sanction: Discrimination Discourtesy, Altering result, Integrity, Image of the sport, Failing to report contraventions.

The reason you might want to dig out alternatives is that there may be governing bodies who prefer to have an easy life and turn a blind eye when Israeli players are boycotted, who see forfeiting a match as penalty enough. But they may get very exercised over lack of professional conduct or courtesy.

One interesting aspect is the regulations all sports have in relation to match fixing. These relate to purposefully altering the outcome of a match and are usually invoked in relation to betting.

Where an Israeli competitor is boycotted it is a form of match-fixing; the event will not have the outcome it would have had if all the bouts had been played. That opens those who boycott Israelis to match-fixing penalties, often the highest of all.

Breaches

I have included below a list of all the regulations we said were breached at the Badminton tournament in Ukraine.

Those in breach started with the players who walked off court. They also included the Coach who filmed the event and passed the video to Saudi media. In this case, because it was a junior tournament there was also a clause that stated that the member federation – in this case the Saudi Badminton Committee – were held to be responsible for all the offences committed by their team.

Including this full list, even without any breakdown, starts making any letter very unwieldy and less likely to be read. In this case the full explanation of how each of these provisions was

breached was kept to an attachment to the letter. In cases where a much shorter letter might achieve better results even the list of breached provisions might be better put in an attachment rather than the letter itself.

Standing

One technical aspect you will need to check is something in the law is known as 'standing'; who is able to initiate a complaint? For some sports it will be restricted to those within the organisation. If you make a complaint and you do not have standing it unlikely to reach the people it needs to, it will get weeded out. In that case your best approach is to turn your letter into a formal request that the relevant executive or committee initiate its own action.

Who to write to

In terms of exactly who to send the letter to; try and follow the procedures laid down in the rules. If they say that complaints about breaches of the rules can come from absolutely anyone and should be sent to the Chair of the Ethics Committee then of course that's what you should do.

If there are limitations on who can inform them of breaches, then the best person to write to is usually whoever fills their chief executive role. Make sure you check the senior leadership roles of the organisation because different roles carry all sorts of names and almost all these organisations have someone nominally in charge but who actually has no day-to-day authority. It is the person with responsibility for the day-to-day administration of the organisation you want to write to.

In the case of Badminton, we wrote to the Integrity Unit Manager who, under their rules, had the power to initiate an investigation or disciplinary process under the BWF Judicial Procedures.

Time Limits

Often there are limits regarding how long after the event action can be taken. These can be quite short and it is something you should check to make sure you are in time. If you are out of time that does not mean should you avoid action. Usually the time runs from awareness of the event rather than the event itself. Even if it is not explicit that is the case, it can be taken as implicit and addressed in your letter. You can note that the time limit has been passed but note that the time should be considered as running from the date of awareness.

You can ask if they were aware of the event before your letter and present them with a series of alternatives. You can invite them to take action if they were not aware. If they were aware and took action, ask them to let you know of the outcome of that. If they were aware and took no action, why not?

Sometimes an apparent barrier to taking action, like standing and time limits, can be turned into something that strengthens your response.

Response

So what happens when you send your letter full of proof that there have been multiple breaches? Sometimes you get a reply with plenty of bland assurances but entirely avoiding the points you have made, sometimes a simple acknowledgment of receipt, sometimes nothing. In those cases you still have options.

The IOC

You have a secret weapon when engaging with sporting federations; the International Olympic Committee. All Olympic sports have to sign up to the IOC rules which trump their own. Since these boycotts are contrary to the Olympic rules it is worth mentioning the fact in your initial letter. Organisations are keen not to fall foul of the Olympic Movement and this may add useful leverage.

It also allows you to follow up in the case of non-action with a letter saying that without any action or response you will take your complaint to the Ethics Committee of the IOC.

We were able to engage with the IOC over problems in Judo and that sport is now taking an extremely robust approach and is setting a gold standard for sport regarding Israel boycotts.

Many sports which are not Olympic sports adhere to the Olympic codes, and in the case of those which aspire to become Olympic sports the idea they may be reported to the IOC may carry considerable weight.

Other options

And there are still a couple more cards up your sleeve. One of the cases we dealt with involved a sporting federation seated in Germany. Some countries, for understandable reasons, have extremely strong anti-discrimination laws, and in Europe there are EU laws in place. We were able to note that unless we were able to secure an adequate resolution from the sporting world we would be advising disadvantaged competitors to seek redress using the national and supranational rules in place to protect them. What sporting organisation would want publicity like that?

And finally…the law of contract. Sporting organisations enter into a contractual relationship with their members. Failure to uphold their own rules is a breach of that contract and open to action by a member in the civil courts.

The sporting world is an ideal setting for disrupting attempts to isolate Israel and Israeli competitors; such a heavily rule-based arena allows scope for rigorous analysis as a basis for confronting sporting organisations with their failings using their own rules.

Example: A list of all the Badminton World Federation Statutes breached by the refusal by Saudi players to compete against an Israeli. After intervention by UKLFI the Saudi players and coach were suspended by the Saudi Badminton Committee.

Breaches by the Players

Players Code of Conduct (Chapter 2; Ethics S.2.2)	
Code of Ethics	3
Withdrawal	4.1.1
Model Competitor	4.2
Conduct	4.2.3
Best efforts	4.2.6, 4.2.7, 4.2.17
Integrity	4.7.1

Code of Conduct In Relation To Betting, Wagering And Irregular Match Results (Ch 2; Ethics 2.4)	
Failure to Complete/Use Best Efforts	3.1.1, 3.1.2

Breaches by the Coach and/or other officials

Coaches and Educators Code of Conduct (Ch2; Ethics S 2.2.6)	
Code of Ethics	3
Team Manager	4.4
Role model	4.14
Code of Conduct in Relation to Betting, Wagering and Irregular Match Returns	4.24
Conduct Contrary to the Integrity of the Sport	4.26.1

Code Of Conduct In Relation To Betting, Wagering And Irregular Match Results (Ch 2; Ethics 2.4)	
Best Efforts	3.1.8
Contriving outcome	3.1.17

Reporting	3.1.24

Breaches by the Saudi Badminton Committee

Junior Tournament Regulations (Ch 5; Tournament Regulations 5.2; Junior Tournament 5.2.3)	
Members' Responsibilities for Tournaments and Players	1.4, 1.4.5, 1.5, 1.5.1

Players' Code of Conduct	
Code of Ethics	3
Withdrawal	4.1.1
Model Competitor	4.2
Conduct	4.2.3
Best efforts	4.2.6, 4.2.7, 4.2.17
Integrity	4.7.

Code of Conduct in relation to Betting, Wagering and Irregular Match Results	
Failure to Complete/ Use Best Efforts	3.1.1, 3.1.2
Best Efforts	3.1.8
Contriving outcome	3.1.17
Reporting	3.1.24

Coaches and Educators Code of Conduct	
Code of Ethics	3
Specific Provisions for Conduct	4.4
Role model	4.14

Code of Conduct in Relation to Betting, Wagering and Irregular Match Returns	4.24
Conduct Contrary to the Integrity of the Sport	4.26.1

CHAPTER 5 – UNIVERSITIES AND STUDENT UNIONS

Here we set out the legal tools that can be used tackle the issues that students and staff at universities may face. These include academic boycotts, discrimination, harassment, freedom of speech, events that promote BDS, BDS motions, hostility to Israel and other hostile motions.

If a university, student union or any student club or society is planning a BDS or other anti-Israel event, debate or vote, there are actions that the students can take, or that their legal advisors can assist them with, which are set out below.

Legal obligations of the university

The Duty not to discriminate against students or staff

This duty applies to Jewish students and academics, who are protected as members of an ethnic group, irrespective of their religious beliefs. Academic boycotts, for example violate these provisions and are therefore illegal.

Academic boycott

It is unlawful for the student union, which is a charity, or its officers in their capacity as officers of the student union to promote an academic boycott, since this is a political campaign, and therefore not allowed under charity regulations. This is the case whether the boycott is promoted to the university, students or others. Examples of unlawful motions include providing for a plaque supporting a boycott to be displayed in the student union or requiring student union officers to press the university to implement an academic boycott or some form of discrimination against academics who are or have connections with Israelis.

In addition, academic boycotts are themselves unlawful. Under the Equality Act 2010, it is illegal for a university to boycott Israeli universities or academics.

Under Part 5 of the Act, discrimination by universities against staff (or prospective staff) on grounds of nationality, ethnicity or religion is prohibited. Under Part 6 of the Act, discrimination by universities against students (or prospective students) on these grounds is also prohibited.

