

The Unsettling Business of Settlement Business

Diakonia International Humanitarian Law Resource Centre
May 2015



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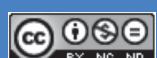
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A. Introduction

Since the beginning of Israel's occupation of the Palestinian territory in 1967, the significant economic element of the occupation has too often been overlooked or undermined in the analysis of rights and obligations in the West Bank, including East Jerusalem, and the Gaza Strip.

While numerous local and international organisations monitor and document violations of international law committed by individuals and States in the occupied Palestinian territory (oPt), significantly less time and effort are dedicated to examining the economic and corporate aspects of the occupation, identifying those responsible and highlighting the appropriate legal framework that governs corporate actors in the oPt.

In other contexts, the increasing understanding of Corporate Responsibility has highlighted issues such as environmentally responsible investments and labour rights. These issues also arise in the occupied territory where the risks of human rights abuses are heightened, but are regulated by an additional layer of law, i.e. international humanitarian law (IHL).

The application of international humanitarian law to the situation in the oPt is well documented. IHL primarily creates obligations for Israel, as the Occupying Power, to provide for the welfare of the protected Palestinian population and to preserve their sovereign resources for their long-term benefit. This is in addition to obligations placed on other parties to the conflict, both state and non-state. The question, then, is to what extent are commercial actors operating in the oPt bound by IHL, and what are the limitations and liabilities of corporate activity examined through an IHL lens? Furthermore, how is the application of IHL to corporate activity complemented by other bodies of international law?

The aim of this brief is thus fourfold:

1. To briefly identify the applicable normative legal frameworks and internationally-accepted documents;
2. To identify the general categories of commercial and financial involvement in the occupation;
3. To provide a non-exhaustive list of corporations that applied the normative framework and consequently altered their activities in the oPt;
4. Finally, to provide recommendations for the various stakeholders to ensure their compliance with their obligations under international law.

B. Normative Framework and Guidelines

Although IHL (primarily the 1907 Hague Regulations and the 1949 Geneva Conventions) lays the foundation for rights and obligations in a situation of occupation, it does not alone provide a sufficient legal framework for businesses' liabilities in such situations. As a basic principle, IHL envisages occupation to be a temporary phenomenon, and as such, norms of IHL do not comprehensively cover economic and corporate activities, which are often viewed as more long-term initiatives.

Instead, IHL is complemented by other bodies of international law in order to provide a more robust legal framework for international corporations. For example, public international law prohibits annexation by force and the Occupying Power's exercise of sovereignty over occupied territory, two fundamental principles of international law that impact significantly on corporate activity. Indeed, one reason for the prohibition of the transfer of the Occupying Power's civilian population to occupied territory is to safeguard the occupied (Palestinian) people's right to self-determination, their sovereignty over the land and natural resources and their ability to pursue political, economic and social development,¹ in line with the United Nations Charter and international law.

The following bodies of law complement each other to provide an over-arching legal framework governing third-party actors, including state, corporate and individual responsibility under International Law:

1. International Humanitarian Law: IHL regulates the conduct of parties engaging in armed conflicts, including military occupations. Some of the main principles that underpin the administration of occupation include the responsibility to provide for the welfare of the local population; a general obligation to leave existing local legislation in place; and any use of natural resources must be for the direct needs of the occupying forces, and not in a manner that depletes the resource (principles of usufruct). The 1949 Geneva Conventions set out the obligation of the parties involved in an armed conflict to respect the law, and establish an additional obligation for all States parties to ensure respect for the Conventions in all circumstances, including providing effective penal sanctions for persons responsible for “grave breaches”.²

2. International Human Rights Law: IHRL regulates the rights of individuals vis-à-vis the government under whose jurisdiction they fall and is primarily made up of treaty law – legally binding agreements between States parties – and customary international law – rules of law derived from the consistent practice of States, which apply to all States, regardless of whether or not they have signed a particular treaty. While international treaties and customary law form the mainstay of international human rights law, other instruments, such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation and development. UN bodies have consistently rejected the Israeli assertion that Israel’s human rights obligations do not apply to its policies and practices in the oPt.³

3. International Criminal Law: Serious violations of human rights and international humanitarian law can and should be investigated and prosecuted in accordance with international criminal law. For this to happen, a national or international court of law must be able to assign responsibility to an individual with the right intent to commit a crime as prescribed by law. Depending on the jurisdiction of the relevant court or tribunal, business persons aiding and abetting, ordering, supervising, and jointly perpetrating crimes can also be held individually accountable. Whether corporate criminal responsibility (in addition to, or instead of, individual criminal responsibility) can be triggered depends on whether the seized jurisdiction attaches criminal liability to legal entities. If yes, the Court could look at, for example, whether the act was committed within the scope of the employee’s activities and responsibilities, in order to establish if the acts can be attributed to a corporate entity.