In addition, under section 149 of the Act, the University has a positive duty (the Public Sector Equality Duty, PSED) to advance equality of opportunity and foster good relations between persons of different nationalities, ethnicities and religions.

It is well established that Jews are an ethnic group and that Judaism is also a religion; and clearly Israelis are a nationality. A boycott of Israeli universities would amount to illegal discrimination against Jews as well as against Israelis, because Jews are more likely to have links with Israelis and Israeli institutions than non-Jews: see the Opinion of Michael Beloff QC and Pushpinder Saini QC, which also refers to an earlier Opinion of Lord Lester QC that has been accepted by the UCU Executive, which has ruled that motions promoting Israel boycotts are out of order, void and of no effect and see also its statement.

A boycott of Israeli universities would be by its nature discriminatory on grounds of nationality. The discrimination would be all the more serious and racist, in the absence of any similar measure being taken in relation to any other countries in the world, including those in occupation of other disputed territories such as Turkey, Russia, China and Morocco; or those responsible for appalling human rights violations such as Syria, Sudan, Saudi Arabia and Iran.

The Duty to have regard to the need to eliminate discrimination, harassment and victimization and to foster good relations.

This important obligation is known as "The Public Sector Equality Duty" or PSED. Again these requirements apply to Jewish students, who are protected as an ethnic group, irrespective of religious beliefs, as well as potentially in respect of their religious beliefs. See Case Study A.

Case study A*:* A student union heavily promotes an anti-Israel motion before and while it is being voted on, with large banners in prominent positions on university property all round campus. This contributes to an intimidating and unpleasant environment for Jewish students on campus, particularly those who are Israeli or have connections with Israel. Arguably, having regard to the need to foster good relations between different ethnic groups and nationalities, the university should not allow the motion to be promoted on campus with such excessive prominence. Although the University also has an obligation to ensure freedom of speech within the law, this does not mean that it should allow oppressive promotion of the debate by the union.

The Duty to protect students from harm.

This harm may come from offensive speech and may be psychological or physiological. Note that the university prospectus may contain representations regarding the university environment, which can be worth citing in a complaint. See ***Case Study B***.

Case study B: In a case concerning discrimination against an Israeli postgraduate student UKLFI drew attention to the following statements in the University's Postgraduate Prospectus: *"A cosmopolitan community …."*, *"We are delighted to welcome students from more than 120 countries and the presence of around 3,500 international students contributes immensely to the richness and vibrancy of university life"* and *"X's multicultural atmosphere gave me the opportunity to interact and share knowledge with people from many different cultures around the world"*. We pointed out that the Prospectus conveyed a commitment to welcome students of different nationalities and cultures.

The Duty to take reasonably practicable steps to secure freedom of speech within the law.

Freedom of speech under this duty applies to students, staff and visiting speakers. Use of premises should not be denied to any individual/body on any ground connected with the beliefs of views of the individual/body or the policy or objectives of the body.

Section 43 of the Education (No 2) Act 1986 imposes a duty on universities (s.43(5)) to take such steps as are reasonably practicable to secure freedom of speech within the law for students, staff and visiting speakers (s.43(1)). This duty includes a duty to ensure, so far as reasonably practicable, that the use of any university or student union premises is not denied to any individual or body on any ground connected with the beliefs or views of that individual/body or the policy or objectives of the body (s.43(2)). See ***Case Study C***.

Case study C: The student union at Y university operates a "no platform for racists" policy. It refuses to allow the Jewish Society to hold a meeting on its premises with a speaker who is a member of the Knesset on the ground that he is a representative of a racist state. This refusal is illegal.

Code of Practice

In order to help discharge the duty to secure freedom of speech within the law, the university must have a code of practice setting out procedures to be followed in connection with the organization of meetings and other activities taking place on its premises (s.43(3)(a)) and at its student union even if this is not on the university's premises (s.43(8)).

This code must also specify the conduct required of persons in connection with such meetings or activities (s.43(3)(b)). The University must take such steps as are reasonably practicable (including disciplinary measures, where appropriate) to secure compliance with the code (s.43(4)).

This code must also specify the conduct required of persons in connection with such meetings or activities. The University must take such steps as are reasonably practicable (including disciplinary measures, where appropriate) to secure compliance with the code (s.43(4)). The code can usually be found on the University's website.

If the relevant procedures are complied with, the university should ensure the security and freedom of speech of, for example a visiting Israeli or anti-BDS speaker. If a talk is disrupted, the university may well have a legal obligation to take disciplinary action against those responsible. See ***Case Study D***.

Case study D: The Politics Society at the University of Z held a meeting at the student union addressed by the Israeli Ambassador. The talk was continually interrupted from the outset by anti-Israel campaigners approaching the speaker shouting offensive slogans. The meeting was abandoned. Several Jewish students filmed the disruption on their mobiles and there had been posts in social media by some students urging action to stop the meeting. The university considers, following the meeting, that it would be counterproductive to take any further steps at the present time. The university's position is illegal: it has a legal duty to investigate and take appropriate disciplinary action against any students responsible for disrupting the meeting who can be identified from the available information.

Note that: the university's duty is to take reasonably practicable steps to secure freedom of speech *within the law*. That means that there is no duty to allow known hate speakers onto campus, pleading academic freedom or freedom of speech, and that there is a duty to make a risk assessment in those cases as to whether criminal offences are likely to be committed. See ***Case Study E***.

***Case study 10*:** LSE Palestine Society mounted an exhibition at the LSE student union extolling Palestinian "martyrs", including terrorists killed in the course of murdering Israelis. LSE seems to have thought that this had to be allowed on grounds of freedom of speech under s.43, since (in their view) it did not amount to the offence of encouragement of terrorism contrary to the Terrorism Act 2006 or any other criminal offence. However, even if LSE was right regarding the criminal law issue (which is debatable), freedom of speech did not require such an offensive exhibition to be held in an area which provides important facilities and is frequented by most students, effectively forcing them to see it. LSE should have taken into account the PSED and prohibited the exhibition in this location.

The Duty of university to have due regard to the need to prevent people from being drawn into terrorism ("Prevent Duty"). Universities should consider carefully whether a speaker is likely to express extremist views that risk drawing people into terrorism or are shared by terrorist groups. If so, the event should not be allowed to proceed unless the university is entirely convinced that this risk can be fully mitigated without cancellation. If an event with such a speaker is allowed to proceed, he should be challenged with opposing views as part of that same event. If the university is in any doubt that the risk cannot be fully mitigated, it should not allow the event to proceed.

The Duty to comply with public procurement rules. Most universities are probably more than 50% funded by the UK government in which case it is illegal for the university to boycott products on the ground that they come from Israel or from a settlement beyond the Green Line or are supplied by a company which is part of a group that operates in Israel or supplies services to the Israeli government or army.

Legal obligations of the student union

The Duty to comply with UK charity law. Student unions are normally charities, and this has important legal consequences. It is unlawful for a student union to engage in activities which do not further its charitable objects, i.e. furthering the education of students at that university. In particular, a student union's income, property, facilities and resources (including the time of its sabbatical officers) must not be used for any other purpose.

Note: the charitable objects of a student union are normally limited to the advancement of education of students **at the particular university**. The standard objects clause does not cover advancement of education at other universities, still less education in other countries. See ***Case Study F***.

Case study F: Manchester University Students Union displayed a very large plaque claiming that Israel deprives Palestinians of their right to education and expressing support for the struggle of Palestinians to realise their fundamental human right to education. Even if this could be said to be for the advancement of education of Palestinians, it was not within the

charitable object of the Union, since it did not advance the education of students at Manchester University.

Student unions may organise debates about political issues, provided these are carried out in a way, which advances students' education in the broad sense at that university. However, student unions must not engage in or support political campaigns, except where these campaigns are themselves for the purpose of advancing education of students at the university (e.g. a campaign to reduce interest charged on student loans). See ***Case Study*** G.

Case study G: A student union can, in principle, hold a fairly conducted debate and take a vote on whether BDS against Israel should be supported. However, it is unlawful for the Union to take any step to implement BDS, e.g. by boycotting Israeli products. Individual students can decide not to buy Israeli products on political or other grounds, but the Union as an organization must remain neutral. Clauses mandating Union officers or staff to operate boycotts are unlawful and should be removed before a motion is circulated and voted on. Even if they are included and the motion is carried, such clauses are invalid and it is illegal to give effect to them. This point has been accepted following legal advice by a number of student unions, eg at KCL, UCL, Edinburgh, York. It is also endorsed by an Opinion of Christopher McCall QC and Raj Desai obtained by the National Union of Students.

In order to qualify as "educational", the debate must be fairly conducted, with each side being given a fair opportunity to present the facts and arguments. The student union can announce the result of a vote on a particular issue but, if it gives special prominence to a vote on a particular political issue, this is likely to be an unlawful political campaign. See ***Case Study H***.

Case study H: Manchester University Student Union had mounted a large plaque in a prominent position in the student union building accusing Israel of denying Palestinians their right to education. Union Officers claimed that it merely expressed the result of a vote of the Union. But no other resolution was publicized in this manner. Following legal advice the union replaced the plaque with a television screen which cycles through all of the resolutions of the union that remain in force.

Note: the National Union of Students (NUS) is not a charity and is not subject to the limitations on individual student unions under charity law. The fact that the NUS carries on some political campaigns that fall outside advancing the education of students does not mean that individual student unions can.

The Duty to comply with public procurement rules. Most student unions are probably more than 50% funded by the UK government in which case it is illegal for the student union to boycott products on the ground that they come from Israel or from a settlement beyond the Green Line or are supplied by a company which is part of a group that operates in Israel or supplies services to the Israeli government or army.

The Duties of Trustees of Student Union. Student unions are required to have trustees, who are legally responsible for ensuring that student union complies with the law, including the requirements of charity law, such as not engaging in political campaigns or other actions outside the charitable object of advancing the education of students at the university.

Relevant criminal law

There are various criminal law offences which may be committed in the course of BDS and other anti-Israel activities. This is not an exhaustive list.

Note: for all criminal offences, it is essential to identify the perpetrator (and if there is a trial, for the prosecution to prove his/her participation in the crime beyond reasonable doubt). Photographic, video or other evidence identifying the perpetrator should be obtained and kept wherever possible.

Public Order Offences. These cover threatening, abusive or insulting words or behaviour or the display of threatening or abusive writing, signs or other material within the hearing or sight of a person likely to be caused harassment, alarm or distress by such words, behaviour or display. It is not necessary to show that any person actually was alarmed or distressed for this offence to be committed, merely that this was likely. See ***Case Study I***.

Case study I: A talk on campus by an Israeli organized by the Jewish Society is broken up by anti-Israel students shouting "Child Murderers" and "Zionists Out". A number of the Jewish students attending the meeting are distressed. Section 5 offences have been committed and, if identified, the perpetrators ought to be prosecuted. In practice, however, the Police have not prosecuted in these circumstances.

Racial and Religious Hatred Offences. These cover threatening, abusive or insulting words or behaviour, and the display, publication or distribution of written material, where this is intended or likely to stir up racial or religious hatred. Racial hatred is hatred against a group of persons defined by reference to colour, race, nationality, citizenship, ethnic or national origins. It is accepted that this covers hatred against Jews. Religious hatred is hatred against a group of persons defined by reference to religious belief or lack of religious belief.

Although it is notoriously difficult to bring a successful prosecution for inciting racial or religious hatred, these provisions may still be invoked as a reason for not allowing an event with a known hate speaker to go ahead, in view of the risk that the speech would not be within the law.

Assault. The offence of assault is committed by intentionally or recklessly causing someone to apprehend immediate use of unlawful violence. There is no need for actual violence to occur. Battery (often referred to as assault) is committed by intentionally or recklessly applying unlawful force to the body of another person. See ***Case Study J***.

Case study J: A Jewish student (A) is filming the disruption of a talk arranged by the Israel Society on her phone. One of the protestors (B) screams at A to stop filming. A continues filming and B hits her arm causing the phone to drop to the ground. B has committed a battery on A.

Criminal damage. This offence is committed by intentionally or recklessly destroying or damaging property belonging to another without lawful excuse. See ***Case Study K***.

Case study K: Students break the glass to set off a fire alarm in order to disrupt a talk by an Israeli speaker. They have committed the offence of criminal damage

Aggravated trespass. The offence of aggravated trespass is committed where a person trespasses on land and does something intended to obstruct or disrupt a lawful activity, or to intimidate and thereby deter persons engaging in it. This offence is normally committed where someone attends an event with the intention of disrupting it and does disrupt it. Such a person is a "trespasser", even if he/she has a ticket or has reserved a place or is permitted to attend, since the permission is to attend as a member of the audience, not to disrupt it.

Harassment. The criminal offence of harassment is committed where a person pursues a course of conduct which amounts to harassment of another person and which he knows or ought to know amounts to harassment of the other person. Note that there has to be a course of conduct, so a single incident does not constitute harassment.

Electronic communications. Grossly offensive, threatening or false communications made with intent to cause distress or anxiety to the recipient are prohibited.

Terrorism. It is an offence to publish intentionally or recklessly a statement which is likely to be understood by some of those to whom it is published as a direct or indirect encouragement or inducement to carry out, prepare or instigate terrorist acts. This includes statements which glorify terrorism and from which members of the public to which they are published could reasonably be expected to infer that the conduct being glorified is conduct which they should emulate in existing circumstances. See ***Case Study L***.

Case study L: A speaker at a meeting of a student society describes a suicide bomber who detonated at bus stop killing civilians as a "brave hero". This glorifies terrorism. However, it does not amount to this offence because the audience would not be likely to infer that they should emulate this conduct, i.e. be suicide bombers themselves.

Inviting support for a proscribed terrorist organisation is an offence.

CHAPTER 6 – UK EDUCATION LAWS

The UK legislation that is most useful to pro-Israel activists is the Education Act 1996, and in particular, sections 406 and 407.

Section 406 of the Education Act 1996, headed "Political indoctrination" is as follows:
*(1) The local authority**]** governing body and head teacher shall forbid—*
(a) the pursuit of partisan political activities by any of those registered pupils at a maintained school who are junior pupils, and
(b) the promotion of partisan political views in the teaching of any subject in the school.
(2) In the case of activities which take place otherwise than on the school premises, subsection (1)(a) applies only where arrangements for junior pupils to take part in the activities are made by—
(a) any member of the school's staff (in his capacity as such), or
(b) anyone acting on behalf of the school or of a member of the school's staff (in his capacity as such).
(3) In this section "maintained school" includes a community or foundation special school established in a hospital.

Section 407 of the Education Act 1996 is headed "Duty to secure balanced treatment of political issues" and is as follows:

(1) The local authority, governing body and head teacher shall take such steps as are reasonably practicable to secure that where political issues are brought to the attention of pupils while they are—

(a) in attendance at a maintained school, or

(b) taking part in extra-curricular activities which are provided or organised for registered pupils at the school by or on behalf of the school,

they are offered a balanced presentation of opposing views.

(2) In this section "maintained school" includes a community or foundation special school established in a hospital.

Case Studies

CGP Geography Book

In January 2020 UKLFI found that a publisher of school textbooks had produced a book that, if it were used in a school, would mean that the school would be in breach of Section 407 of the Education Act 1996 , the duty to secure balanced treatment of political issues.

A section of a Geography revision and practise book for Key Stage Three (aimed at children aged 11 to 14 years old), published by CGP, contained unbalanced and misleading content in relation to Israel.

At page 10 was a map of The Middle East headed "The Middle East is made up of Several Countries". Where the country was too small to be labelled on the map, there was an arrow to that country, and a label at the side of the map, with the name of the country, and in some cases, some information about that country. Where the country was large enough for its name to be written on the map, there may be an arrow with information about its capital city, or about one of its rivers or another physical geographical feature.

The information given about some of the other countries (Turkey, Egypt and Iran) related to the capital city name and population. Iraq has information about the Tigris river and its length, and Syria has the Euphrates river and its length. The entry on the United Arab Emirates mentions its oil wealth.

However, in contrast to the physical geographical information given about these other countries on the map, the label to the arrow pointing at Israel, did not give any information about its capital city or rivers but about war. It says " Israel - Ongoing conflict between Israelis and Palestinians".

UKLFI wrote to the publishers CGP pointing out that if a child is learning about Israel, this one phrase presented a very skewed picture of Israel and defines the country only in terms of an ongoing conflict. This is extremely misleading, especially given that Israel's neighboring countries in the Middle East have ongoing conflicts, which have inflicted considerably larger numbers of fatalities.

UKLFI explained to CGP that the labels for Syria, Iraq and Yemen did not mention ongoing conflicts despite the following facts:

1. Between 380,636 and 585,000 people were killed in the conflict in Syria between March 2011 and December 2019.
2. There were 460,000 deaths in Iraq as a result of the war from March 2003 to June 2011.
3. Deaths in Yemen's war since 2015 has reached 100,000,
4. From 24 January 2008 to 17 September 2019 there have were 248 Israeli casualties due to conflict. There have also been 5,559 Palestinian casualties, according to United Nations Office for the Coordination of Humanitarian Affairs, although these did not take place in Israel, but in the Palestinian Territories.