4. Peremptory Norms of International law: Also known as Jus Cogens, this is a category of customary international rules of superior hierarchical status from which there can be no derogation. These norms give rise to obligations Erga Omnes, i.e. obligations owed to the international community as a whole (rather than bilateral or multilateral ones).⁴ Peremptory norms are generally considered to include prohibition of torture, the right to self-determination and the basic rules of IHL.⁵ These norms are of such importance that they include an additional and separate obligation on Third States:

¹ The Occupying power is only permitted to administer and use state land in a manner that preserves its capital. Article 55, Hague Regulations on the Laws and Customs of War on Land and its attached Regulations of 1907, 18 October 1907, U.K.T.S. 9 (1910), Cd. 5030 [Hague Regulations]; See also, Yutaka Arai-Takahashi, *The Law of Occupation, Continuity and Change of International Humanitarian Law and its interaction with International Human Rights Law* (Leiden: Martinus Nijhoff, 2009) at 213–216; International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, common Art. 1(2); International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3, common Art. 1(2).

² Articles 146 and 147. The same article also states that “The obligation on the High Contracting Parties to search for persons accused to have committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed”

³ See Diakonia, Rule of Law: A Veil of Compliance in Israel and the oPt 2010–2013, pp. 27–31 http://www.diakonia.se/globalassets/documents/ihl/ihl-resources-center/rule-of-law_final_mar5.pdf

⁴ See: Responsibility of States for Internationally Wrongful Acts, Art. 41; and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice, 9 July 2004, para 159.

- i. Duty to respect and promote the Palestinian people's right to self-determination⁶ as reinforced and elaborated on in the ICJ's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. The ICJ Advisory Opinion clarified that Third States must ensure that any impediment to self-determination created by the construction of the Wall is brought to an end.⁷ This same analysis extends to other impediments to the exercise of self-determination, including the illegal settlements and their related infrastructure, and Israel's illegal closure of the Gaza Strip.
- ii. States not party to the conflict have an obligation not to recognise as lawful, or act in a manner that implies recognition for, a situation resulting from a violation of a peremptory norm, even if committed by another State.⁸
- iii. Third States must not render aid or assistance to maintaining or indirectly sustaining an illegal situation caused by a gross violation of a *jus cogens* obligation by another state.

C. Regulatory Frameworks for States and Corporations

In the last two decades an increasing expectation has been placed on the private sector to partake in, and contribute to, the management of global challenges. This includes the development of the corporate social responsibility (CSR) agenda, i.e. recognising that companies are responsible for their impact on society and the environment, and that they must consider impacts on other parties beyond their own direct shareholders.⁹ As of today, corporate human rights responsibilities are primarily addressed through soft law norms, i.e. non-binding regulations and industry standards. There is a wide range of norms, policies and tools aimed at providing guidance in this regard.

UN Global Compact

A key milestone was the establishment of the UN Global Compact in 1999, today the largest initiative for corporate citizenship and sustainability with over 6000 businesses participating from 135 different countries. Like most multi-stakeholder initiatives on corporate responsibility, the UNGC is not a legally-binding code of conduct and has no complaint mechanism.

UN Guiding Principles

Following a four year-long multi-stakeholder dialogue led by Professor John Ruggie, the launch and adoption of the "Protect Respect and Remedy-framework" and the UN Guiding Principles for Business and Human Rights (UNGPs) in 2011 mark another step in the effort to develop universal principles of corporate responsibility. The UNGPs have gained international recognition as an authoritative standard for business and human rights, and a number of countries are currently incorporating these standards through National Action Plans.¹⁰ According to the UNGPs, corporations have a responsibility to respect human rights (pillar two), as well as standards of international humanitarian law in situations of armed conflict, and take necessary actions to identify, prevent, mitigate and account for how they address their impact. Since the adoption of the UNGPs, the concept of 'due diligence' has been established through a broad set of standards and laws. The concept of human rights due diligence has