Therefore it is highly misleading to characterise only Israel as having "an ongoing conflict" when the numbers of Israeli deaths due to conflict, are tiny in comparison to those of its neighbours.

Furthermore, the book again characterised Israel as only being in the midst of a conflict on page 11, where the book stated:
"*There have been several conflicts in the Middle East, some still ongoing. Events like the Iraq War (2003-2011) and the ongoing conflict in Israel can cause major disruption to levels of development as well as loss of life."*

UKLFI objected to Israel being included in this paragraph along with Iraq as being in an "ongoing conflict" and also to the fact that conflict did not cause major disruption to levels of its development. In fact Israel's development since the founding of the state in 1948, and indeed in recent years has been phenomenal, despite the "ongoing conflict".

We requested that CGP amend the Middle East Section of this book. Within a few days CGP confirmed it would amend the section for its next edition, to be published in June 2020, removing the reference to Israel's conflict on the map, and replacing it with something less controversial, and removing the reference to Israel in the paragraph on how conflict can disrupt development.

Amnesty International and Littleover Community School

In July 2019 Littleover Community School in Derbyshire, used its Facebook page to publicise a petition some of its children had sent to Airbnb, asking it to remove all properties within the "Occupied Palestinian Territory" and stating that the properties were illegal under international law. A group of pupils had set up an Amnesty International branded stall at the school and had been showing the other pupils inaccurate and misleading information about the West Bank, encouraging them to sign the petition, and giving away stickers.

UKLFI wrote to the school, pointing out that in accordance with section 407 of the Education Act 1996 the school had a duty to secure balanced treatment of political issues and requested that they offer a balanced presentation of the opposing point of view.

UKLFI also pointed out that the claims put forward in the letter that Amnesty International and the school had encouraged the pupils to sign were completely erroneous. UKLFI explained that Israel's occupation of the West Bank is lawful in accordance with UN Security Council Resolution 242 and the Oslo Accords pending the settlement of its status by negotiations. Furthermore, there are rival claims to the land which must be resolved by negotiation, so it is wrong to suggest that the land belongs to Palestinians. The 1949 Armistice Agreement between Israel and Jordan is irrelevant, especially as Jordan has disclaimed any entitlement to the West Bank and Israel acquired the territory following Jordan's flagrant violation of the Armistice Agreement in 1967.

Properties owned by both Arabs and Jews in the West Bank are listed by Airbnb, so the removal of all West Bank listings requested by the letter would harm Arabs as well as Jews.
UKLFI said that the school had a legal and moral obligation to rectify the misinformation and indoctrination by a balanced explanation of the position in accordance with section 407 of the Education Act 1996.

The headmaster replied that the students involved were "*aware of the alternative viewpoint set out in our letter. Indeed, the controversy over the issue has been a valuable learning experience for them in itself. I can assure you that in any future engagement with these issues, curricular or extracurricular, the school will continue to take reasonable steps to ensure that the full complexity of the situation is considered, and that we strive to remain unbiased and open-minded."*

Pearson Middle East textbook
In October 2019 UKLFI wrote to the educational publishing company, Pearson, regarding a school textbook: Edexcel International GCSE (9-1) *History, the Middle East: Conflict, Crisis and Change 1917-2012*.

A review of the book by researcher David Collier, commissioned by UKLFI, found a litany of problems, for example:

- It describes the massacres of Jewish communities by Arab mobs in Mandatory Palestine in 1929 as 'Arab / Jew' clashes
- It fails to mention the Palestinian leadership's alliance with the Nazis
- It shows images of violence carried out by Jews, but no images of atrocities carried out by Arabs against the Jews
- It fails to mention the many terror attacks against Israelis by Arabs after the Oslo accords
- The timeline from 1900 to 2010 fails to mention the Holocaust

Mr Collier concluded that the book was full of errors, lies and distortions.

UKLFI pointed out that the use of this book was liable to result in a lack of balance and the promotion of partisan political views in the teaching of this subject. As well as being extremely damaging, given the sensitivity of the subject and the risk of encouraging antisemitism, this would mean that schools using the book would be in breach of sections 406 and 407 of the Education Act 1996.

We asked Pearson to withdraw this book from sale, and have it reviewed and revised by a historian whose impartiality is widely recognised on all sides.

The same author had written another book on the subject: Edexcel GCSE (9-1) *History Conflict in the Middle East, c1945-1995* which we also requested should be withdrawn and reviewed since it is likely that it contained similar inaccuracies.

Pearson responded positively by reviewing the two books, withdrawing them, and subsequently rewriting them, with considerable input from UKLFI and the Board of Deputies.

Hodder Textbook

In March 2020 UKLFI wrote to the publisher Hodder regarding its GCSE History Edexcel "Conflict in the Middle East". UKLFI attached a critique of the first chapter of the book and found a litany of problems. UKLFI advised that the entire book required substantial revision, in order to ensure that it is accurate, and to remove errors, lies and distortions. We requested that Hodder withdraw this book from sale, and have it reviewed and revised by a historian whose impartiality is widely recognised on all sides.

A warning that the book has been withdrawn should also be issued to any schools that have purchased it.

UKLFI wrote that they were very concerned that the use of this book would be liable to result in a lack of balance and the promotion of partisan political views in the teaching of this subject. As well as being extremely damaging, given the sensitivity of the subject and the risk of encouraging antisemitism, schools which use this book are likely to breach sections 406 and 407 of the Education Act 1996. This letter had the desired effect, and Hodder confirmed that the book would be withdrawn.

CHAPTER 7 – COUNTER TERRORISM LAWS APPLICABLE TO FINANCIAL AND OTHER SERVICE PROVIDERS

The Office of Foreign Assets Control (OFAC) at the US Department of Treasury administers and enforces stringent economic sanctions programs against countries and groups of individuals or entities such as terrorists or terrorist organisations.

OFAC's sanctions apply to "U.S. persons", although the definition of "US persons" varies slightly according to the sanctions programme, but generally includes all U.S. citizens regardless of where they are located, all people and entities within the United States, and all U.S. incorporated entities and their foreign branches.

The fines for violations of these sanctions can be substantial. In many cases, civil and criminal penalties can exceed several million dollars. Details of penalties are at 31 C.F.R Part 501

Because violations of OFAC sanctions carry such stiff penalties, organisations do not want to risk the prospect of breaching the sanctions. Therefore the OFAC sanctions are a very useful tool for pro-Israel NGOs who wish to prevent companies from providing any services to designated terrorist organisations – or those organisations closely associated with them.

UKLFI has successfully used the threat of OFAC sanctions against organisations such as fundraising platforms, banks and social media organisations to dissuade them from further dealings with designated terrorist NGOs, or those closely associated with them.

Case Studies

Interpal

UKLFI has used the OFAC sanctions effectively to prevent many organisations from providing services to the UK Charity Interpal (Palestinians Relief and Development Fund) which is a designated terrorist organisation in the USA, Canada, Australia and Israel, but operates as a regulated charity in England and Wales.

The first step is to find out whether an entity is on OFAC's sanctions list, and if so, under which programme. The OFAC sanctions list search is HERE.

A search on the name "Interpal" produces the information that it **is** listed on the US Sanctions list, and that it is a Specially Designated National (SDN), listed under the programme "SDGT" or "Global Terrorism Sanctions Regulations", which are set out in 31 C.F.R. part 594

The most relevant regulations under 31 CFR part 594 are as follows:

§594.204 Prohibited transaction or dealing in property; contributions of funds, goods, or services.

Except as otherwise authorized, no U.S. person may engage in any transaction or dealing in property or interests in property of persons whose property and interests in property are blocked pursuant to §594.201(a), including but not limited to the following transactions:

(a) The making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to §594.201(a); and

(b) The receipt of any contribution or provision of funds, goods, or services from any person whose property and interests in property are blocked pursuant to §594.201(a).

Under §594.315, the definition of "U.S. person" is "*any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States."*

Therefore any US company (such as a US based credit card company) is not allowed to provide goods or services to the designated organisation, or to receive any payment from them. Furthermore, if a foreign company has a US branch, then it can be argued that they are also caught by the OFAC regulations.

Interpal and BT My Donate

In July 2018 UKLFI wrote to Mastercard, a US based credit card company, pointing out that its credit card was specifically being used by BT MyDonate, a fundraising platform, to raise money for Interpal. BT's website explained that Mastercard would receive 1.3% of each credit card donation and a flat fee of 15p on debit card transactions.

UKLFI pointed out that it was clear that Mastercard was in breach of Regulation §594 by its provision of services to BT MyDonate, which was raising funds for Interpal. As a US company it was prohibited from providing services to Interpal (even via BT) including financial support, and also prohibited from receiving funds from Interpal (via BT).

The result of UKLFI's letter was that Mastercard put pressure on BT Donate to drop Interpal from its fundraising platform, and Interpal had to stop using BT MyDonate for fundraising in August 2018.

Interpal and Credit Cards

Interpal offered donors the chance to donate by credit card on its website in October 2018, but this facility was withdrawn following letters from UKLFI to the credit card companies pointing out that they were in breach of OFAC Regulations, as set out above, and liable to heavy fines. The credit card facility was removed from Interpal in October 2018.

Interpal and Just Giving

Just Giving is a crowdfunding platforms, which also has branches in the US and Australia, and was being used to raise funds for Interpal. UKLFI noted that Just Giving had branches in the US and Australia, and that in both places there were sanctions in place against Interpal. UKLFI warned Just Giving that since it had a US subsidiary it could be counted as a "US person" and so be caught by the OFAC regulations. Just Giving removed all the Interpal donation pages in February 2019.

Interpal and Facebook donations

Facebook blocked Interpal's donations buttons from its platform in February 2019 following a letter from UKLFI pointing out that Facebook was in breach of US terrorism sanctions by

allowing Interpal to raise money through its site. Facebook was clearly a "US Person" and was providing services and technological support for the benefit of a US designated organisation, in breach of the OFAC sanctions.

Interpal and SMS donations

Interpal advertised for donations by SMS message. In the UK there are 4 SMS networks. Three out of four of the companies running the UK mobile phone networks had operations in the USA. Following our letters to the four companies, pointing out their breaches or possible breaches of the OFAC regulations, Interpal's SMS donation facility was withdrawn.

SECONDARY designation - Targetting anti-Israel organisations LINKED TO designated terrorist organisations

An anti-Israel NGO which has strong links with a designated terrorist organisation cannot be found on the OFAC sanctions list search. However, it is possible to persuade organisations which provide financial or other services to these organisations to cease doing so by presenting the evidence of terrorist links between the anti-Israel NGO and a designated terrorist organisation.

Education Aid for Palestinians

UKLFI showed that Education Aid for Palestinians (EAP) was 50% funded by Interpal in 2017, shared a co-founder and was therefore closely allied with Interpal, which was itself an SDN and was subject to the programme "SDGT" or "Global Terrorism Sanctions Regulations", which are set out in , 31 C.F.R. part 594. UKLFI used this information to disrupt the funding of EAP as follows:

- In February 2019 Credit cards and Worldpay stopped dealing with EAP so they could no longer take credit card donations
- In February 2019 Just Giving, the donations platform, ceased allowing funding for EAP
- In March 2019 Muslim Giving, removed EAP from its donations platform.

Defence for Children International- Palestine (DCI-P)

DCI-P was closely linked to the Popular Front for the Liberation of Palestine (PFLP), another terrorist entity that appears on the OFAC sanctions list search. The PFLP is designated under SDGT (Global Terrorism Sanctions Regulations), and FTO (Foreign Terrorist Organization). Therefore 31 CFR parts 594 and 597 apply.

UKLFI succeeded in disrupting the finances of DCI-P, by pointing out OFAC's listing of PFLP as a designated organisation, and describing the links between DCI-P and the PFLP.

- In June 2018 UKLFI caused Arab Bank, Citibank and Credit Suisse to cease dealing with DCIP.
- In January 2019 Global Giving, the fundraising platform, ceased dealing with DCI-P
- In June 2019 Global Giving UK ceased providing fundraising services for DCI-P.

There are many more examples of anti-Israel NGOs having secondary, and even a tertiary link to an organisation on the OFAC list, which resulted in organisations withdrawing their services to that NGO.

An example of a tertiary link to an organisation on the OFAC list is as follows: War on Want had a partnership with the prisoner's rights NGO Addameer, which in turn had links with the PFLP. As a result of pointing out this connection, UKLFI succeeded in getting PayPal to stop providing services to War on Want.

Mohammed Sawalha and Airlines

Mohammed Sawalha, who lives in the UK, was part of the Hamas terrorist organisation since the late 1980s and is apparently a current member of the Hamas Political Bureau.

UKLFI prepared a report showing evidence of Sawalha's connections with Hamas, and also showed that he had on a number of occasions, travelled to countries including Russia and Turkey as part of high level Hamas delegations, for meetings with, for example the Russian foreign secretary, or deputy foreign secretary, or for political conferences.

Although we did not know for sure which airlines he used, we wrote to possible airlines that he may have used or may in future use for such meetings.

Hamas is listed by the US Office of Foreign Assets Control (OFAC) as an SDN – Specially Designated National – under the programs SDGT and FTO.

We wrote to Turkish Airlines pointing out that they would be caught by US anti-terrorism legislation because Turkish Airlines has offices in the US and therefore employs US persons.

Once again the OFAC regulations in relation to the SDGT programme, as set out 31 CFR §594.204 was relevant since it prohibited transactions or dealing in property, or contributions of goods or service to the designated persons. UKLFI argued that if Turkish airlines provided services to the person acting on Hamas business, they would be violating the OFAC rules.

Recommendations for Action

OFAC regulations are a particularly strong tool as they can be applied to organisations anywhere in the world, as long as that organisation also has a branch in the USA. The regulations could be applied to telecommunications companies, credit card companies, utility companies, banks, internet providers or any organisation that provides services to the organisation that is on the OFAC list, or is strongly linked to an organisation on the OFAC list.

Pro-Israel organisations could search the organisations on OFAC's list, and then check if these organisations are on social media such as Facebook, Twitter, YouTube or any fundraising platforms, and also try to find out which organisations supply them with any services at their office addresses, and then write to the suppliers of services, outlining the OFAC regulations, and advise them to stop supplying the organisation.

The USA PATRIOT Act

The US Treasury Financial Crimes Enforcement Network (FinCEN) states that its mission is to safeguard the US financial system from illicit use, combat money laundering and its related crimes including terrorism. It promotes national security through the strategic use of financial authorities and the collection, analysis, and dissemination of financial intelligence.

On 26 October 2001 the US President signed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (The USA PATRIOT Act), which aimed to promote the prevention, detection and prosecution of international money laundering and the financing of terrorism.

Section 311 of the USA PATRIOT Act provides the Secretary of the US Treasury Department and FinCEN with a range of options that can be adapted to target specific money laundering and terrorist financing risks.

There are five special measures which can be imposed individually, jointly, in any combination and in any sequence:

- Recordkeeping and reporting certain transactions;
- Collection of information relating to beneficial ownership;
- Collection of information relating to certain payable-through accounts;
- Collection of information relating to certain correspondent accounts; and
- Prohibition or conditions on the opening or maintaining of correspondent or payable-through accounts

FinCEN is authorised to designate foreign financial institutions as being of "primary money laundering concern" and to take any of the above five special measures against institutions so designated, pursuant to Section 311 of the USA Patriot Act.

The fifth measure is the most severe that FinCEN may impose, which prevents a foreign financial institution from having correspondent accounts at US financial institutions.

The USA PATRIOT Act is a powerful tool which can be invoked when writing to banks which are dealing with any terrorist linked entity, when trying to persuade them to cease dealing with that entity.

An overview of the USA PATRIOT Act , and description of how the sanctions are implemented is described here.

A list of banks and financial institutions that are or have been put in special measures under Section 311 of the USA Patriot Act is here.

On 28 August 2019 FinCEN launched a Global Investigation Division which would be responsible for implementing targeted investigations to combat illicit finance threats and related crimes, both domestically and internationally.

Case Study

FBME Bank Ltd, formerly known as the Federal Bank of the Middle East Limited was found to be a "primary money laundering concern", in a Notice by the Financial Crimes Enforcement Network issued on 22 July 2014. FBME, a Tanzanian chartered bank operating primarily out

of Cyprus, facilitated a substantial volume of money laundering through the bank for many years.

FBME was used by its customers to facilitate money laundering, terrorist financing (including by Hezbollah), transnational organised crime, fraud, sanctions evasion and other illicit activity internationally and through the US financial system.

FBME was said to have systematic failures in its anti money laundering controls that attracted high risk shell companies. Fincen imposed its fifth (most serious) special measure on FBME on 22 July 2014, to guard against international money laundering and other financial crime risks, by restricting the ability of FBME to access the US financial system to process transactions. It also publicly notified the international community of the risks posed by dealing with FBME.