⁵ See the ILC Commentary, at 84. http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. Exactly which these rules entail has not been clearly defined by the ILC. See: https://www.icrc.org/eng/assets/files/other/irrc_850_chetail.pdf

⁶ Barcelona Traction, Second Phase, ICJ Reports 1970 p 3, 304 (Judge Ammoun); International Law Commission, Fragmentation of International Law: Difficulties arising from Diversification and Expansion of International Law, A/CN.4/L.702 (18 July 2006) §33, as quoted in James Crawford, Brownlie's Principles of Public International Law, Eighth Edition (Oxford: Oxford University Press, 2012) at 596 fn43.

⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice, 9 July 2004, para. 159.

⁸ See: Responsibility of States for Internationally Wrongful Acts, Art. 41; see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice, 9 July 2004, para 159.

⁹ There are many existing definitions of CSR. OECD define it as: the responsibility of enterprises for their impacts on society. EU Commission, A renewed EU strategy 2011-14 for Corporate Social Responsibility, Brussels, 2011, at 6.

¹⁰ See: <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>

been incorporated as a requirement in the OECD Guidelines on Multinational Enterprises (see below) and in a new ISO (International Organization of Standardization) standard, ISO 26000.

The UNGPs do not describe in detail necessary measures to be taken in situations of armed conflict, including occupation, but the framework clearly states that "In situations of armed conflict enterprises should respect the standards of international humanitarian law".¹¹ The general principles of the framework recognise the obligation of states to respect, protect and fulfil basic rights (first pillar). The framework also recognises the "need for rights and obligations to be matched to appropriate and effective remedies when breached" (third pillar).¹² A heightened risk of human rights violations requires enhanced due diligence, as per the recommendation of the UN Working Group on Business and Human Rights (appointed to implement the UN Guiding Principles).¹³

OECD Guidelines

The OECD "Guidelines for Multinational Enterprises" also include recommendations from governments to multinational enterprises operating in or from OECD countries, in addition to Argentina, Brazil and Chile.¹⁴ While the OECD guidelines are not directly binding on corporations, OECD and signatory governments are required to uphold principles and standards for responsible business conduct in accordance with applicable laws and internationally recognised standards. One important mechanism for ensuring compliance includes the National Contact Points mandated to handle complaints against companies for non-compliance.

Montreux Document

In 2008, before the adoption of the UNGPs, a joint initiative of the ICRC and the Swiss Federal Department of Foreign Affairs resulted in the Montreux Document. The document reaffirms the existing legal obligations of states with regard to private military and security companies and recommends a range of good practices for the implementation of existing legal obligations to ensure compliance with IHL and IHRL. Accordingly, the signatory states (50 states, Israel not a signatory) commit to taking appropriate measures to redress the unlawful activities of their corporate nationals through the introduction of effective regulatory measures to ensure compliance with international law, including the proper licensing of companies as well as the licensing of specific contracts through a regulatory authority.¹⁵

In addition to complying with regulations developed by the international community, such as the UN Guiding Principles, businesses have agreed to their own set of self-regulatory codes of conduct, industry standards and ethical initiatives. One example of such an initiative is the "International Code of Conduct for Private Security Service Providers", which was developed as a Swiss government-convened, multi-stakeholder initiative to clarify international standards for the private security industry. The Code, published in February 2013, is signed by 708 companies from 70 countries setting out human rights-based principles for the responsible provision of private security services.

Other efforts at the international level include the ICRC "Business and International Humanitarian Law: An introduction to the rights and obligations of business enterprises under international humanitarian law" published in 2006.¹⁶

¹¹ See: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 2011,

¹² Ibid

¹³ See: Statement on the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory, 6 June 2014, <http://www.ohchr.org/Documents/Issues/Business/OPTStatement6June2014.pdf>