On 14 April 2017 the District Court for the District of Columbia upheld FinCEN's imposition of the Patriot Act's fifth special measure against FBME, after two earlier appeals. The court had previously twice blocked FinCEN's attempt to prevent FBME from conducting banking business in the US. FBME could no longer utilize correspondent banks in the US.

According to the judgment, FinCEN did not need to look to comparative or other objective benchmarks involving other similarly situated banks to support a claim in an enforcement action that transactions occurring at the bank in question involved an unacceptably high number of Suspicious Activity Report (SAR) filings, use of shell companies, or other indicia of suspicious activity. Rather, findings based on selected absolute data may suffice.

UKLFI has successfully invoked the FinCen powers under the USA PATRIOT Act when writing to banks whose customers included various NGOs linked to terrorist groups. These include the following:

- Arab Bank, Citibank and Credit Suisse, who were correspondent banks for Defence for Children International, an NGO that we showed had links to the PFLP terrorist group.
- TSB, which was the bank for the Islamic Human Rights Commission Trust, an organisation that was linked to Hezbollah.

The above banks all terminated their relationships with the terrorist linked NGO in question.

Like the OFAC regulations, a mention of the FinCEN powers under Section 311 of the USA PATRIOT Act can serve as a great threat to use against any non-US bank operating anywhere in the world, who is providing services to a dubious terrorist linked entity.

CHAPTER 8 – OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the Guidelines) were set up to promote responsible business conduct by multinational organisations. The latest version of the Guidelines was published in 2011. An additional Due Diligence Guidance was published in 2018 setting out the due diligence that multinationals should undertake in order to ensure that they abide by the Guidelines.

The Guidelines aim to prevent human rights and other abuses by corporations operating internationally and they cover labour rights, environmental issues, bribery, consumer interests, information disclosure, science and technology and taxation. They are recommendations addressed by governments to multinational enterprises operating in or from adhering countries, and are non-binding principles and standards, which aim to encourage responsible business conduct.

Although the principles are non-binding, if an adverse finding is made, this can lead to bad publicity for the multinational organisation, and pressure on it to change its business practises and adopt the correct procedures – or to pull out of the contract in question.

Any interested party can file a complaint, including Non-Government Organisations, so the Guidelines can be a useful tool for pro-Israel NGOs to use, in appropriate circumstances.

National Contact Points

Each OECD member country has its own National Contact Point (NCP) which is established by the government to promote the Guidelines and to handle cases against companies when the Guidelines are not observed. A complaint is made to the NCP where the head office of the multi-national enterprise is based. They act as a non-judicial grievance mechanism and also provide a platform for the parties to mediate, in order to reach conciliation. If this is not possible, then they publish their findings regarding the complaint in a Final Report. A list of all the ongoing and closed complaints to the UK NCP can be found HERE.

Anti-Israel Activists' use of OECD Guidelines Complaint Procedure

The anti-Israel activists were the first to see the potential of using the Guidelines to attack businesses operating in Israel. The group Lawyers for Palestinian Human Rights (LPHR) complained in November 2013 to the UK NCP about G4S, a UK based international security solutions group which had two Israeli subsidiaries: G4S Secure Solutions (Israel) Limited and G4S Security Technologies (Israel) Limited.

G4S's subsidiaries had contracts to service and maintain baggage scanning equipment and metal detectors used at checkpoints, including a small number of checkpoints along the separation barrier/Wall. LPHR described the alleged human rights violations by Israel of restricting of freedom of movement for Palestinians at the military checkpoints/crossings and impeding Palestinians from exercising a range of associated basic human rights.

G4S also had contracts to install and maintain security systems – such as closed circuit television (CCTV) and access control systems within many Israeli Prison Service managed prisons, including the Ofer prison in the West Bank. LPHR claimed Israel maltreated Palestinian detainees and prisoners being held by the Israeli Prison Service (IPS) in the West Bank and Israel.

LPHR asked G4S to provide information about where and how its equipment was used and what due diligence checks were conducted in providing it. LPHR also asked G4S to stop servicing the equipment, to remove it, to agree to an independent audit of these actions, and to agree to identify ways to compensate people who have suffered adverse impacts.

In its Final Decision, in March 2015, the UK NCP found that from September 2011, G4S's actions were technically inconsistent with its obligation under Chapter II, Paragraph 2 of the Guidelines to "*respect the internationally recognised human rights of those affected by their activities*" and also technically inconsistent with its obligation under Chapter IV Paragraph 1 to "*respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved*."

Specifically, G4S did not meet its obligation under Chapter IV, Paragraph 3 to "***s**eek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts*."

The UK NCP did not recommend that G4S end its contracts with the Israeli Government, and only found "technical breaches". However, it recommended that G4S should demonstrate that it was addressing human rights impacts of its business relationships.

LPHR scored a PR victory when the finding was published in March 2015., and again in July 2016 when the UK NCP published a follow up report a year later, and found that G4S had not followed its recommendations. A few months later in December 2016, G4S sold G4S Secure Solutions Israel Ltd, so moved out of the Israeli market.

This showed that even though the OECD Guidelines are non-binding, an adverse finding could have far reaching effects on a multi-national organisation.

This is a procedure whereby no costs are at stake (on either side), there are no court costs, and therefore there is very little to lose in putting forward a complaint.

UKLFI's use of the Guidelines

UKLFI has made two complaints to date under the Guidelines. Both complaints concerned the "Big Four" accountancy firm, PriceWaterhouseCoopers (PwC).

In both cases PwC had sought to avoid scrutiny by the UK NCP by claiming that it was not a multinational enterprise – and that the firms in its network were a series of separate legal entities. However, the UK NCP decided that it was indeed a multinational enterprise, and so subject to the Guidelines. This in itself was a significant decision as it meant that PwC and indeed the other Big Four accountancy firms, were now bound, as a multinational enterprise, to comply with the OECD Guidelines.

The First Complaint was submitted by UKLFI in December 2016 and concerned audit work undertaken by PwC Palestine Limited for the World Bank' on a multi-donor trust fund for the support of the Palestinian Recovery and Development Plan (PRDP-MDTF) until 2015.

UKLFI had evidence that the Palestinian Authority was using the money from this trust fund to pay salaries to terrorists in Israeli prisons and their families. UKLFI argued that PwC was in breach of its obligations under the OECD Guidelines regarding human rights, by violating the human, economic and civil rights of the victims of terror, of Palestinian citizens from whom funding is diverted as well as the taxpaying citizens of the donor nations.

Donors, including the UK Government, relied on the fact that the fund was audited by PWC to argue that no further scrutiny was needed of the aid directed to the PA. UKLFI contended that PWC did not alert the donors relying on its audits to the fact that their aid has directly or indirectly funded terrorism and has not taken any other steps to discourage the PA from undertaking such actions. UKLFI argued that PwC had breached the following Guidelines:

Chapter II, General Policies, paragraphs A.1, 7, 10, 11, 12, 13

Chapter II, General Policies A "Enterprises should:
1. Contribute to economic, environmental and social progress with a view to achieving sustainable development.
7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.
10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.
11. Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.
12. Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.
13. In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.

Chapter III, Disclosure, paragraphs 1, 3(c), 3(d), 3(e)
Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.

3 Enterprises are encouraged to communicate additional information that could include:

c) its performance in relation to these statements and codes;

d) information on internal audit, risk management and legal compliance systems;

e) information on relationships with workers and other stakeholders.

Chapter IV Human Rights Paragraphs 1, 2, 3, 5 and 6:
States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:
1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts
5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.

In particular PwC had breached Chapter II, paragraph A.11: "*Enterprises should avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur*"
and Chapter II, paragraph A.12: "*Enterprises should seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.* "

The UK NCP published it's Final Statement, published on 11 March 2020. The UK NCPK said that it was unable to fully investigate many of the matters within UKLFI's complaint because PwC relied on client confidentiality so refused to disclose whether it had raised any concerns about terrorist financing with its client, or whether it had carried out due diligence to mitigate actual or potential adverse impacts of its audits. In the circumstances, the UK NCP concluded there was no breach of the OECD Guidelines by PwC. However, the UK NCP called for PwC to update its global human rights policies to reflect the OECD Guidelines, and re-affirmed to PwC that it must recognise the Guidelines and apply them globally to its network of firms. This was a partial success for UKLFI in that PwC were forced to admit that their worldwide organisation was bound by the OECD Guidelines.

The Second Complaint by UKLFI against PwC was submitted in October 2019 although correspondence between the parties had started in May 2018. The Second Complaint concerned the fact that PwC was the auditor of two terrorist linked NGOs – the Union of

Agricultural Work Committees (UAWC) and Defence for Children International Palestine (DCI-P). UKLFI set out the links between the two NGOs and the terrorist group, the Popular Front for the Liberation of Palestine (PFLP). UKLFI complained that PwC failed to alert the donors to the terrorist links and in effect whitewashed the two NGOs. Donors relied on PwC's audits to show that the NGO to whom they were donating were legitimate organisations.