¹⁴ See: <http://www.oecd.org/investment/mne/1903291.pdf>

¹⁵ Full document: http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf

¹⁶ https://www.icrc.org/eng/assets/files/other/icrc_002_0882.pdf

EU Regulatory Framework

In addition to international norms, the EU has developed its own policies and regulatory framework with regard to commercial and financial links with the Israeli settlements in the oPt. The EU's non-recognition of Israeli sovereignty over the occupied territory (the West Bank, including East Jerusalem, and the Gaza Strip) is by far the most important principle in the EU's relationship with the settlement economy. In June 2013, the European Commission adopted Guidelines on the eligibility of Israeli entities and their activities in the occupied territory for grants, prizes and financial instruments funded by the EU from 2014 onwards¹⁷ to ensure that EU funding and programmes do not contribute to Israeli entities and activities in settlements. This builds on the conclusions of the EU's Foreign Affairs Council that: "settlement activity will not benefit from any sort of EU funding or programmes"¹⁸ and "in line with international law, all agreements between the State of Israel and the European Union must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967".¹⁹

With regards to the labelling of settlement products, EU member states have repeatedly stated their intention to adopt EU-wide labelling guidelines, but this has yet to materialise.²⁰ The UK was the first EU member state to issue its own labelling guidelines. In December 2009, the UK advised retailers to label products as "Produce of the West Bank (Israeli settlement produce)" and Palestinian products as "Produce of the West Bank (Palestinian produce)". Denmark followed with a similar set of guidelines in 2012.

In the summer of 2014, the EU member states agreed on a common message "aimed at raising awareness among EU citizens and businesses regarding involvement in financial and economic activities in the settlements". As of 15 April, this had not been adopted and published by the EU, but instructions and advice have been published by a number of individual states.²¹

Examples of civil law suits and criminal proceedings at the national level

As mentioned above, International Criminal Law creates obligations upon States to investigate international crimes, including war crimes, and if there is sufficient evidence, to prosecute the alleged perpetrators. Those convicted must be punished according to international law.²² Under most legal systems, corporations are also liable for the civil consequences of the offences committed by their representatives.²³ Thus, corporations might also be liable under national civil law for activities in violation of international humanitarian law. For example, in March 2013, the Versailles Court of Appeals (France) confirmed that under French law corporations can be held liable under civil law for their contributions to activities in violation of IHL.²⁴

In May 2013, the Dutch Prosecutor (in the case against Lima Holding B.V) affirmed that Dutch persons and legal entities are required to ensure that they are not involved in any manner with violations of international humanitarian law. While the Prosecutor deemed the contribution of the defendants minor and dismissed the case, the Prosecutor also considered the danger of repetition to be minor, sending the signal that the conduct was expected to cease. Lima Holding B.V. did cut its ties with the concerned activities after the criminal complaint was lodged.²⁵

¹⁷ Published in the Official Journal of the EU, C-205, pp. 9–11, on 19 July 2013.

¹⁸ See OJEU L-125 of 7.5.2013, p. 34, and Council Document Nr. 17814/12 of 14.12.2012.

¹⁹ Foreign Affairs Council conclusions on the Middle East peace process, 10.12.2012, point 4.

²⁰ See: Foreign Affairs Council conclusions on the Middle East peace process, May 2012, http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/130195.pdf Foreign Affairs Council conclusions on the Middle East peace process, July 2014, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/144092.pdf

²¹ E.g. Finland, Portugal, Spain, United Kingdom.

²² The responsibility to investigate is codified in several treaties, including the Geneva Conventions, and recognized as binding obligation under customary law. Soft law instruments including the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Van Boven Principles) offer a useful restatement of the law. These principles highlight the duty to, inter alia : "investigate violations effectively, promptly, thoroughly and impartially and where appropriate, take action against those allegedly responsible in accordance with domestic and international law." Van Boven principles, at 3. <http://www2.ohchr.org/english/issues/remedy/principles.htm>

²³ See for examples: http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf

²⁴ The Court did however dismiss the claim against the French corporations Alstom Transport, Alstom and Veolia Transport. <http://blog.eur.nl/iss/hr/files/2012/02/Decision-Versailles-Appeal-Court-22-March-2013.pdf>

²⁵ <http://www.alhaq.org/advocacy/targets/accountability/71-riwal/704-prosecutor-dismisses-war-crimes-case-against-riwal>

D. Corporate Involvement in Israeli Occupation²⁶

The involvement of Israeli and international corporations in the occupation is widespread and multi-layered. The following categories are limited to those aspects of IHL related to the “administration of occupied territory”. Other categories related to the “conduct of hostilities” need further, detailed research and could invoke issues of criminality/liability.

a. Settlement Industry²⁷

The report of the UN Human Rights Council’s Independent Fact-Finding Mission to Investigate the Implication of Israeli Settlements dedicated a full section on the role of businesses in the growth of illegal settlement expansion. According to the report “business enterprises have directly and indirectly, enabled, facilitated and profited from the construction and growth of the settlements”.²⁸ The report provides a thorough account of activities related to settlements that raise concerns over human rights violations. The report pays special attention to companies operating in settlements that present their products as having originated in “Israel”.

These categories include corporations involved in the construction of Israeli infrastructure and settlement real estate, but also corporations facilitating trade with the settlements, producing settlements goods, providing settlements with financial/banking services, transportation, surveillance, catering and other services and equipment necessary for the maintenance and continuation of settlements enterprise. This also includes companies dealing with the provision of water and energy to settlements. Their involvement should be assessed against human rights and humanitarian law violations such as, but not limited to, the appropriation of land and private property, forcible transfer of the protected population, and transferring/settling the Occupying Power’s own population in the occupied territory.²⁹

b. Demolitions³⁰

Recent years have shown a sharp increase in both demolitions and demolition orders in Area C and East Jerusalem, which are closely related to the construction of illegal settlements. The number of demolished structures increased by 130 per cent between 2009 and 2012, and in 2014 alone, 590 Palestinian structures were destroyed resulting in the displacement of more than 1,177 individuals. Overall estimates indicate that more than 28,000 Palestinian structures have been demolished in the oPt since 1967, leading to the displacement of more than 160,000 Palestinians.³¹

Corporations involved in demolitions are not only involved in the destruction of private property, but can possibly be linked to the forcible transfer of the protected population as well.³² Extensive destruction and appropriation of property not justified by military necessity amounts to a grave breach of IHL and may therefore be prosecuted as a war crime under international criminal law. The same applies to the prohibition on forcible transfer of the protected population, i.e. the Palestinians in the oPt.

²⁶ Various corporations and their activities in the oPt are mentioned by the previous UN Special Rapporteur on the Situation of Human Rights in the oPt and documented in his reports (2012–2014). See: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/101/98/PDF/G1410198.pdf?OpenElement>

²⁷ For a complete IHL analysis on settlements see Diakonia webpage <http://www.diakonia.se/en/IHL/Occupied-Palestinian-Territory/Administration-of-Occupation/Israeli-Settlements-policy/>

²⁸ Full report http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-63_en.pdf

²⁹ E.g. Articles 49 and 53 of the IV Geneva Convention

³⁰ For a complete IHL analysis on demolitions see Diakonia webpage <http://www.diakonia.se/en/ihl/occupied-palestinian-territory/administration-of-occupation/house-demolitions1/>

³¹ Figures from UNOCHA, ICAHD, http://www.ochaopt.org/documents/hc_statement_on_demolitions_23jan2015.pdf for more see Diakonia report: Rule of Law: A veil of Compliance in Israel and the oPt 2010–2013 http://www.diakonia.se/globalassets/documents/ihl/ihl-resources-center/rule-of-law_final_mar5.pdf

³² See Article 49 and 53 of the IV Geneva Convention

c. Movement and Control

Private military and security firms guard illegal settlements and construction sites in the occupied territory. Such firms are also responsible for the day-to-day operation, security and maintenance of checkpoints within the West Bank and between Israel and the oPt. All companies involved in the planning, construction, operation and maintenance of the intricate mechanisms of physical separation and restriction of movement resulting from the Wall also fall under this category.

The Wall, when built on West Bank land, including East Jerusalem, and its associated regime, was recognised as illegal by the International Court of Justice in 2004 for a number of reasons; mainly for violating the prohibition on annexation of territory, contributing to demographic changes in the oPt, and reinforcing the illegal transfer of population and the destruction of Palestinian private property.³³

Actors under this category include contractors who build wall infrastructure, including checkpoint ditches, civil engineering firms that supply ready-made watch towers or raise razor wire fences, and suppliers of biometric identification systems and high-end surveillance technologies.³⁴

d. Exploitation of Natural Resources

IHL prohibits the Occupying Power from using the natural resources, including water, in occupied territory unless it is used for the benefit of the local population (laws of usufruct) or for the Occupying Power's imperative military needs. However, a relatively recent judgement by the Israeli High Court of Justice allowed for the continuation of stone and marble quarry extractions in the West Bank,³⁵ a decision that ignored basic IHL guidelines and regulations.³⁶ The Israeli quarries in the West Bank (a number of them operating as subsidiaries to international corporations) yield an income of almost one billion ILS annually (approximately USD \$250 million). Of that total amount, 2.5 per cent is granted as royalty to the Israeli Civil Administration and the remaining 97.5 per cent goes directly to the Israeli economy.³⁷