UKLFI argued that PwC was in breach of several of the Guidelines (as set out in the First Complaint above).

In particular we submitted that PwC had breached Chapter II paragraph A.11: "*Enterprises should avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities and address such impacts when they occur.*" and on Chapter II paragraph A.12: "*Enterprises should seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations products or services by a business relationship*."

UKLFI argued that PwC failed to report on the impropriety of the connections between DCI-P and the PFLP, or between UAWC and the PFLP, and had not attempted to dissuade DCI-P and UAWC from having such connections. PWC had facilitated and failed to discourage conduct that glorified terrorism and encouraged terrorist attacks on innocent civilians. UKLFI described the adverse impacts on victims of terrorism, Palestinian citizens and on donors, and taxpayers funding the donors.

An interim assessment was published by UK NCP on 16 June 2020 stated that the issues raised by UKLFI were "material and substantiated" and "merit further examination". The Final Assessment has not yet been published. It is significant that in May 2019, a year after UKLFI first alerted PwC Global to the terrorist connections of its client, UAWC, PwC ceased to be the auditor of UAWC.

Lawyers for Palestinian Human Rights (LPHR) have made a 2nd complaint to UK NCP that JC Bamford's products and construction machinery was used in the demolition of Palestinian property and settlement-related construction that have adverse human rights impacts.

The Initial Assessment was published on 12 October 2020 The UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises decided that:

- the claims related to JCB's human rights due diligence processes, the claims regarding its business relationships that they are directly linked to and their human rights policy commitments merit further examination
- the claims related to JCB contributing to abuses of human rights do not merit further examination

LPHR argued that JCB is not operating in line with the OECD Guidelines as their products and construction machinery were used in the demolition of Palestinian property and settlement-related construction. They claim JCB is in breach of the Guidelines by:

- contributing to adverse human rights impacts by selling products that facilitate another entity to cause harms

- failing to stop the sales of products that facilitate another entity to cause adverse impacts once there is knowledge of these harms occurring
- failing to seek ways to prevent and mitigate human rights impacts that are directly linked to their business operations and products
- failing to have a human rights policy in place
- failing to carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks

JCB's response was to reject the allegations that they were associated with any adverse human rights impacts and to state that they do not condone human rights abuses in any form.

The UK NCP decided to accept the complaint for further examination on the issues related to JCB's obligation under Chapter IV, paragraphs 3, 4 and 5. These are:

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.

4. Have a policy commitment to respect human rights.

5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.

The UK NCP has decided not to accept the complaint for further examination related JCB's obligations under Chapter IV, paragraphs 1 and 2. These are:

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.

LPHR claimed that JCB contributed to and was directly linked to adverse impacts through their business operations by virtue of the use of their machinery by Israeli authorities (and/or private contractors), that they are linked to via a supply chain.

The NCP did not consider that the information provided by LPHR demonstrated that JCB caused or contributed to the issues raised.

The NCP does, however, consider that the information demonstrates that there may be a link between JCB and the issues raised through its supply chain and business relationships. Therefore it will go on to consider these issues and make a final judgment, unless the dispute can be solved by mediation.

Pro-Israel NGOs are considering questioning whether there actually are "adverse impacts" as LPHR claims, and finding a way of presenting some alternative evidence. However, it is likely that evidence will only be allowed to be presented by one of the parties to the dispute, rather than third parties.

While the NCP has indicated that it does not consider JCB directly linked to any "adverse impacts", it appears keen to ensure that enterprises have policies in place regarding human rights, and carry out due diligence regarding human rights risks, and if it finds no such policies in place, it may be keen to make a ruling to ensure that such policies should be put in place.

The OECD Guidelines can be a very useful tool for pro-Israel NGOs to use pro-actively against multi-national organisations including banks, auditing companies, telecommunications companies, or other companies that provide services to terrorist linked NGOs.

Unlike litigation, the NGO making the complaint is not at risk of having to pay the costs of the multi-national organisation, and although the NGO may be very small, its argument will be treated equally with that of the multi-national organisation. The very fact that the small pro-Israel NGO has made the complaint can cause the multi-national a great deal of harm, through adverse publicity. The main problem so far has been that the multi-nationals have hidden behind the veil of "customer confidentiality" and have been unwilling to reveal whether or not they have implemented any human rights policies or due diligence.

CHAPTER 9 – ONLINE ANTISEMITISM

Online antisemitism and holocaust denial are unfortunately increasingly prevalent on the web, and in social media. There have been recent efforts to persuade several of the mainstream social media organisations to remove antisemitic content, to adjust their community standards and adopt the IHRA definition of antisemitism as a guide to what is or is not antisemitic. The mainstream social media organisations have been fairly successful in removing the most extreme content from the larger social media platforms.

However, there are many smaller platforms who accept content which is rejected by the major players, who do not appear to monitor their content closely and appear to attract extreme antisemitic and holocaust denying material to their websites.

One such platform, Bitchute, states on its website that it has community standards, and it has indeed removed many of its videos from sight (at least of UK viewers). When a website such as Bitchute becomes a magnet for this type of offensive comment, it seems that a proliferation of hateful and offensive material is constantly being added.

Service Providers

One method of preventing such antisemitic content is to write to the service providers of the website and asking them to terminate their relationships with the website in question.

To find the service providers of a "rogue" website hosting antisemitic content (or any other website), the first step is to search on the Whois domain lookup website at

www.whois.com/whois . This will reveal the name of the registrar for the website, and the name of the servers (so you can identify the owner of the servers). The administrative contact is given, and the technical contact. You can write to the Head of Compliance or Legal Director of all the companies that are providing services to the website in question.

If there is a donations page on the website then other service providers can be found on that page – for example banks, credit cards, paypal etc.

Report abuse to the website

The website hosting the antisemitic content may have an abuse reporting system, so you could report the content this way, then check to see if it has been removed. The Whois search also gives an email address for reporting abuse.

Criminal Prosecutions

Both the individuals uploading the content and the websites and organisations hosting the content could be committing criminal offences.

Antisemitism online and holocaust denial online are not specific criminal offences in the UK but other general criminal legislation can cover this behaviour.

The perpetrator of the offence would have to be based in England or Wales to be caught by the UK legislation.

The Malicious Communications Act 1988 (amended 2001)

According to Section 1 of The Malicious Communications Act 1988, which applies in England Wales, any person who sends to another person an electronic communication or article of any description which conveys a message which is indecent or grossly offensive, or information which is false and known or believed to be false by the sender, is guilty of an offence if his purpose, was to cause distress or anxiety to the recipient. There is no necessity for the message to reach the recipient; it only needs to have been "*sent, delivered or transmitted."* The wording of the offence is as follows:

Offence of sending letters etc. with intent to cause distress or anxiety.

(1)Any person who sends to another person—

*(a)a letter, electronic communication or article of any description**]** which conveys—*

(i)a message which is indecent or grossly offensive;

(ii)a threat; or

(iii)information which is false and known or believed to be false by the sender; or

*(b)any article or electronic communication**]** which is, in whole or part, of an indecent or grossly offensive nature,*

is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.

This would appear to cover the antisemitic and holocaust denying content being uploaded onto a website like Bitchut.com on the internet, and conveyed to readers of this website. However, the uploading must have been carried out in England or Wales.

Communications Act 2003

Section 127 of The Communications Act 2003, which applies in the UK, makes it a criminal offence to send a grossly offensive, indecent, obscene or menacing message, or to cause any such message to be sent. A person is also guilty of a criminal offence if they cause annoyance, inconvenience or needless anxiety with a knowingly false message.

It is likely that the virulently antisemitic and holocaust denying videos / material online would be caught by this legislation. The wording of the section is as follows:

127 Improper use of public electronic communications network

(1)A person is guilty of an offence if he—

(a)sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or

(b)causes any such message or matter to be so sent.

(2)A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—

(a)sends by means of a public electronic communications network, a message that he knows to be false,

(b)causes such a message to be sent; or

(c)persistently makes use of a public electronic communications network.

(3)A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

(4)Subsections (1) and (2) do not apply to anything done in the course of providing a programme service (within the meaning of the Broadcasting Act 1990 (c. 42)).

Public Order Act 1986

See Part III sections 17-23

The antisemitic websites may be caught by the Public Order Act 1986. Section 18 says that a person who **displays** any written material which is threatening, abusive or insulting, is guilty of an offence if he intends thereby to stir up racial hatred, or if racial hatred is likely to be stirred up.