Israel also permits the illegal exploitation of Dead Sea minerals by the Israeli corporation Ahava – Dead Sea Laboratories Ltd., which is located in the Mitzpe Shalem settlement in the occupied West Bank. Together, the settlements of Mitzpe Shalem and Kalia hold 44.5 per cent of Ahava's shares, and as such, both the Israeli economy and the settlement economy are benefitting directly from the exploitation of Palestinian natural resources.³⁸

E. Recent Corporate Decisions:

The majority of IHL recommendations in the oPt context are usually directed towards High Contracting Parties to the Geneva Conventions (Third States). However, few of these calls have resulted in concrete actions to prevent the continuation of Israeli violations of international law. On the other hand, the recent emphasis on the obligations of corporations and investors led to the exclusion of or divestment from certain Israeli and multinational corporations involved in the economy of the occupation. Below is a non-exhaustive list of companies and investment funds that decided to publicly alter their activities and investments in the oPt during the last five years, directly referencing Israel's violations of international law.

³³For more information, see Diakonia webpage: <http://www.diakonia.se/en/IHL/Occupied-Palestinian-Territory/Administration-of-Occupation/The-Separation-Wall/>

³⁴ See Diakonia report on G4S, available at <http://www.diakonia.se/globalassets/documents/ihl/ihl-resources-center/g4s-report.pdf>

³⁵ HCJ 2164/09 Yesh Din v IDF Commander in the West Bank (26.12.2011) (Quarries case). An English version is available at <http://www.yesh-din.org/infoitem.asp?infocatid=171>

³⁶ See expert opinion <http://www.diakonia.se/globalassets/documents/ihl/ihl-resources-center/expert-opinions/quarrying-in-area-c---final---july-2012.pdf>

³⁷ <http://www.haaretz.com/weekend/week-s-end/west-bank-palestinians-see-an-israeli-roadblock-to-economic-independence-1.420361>

³⁸ See, for example, Al Haq's "Pillage of the Dead Sea", (2012), or Al Haq's September 2014 submission to the UN Human Rights Committee, available at http://www.alhaq.org/images/stories/PDF/2012/ALHAQ_ICCPR_Alternative_Report_Final.pdf

1. PGGM, one of the largest Dutch pension funds divested from five Israeli banks due to their involvement in settlements, referencing IHL violations.³⁹
2. GPFG, the Norwegian Government Pension Fund – Global, one of the largest in the world and one that controls more than USD \$800 billion in assets, excluded two companies with reference to settlements and the status of East Jerusalem.⁴⁰
3. Denmark's largest bank, Danske Bank, decided to exclude the Israeli Bank Hapoalim, Africa Israel Investments Ltd. and Danya Cebus Ltd. because of their involvement in the funding of settlement construction in conflict with IHL.⁴¹
4. Deutsche Bank, Germany's largest bank, included Israel's Hapoalim Bank on a list for a client of companies that are "ethically questionable". Deutsche Bank launched a "moral investment plan" for investors who wish to make sure their funds are not put to unethical use.⁴²
5. Fonds De Compensation, a Luxembourgish investment fund that administers the public general pension insurance scheme, excluded nine companies related to the oPt, including five Israeli Banks. Reasons included links with the construction/financing of illegal settlements in occupied territories; links with the provision of security systems for the illegal separation barrier on occupied territories; and assisting in human rights violations in occupied territories.⁴³
6. Swedish National "Första AP-Fonden", the Norwegian government pension fund and German Deutsche Bank decided to sell shares – and clients' shares – in the Israeli Elbit corporation. The Norwegian Minister of Defence stated that: "we do not wish to fund companies that so directly contribute to violations of international humanitarian law".⁴⁴
7. Dutch company Royal HaskoningDHV decided to terminate a contract with the Jerusalem Municipality to build a wastewater treatment plant in East Jerusalem as it "came to understand that future involvement in the project could be in violation of international law."⁴⁵
8. The Nordic-based financial group Nordea listed Cemex on its exclusion list portfolio, due to the company's extraction of natural resources from the oPt.⁴⁶

³⁹ Bank Hapoalim, Bank Leumi, First International Bank of Israel, Israel Discount Bank and Mizrahi Tefahot Bank. Full statement <https://www.pggm.nl/english/what-we-do/Documents/Statement%20PGGM%20exclusion%20Israeli%20banks.pdf>

⁴⁰ Africa Israel Investments and Danya Cebus. Full statement http://www.regjeringen.no/pages/1930865/Africa_Israel_nov_2013.pdf

⁴¹ Full statement <https://www.danskebank.com/en-uk/CSR/business/SRI/Pages/exclusionlist.aspx>

⁴² The client is "Ethical MSCI World Index UCITS ETF", for more see <http://www.haaretz.com/news/diplomacy-defense/1.574743>

⁴³ Bank Hapoalim, Bank Leumi, First International Bank of Israel, Israel Discount Bank and Mizrahi Tefahot Bank, as the companies Motorola, Jerusalem Economy LTD, Elbit Systems and AFI group. Full Statement http://www.fdc.lu/fileadmin/file/fdc/Organisation/Liste_d_exclusion20140515.pdf

⁴⁴ <http://www.haaretz.com/business/germany-s-deutsche-bank-divests-from-israel-firm-linked-to-west-bank-separation-fence-1.292993> and <http://www.nordstjernan.com/news/nordic/2078/>

⁴⁵ <http://www.haaretz.com/news/diplomacy-defense/.premium-1.545605>

⁴⁶ Full exclusion list <http://esg.nordea.com/exclusion-list/>

E. Recommendations

Corporations and their operations are an essential part of Israel's control of the oPt, and benefit from illegally-confiscated Palestinian natural resources, including land, while also sustaining and expanding illegal settlements and settlement-related infrastructure. Third States and corporations are involved in different ways in the Israeli efforts to build, maintain and finance the settlements. These include the import, export and distribution of goods and services produced in, or by, settlements, thus profiting from the violations that flow from the continued occupation and annexation of Palestinian territory. The following recommendations seek to address this:

Corporations

Corporations with activities in the oPt need to understand and mainstream into their operations the specific legal framework of rights and obligations that regulates a situation of occupation.

- Activities and investments must be assessed against both human rights and international humanitarian law standards, as reflected in the UNGPs.
- If engagement in violations or illegal activity continues, companies should be able to demonstrate their own efforts to mitigate any adverse impact and be prepared to accept any consequences — reputational, financial or legal — of continuing their operations.
- Investors, both current and potential, should consider the liabilities they may incur while operating in the oPt, the precarious nature of investing in a corporation involved in activities in occupied territory, and the unparalleled legal and reputational risk to their investment when the profit model is conflict-dependent and linked to practices that may amount to grave breaches of IHL and possible war crimes and crimes against humanity (e.g. forcible transfer).
- Retailers of Israeli products must be able to credibly guarantee and demonstrate that the products do not (fully or partly) originate in settlements.

Third States

Third States have an obligation to take all necessary measures to ensure their engagement with businesses in the oPt does not violate their obligations (1) to ensure respect for IHL, (2) not to recognise as legal the illegal situation created by the settlement policy, and (3) not to render aid or assistance in maintaining this situation.⁴⁷

States should:

- Initiate a public inquiry into all official relationships and contracts with Israel to ensure that they are limited in scope and impact to the territory of Israel.
- Ensure that settlements are excluded from any economic relationships with Israel and Israeli entities, including through public procurement.
- Publish and enforce instructions to companies involved in settlements or supporting settlements.
- Ensure that the development of National Action Plans (UNGP) adequately reflects the legal specificities with regards to rights and responsibilities applying to occupied territory, and to introduce domestic laws to that effect.
- Investigate the business activities of companies registered in their own domicile that profit from Israel's violations of IHL and require that the businesses transparently demonstrate that their engagement does not contribute to illegalities.
- Appropriately regulate the activities of corporations in their domicile in accordance with the States own obligations and take appropriate measures to ensure that those businesses respect human rights and IHL obligations throughout their operations.
- Inform companies engaging in innovation exchanges, e.g. EU's Mission for Growth, of the legal and reputational risks involved in engagement in the occupation and/or with settlements.

⁴⁷ See for instance, F. Dubuisson, *The international obligations of the European Union and its member States with regards to economic relations with Israeli settlements, Made in Illegality*, February 2014; Al-Haq, "Feasting on the Occupation: Illegality of Settlement Produce and the Responsibility of EU Member States under International Law", 2013.