However, the act says that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling. (So if everyone is working from home there may be no offence!)

Under section 19 of the Public Order Act 1986, a person who **publishes or distributes** written material which is threatening, abusive or insulting is guilty of an offence if he intends thereby to stir up racial hatred, or having regard to all the circumstances racial hatred is likely to be stirred up thereby.

It is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting. Section 22 deals with broadcasting threatening, abusive or insulting material.

There are other sections of the Public Order Act (sections 29B, 29C, 29E and 29F) that deal with offences of **stirring up religious hatred** in written material, or by publishing or distributing written material, by playing a recording of visual images or sounds, or by broadcasting a programme.

A website based in England, such as Bit Chute Limited, which publishes and distributes the abusive material, could be committing some of the criminal offences described.

Racial and Religious Hatred Act 2006 Part 3A, Section 29:

The act amended the Public Order Act 1986 by making provision for hatred against any "persons defined by reference to religious belief or lack of religious belief". This includes threatening words and behaviour and displays and written material, which is threatening, whether it be in a public or private space as long as it is seen or heard by others. A person is also guilty of an offence if a public performance includes threatening words or behaviour, intended to stir up racial hatred or distributes a recording of visual images or sounds. Possession of such material is also a criminal offence.

Protection from Harassment Act 1997

The Protection from Harassment Act includes both offline and online behaviour. For an act to be legally deemed harassment, it must be repeated and unwarranted, causing the victim alarm or distress. It is considered harassment if the perpetrator knowingly, or a "reasonable person" would know the conduct amounted to harassment.

Crime and Disorder Act 1998

According to Section 32 of the Crime and Disorder Act 1998, a person can be found guilty of racially and religiously aggravated harassment if they commit an offence under the Protection from Harassment Act 1997, which is motivated by racial or religious hate.

Professional Punishments

If the person posting antisemitic tweets, videos or sending emails is a member of a profession, then his professional body can often hand out sanctions, such as fines and / or banning him from membership. Therefore it is worthwhile making a formal complaint to the perpetrator's professional body. See example of Majid Mahmood below.

Other references

The Antisemitism Policy Trust has published a paper entitled Antisemitism and Online Harms White Paper.

Case Studies

The Community Security Trust (CST) records antisemitic incident data. In 2015, there were 185 online incidents, which rose to 697 cases in 2019, an increase of 277%. For an incident to be recorded, either the victim or the perpetrator must be based in the UK.

Several cases of antisemitic online hate have been successfully prosecuted in the UK, but these form only a fraction of the total number of cases recorded.

Some of the online antisemitic crimes that have been successfully prosecuted, using the existing legal tools, as described above include the following:

Between 13 and 19 May 2016, David Bitton tweeted various threats, abuse and insults against black and Jewish people (as racial groups) and Muslims (as a religious group). The Twitter account was "open" at the time meaning any member of the public could see what was being said. Mr Bitton was charged with 13 offences contrary to Public Order Act 1986 - six offences under section 19 (inciting racial hatred in respect of his tweets against black and Jewish people) and seven offences under section 29C (inciting religious hatred in respect of his tweets against Muslims). At Manchester and Salford Magistrates' Court on 18 January 2018, Mr Bitton pleaded guilty to all charges and on 15 February 2018, he was sentenced to four years' imprisonment.

In August 2018 Jonathan Jennings, a 34-year-old from Brynamman in Wales, pleaded guilty at Swansea Crown Court to 10 counts of publishing threatening written material to stir up religious hatred, sending an electronic communication conveying a threatening message, and sending an electronic communication of an offensive nature. Jennings posted messages on the social media site Gab targeting Muslims, Jews and public figures. He posted that it would be "a good idea" if there was a "burn a mosque day", Muslims should be gassed and Hitler was born "100 years too soon". He threatened that if the Jews did not behave themselves they would share the same fate as Muslims. Jennings was jailed for 16 months. He was convicted under the Public Order Act offenses dealing with stirring up religious hatred, and the Malicious Communications Act.

In May 2018 Alison Chabloz, a far-right blogger and musician, was convicted at Westminster Magistrates Court of writing and performing antisemitic songs which denied the Holocaust, at a meeting of the London Forum and which she posted to YouTube. She was convicted of three offences under section 127 (1) (a) and (b) of the Communications Act 2003 – on two counts of sending an offensive, indecent or menacing message through a public communications network, and a third charge relating to one of three songs on YouTube. She was sentenced to 20 weeks imprisonment, suspended for two years, banned from posting anything on social media for 12 months, and has to complete 180 hours of unpaid community work.

On 3 March 2018, a Twitter user, known as Lee Munns, was sentenced to community service and a fine after being found guilty of committing a Section 4a Public Order Offence after posting an antisemitic tweet in August 2017. He wrote that "Hitler isn't the only one that can silence 70,000 Yids" after Chelsea beat Spurs 2 – 1 at Wembley Stadium in August 2016.

In 2017 a prolific internet troll, John Nimmo, targeted Jewish former Member of Parliament, Luciana Berger, with a series of antisemitic death threats via email, including stating she would "get it like Jo Cox", the MP who was murdered by a far-right sympathiser. Nimmo also sent an image of a knife and told Berger to "watch her back Jewish scum". Nimmo was found guilty of nine offences under the Malicious Communications Act 1988 and sentenced to two years and three months imprisonment.

In August 2017 Majid Mahmood, a 40-year-old criminal defence solicitor, was fined by the Solicitors Disciplinary Tribunal for posting abusive and antisemitic messages on Facebook in 2015 and 2016. In one post, Mahmood referred to 'chosen people' and said it was a shame a plane carrying Israeli's 'didn't blow up mid-air'. Mahmood was handed a one-year suspension from practice, suspended for 12 months, fined £25,000 and ordered to pay around £9,500 in costs.

In March 2017 Lawrence Burns, a 26-year-old from Cambridge, was jailed for four years at Peterborough Crown Court after he was found guilty of two charges of stirring up racial hatred contrary to the Public Order Act 1986. Burns posted racist and antisemitic comments on Facebook, including referring to Jews as "sub-human animals", as well as making a racist and antisemitic speech at a far-right demonstration. He also called Jews cancer, maggots and an infestation to be exterminated. His sentence was later reduced to two and a half years by the Court of Appeal due to his young age and "poor educational background.

In June 2015 John Churchod was fined £1000 and ordered to pay £650 costs at Hastings Magistrates Court Sussex after sending antisemitic and homophobic messages on Twitter, in August 2014. Among the messages he tweeted were "The world will exterminate you. As Hitler failed to do in entirely" and "Jewish and gay, probably the worst combination ever". Churchod pleaded to guilty to sending grossly offensive, obscene or menacing communications and was sentenced to pay a fine of £1,000 and £650 in costs.

In February 2015 Mahmudul Choudhury, a 35-year-old married teacher, was fined £465 plus a £47 victim surcharge at Bromley Magistrates Court London after posting Hitler images on Facebook together with "*Yes man, you were right. I could have killed all the Jews, but I left some of them to let you know why I was killing them. Share this picture to tell the truth a whole world"*. He was convicted, after pleading not guilty, of using threatening, abusive or insulting words or behaviour or disorderly behaviour with intent to cause harassment, alarm or distress, and the offence was deemed to be racially aggravated contrary to the Public Order Act 1986 and the Crime and Disorder Act 1988. Choudhury was fined £485 and ordered to pay costs of £132.

In 2015 Joshua Bonehill-Paine was found guilty of publishing written material intended to stir up racial hatred under the Public Order Act 1986 and sentenced to 3 years and 4 months imprisonment Following a history of internet trolling and targeting Jewish users, far-right activist Joshua Bonehill Paine had posted on his website grossly offensive images such as a negative caricature of a Jewish man next to Auschwitz with a bottle of "Roundup" weed killer spraying him, as an advertisement for "an anti-Jewification event" in Golders Green. Other images included a poster calling to "Liberate Stamford Hill", an area with a high proportion of visibly orthodox Jews.

In 2011 Mohammed Sandia wrote on the Scotsman newspaper's website, that Jews should be "*attacked wherever you see them*". He also called Jews a "genetically mutated inbred tribe. Jews are not fit to breathe our air…throw rocks are their ugly, hook nosed women and mentally ill children, and light up the real ovens". He pleaded guilty to a count under the Public Order Act 1986 for publishing written material which was likely to be threatening or abusive. He was sentenced in the Scottish courts as he was charged with publishing the comments at the Scotsman newspaper's address in Edinburgh. Sandia's sentencing was deferred by a year by the Sheriff, giving him a criminal record.