- While the ICC does not have jurisdiction over companies, business actors should be informed that they may be investigated individually for any contribution to war crimes and crimes against humanity taking place in the oPt.

EU (in addition to the above mentioned recommendations)

- Publish and enforce existing common EU message (from June 2013) discouraging corporate involvement in settlements or supporting settlements.
- Strengthen the common EU message for businesses to actively discourage companies from engaging in projects that benefit from the settlement enterprise and encourage termination of problematic contracts.
- Introduce a ban on the import of settlement products. This ban should be modelled on the EU agreement to ban imports of Russian goods originating in Crimea following its illegal annexation by Russia.⁴⁸
- Introduce a ban on European private investments in unlawful economic activities in the oPt. In the case of Crimea and Sevastopol, the EU agreed to ban new investment for infrastructure projects (transport, telecommunications and energy sectors) and the exploitation of natural resources (oil, gas, agriculture & minerals) as well as a ban on the provision of equipment; finance and insurance services to such transactions.
- Extending the scope of funding-guidelines (July 2013) to exclude companies involved in violations of IHL/IHRL from EU-funded projects. This includes companies involved in the construction or the maintenance of the Wall, extraction of natural resources, building of transport infrastructure crossing over the oPt and/or serving settlements or home demolitions, in line with UNGP n. 7 (c).

⁴⁸ An EU-wide ban adopted under the regime of sanctions would require the agreement of at least 15 MS comprising 65% of the EU population.

See other Diakonia IHL Resource Center briefs:

Accountability for violations of International Humanitarian Law: An introduction to the legal consequences stemming from violations of international humanitarian law

International Crimes and Accountability: A beginner's introduction to the duty to investigate, prosecute and punish

The forced transfer of Bedouin communities in the oPt

Israel's Administrative Destruction of Cisterns in Area C of the West Bank

The Gaza Strip: Status under international humanitarian law

Jerusalem light rail IHL analysis

The maritime blockade of the Gaza Strip

Diakonia's IHL Resource centre seeks to increase awareness of IHL among:

- The international community present in the oPt – international NGOs, international agencies such as United Nations and European Union bodies, international media and diplomatic missions as well as decision makers visiting the area;
- Israeli and Palestinian civil society, media, lawyers and the general public in Israel and Palestine;
- EU and UN bodies based in Brussels and Geneva;
- International corporate actors active in the oPt.

Where possible, the disseminated IHL information and work with partner organisations also includes a gender perspective.

How we work

The IHL Resource Centre consists of four interlinked components:

- Legal research and briefings to civil society and the international community;
- Education and information, including through the creation of an IHL Helpdesk and work with local partners;
- Monitoring of and reporting on IHL violations;
- Advocacy from Diakonia's Head Office in Stockholm.



PEOPLE CHANGING THE WORLD

What is Diakonia?

Diakonia is a Swedish development organisation working together with local partners for a sustainable change for the most vulnerable people in the world. We support more than 400 partners in nearly 30 countries and believe in a rights-based approach that aims to empower discriminated individuals or groups to demand what is rightfully theirs. Throughout the world we work toward five main goals: human rights, democratisation, social and economic justice, gender equality and sustainable peace.

Diakonia International Humanitarian Law Resource Centre

The goal of Diakonia International Humanitarian Law Resource Centre is to increase the respect for and further implementation of international law, specifically international humanitarian law (IHL), in the Israeli–Palestinian conflict. We believe that addressing violations of IHL and international human rights law tackle the root causes of the humanitarian and protection crisis in the oPt, in a sustainable manner. Our Centre makes IHL expertise available by providing:

- Briefings to groups and organisations on IHL and its applicability to Israel and the oPt;
- Tailored in-depth trainings on specific issues and policies relating to IHL;
- Legal analyses and ongoing research on current IHL topics; and
- Legal advice, consultation and legal review of documents for other actors in the oPt, to support policy formulation and strengthen advocacy with an IHL perspective.

Do you or your organisation want to learn more about IHL and its applicability to the oPt? Visit our website ‘An Easy Guide to International Humanitarian Law in the occupied Palestinian territory’ at: www.diakonia.se/en/IHL/ – or contact us to set up a general or specialised legal briefing by our legal advisors.

Contact us at: ihl@diakonia.se