

# *Business and Human Rights in Occupied Territory: The UN Database of Business Active in Israel's Settlements*

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## **Abstract**

*The law and practice concerning the responsibilities of businesses and the obligations of their home states in relation to private dealings in occupied territory are under-developed. The establishment of a database by the United Nations (UN) Office of the High Commissioner for Human Rights to monitor the activities of corporate actors in the Occupied Palestinian Territory (OPT) is an opportunity to provide much-needed guidance on the scope of application of existing international law in this paradigmatic case of a high-risk business environment. This article engages with the contribution of this initiative to the regulation of transnational corporate dealings through two normative issues: the structural characteristics and effects of the violations taking place in certain business environments maintained in the OPT on the responsibilities of business and home states; and the various modes through which businesses become directly linked with and contribute to the illicit property rights regime underpinning the existence of settlements and the serious human rights abuses perpetuated by their maintenance.*

**Keywords:** belligerent occupation, home state regulation, immitigability, OHCHR, third state responsibility

## I. INTRODUCTION

On 22 March 2016, the Human Rights Council adopted Resolution 31/36, which requested the Office of the High Commissioner for Human Rights (OHCHR), in close consultation with the United Nations Working Group on Business and Human Rights (UNWG), to 'produce a database' of businesses that directly and indirectly enable, facilitate and profit from the construction and growth of Israeli settlements in the Occupied Palestinian Territory (OPT).<sup>1</sup> The origin of the database, which is to be updated annually, was the recommendation by the independent international fact-finding mission on the implications of the settlements for the ability of the Palestinian people to enjoy their basic human rights, 'call[ing] upon all Member States to take appropriate measures to ensure that business enterprises domiciled in their territory and/or under their jurisdiction, including those owned

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<sup>1</sup> Human Rights Council, 'Resolution 31/36 Israeli Settlements in the Occupied Palestinian Territory, Including East Jerusalem, and in the Occupied Syrian Golan', A/HRC/31/L.39 (22 March 2016), para 17.

or controlled by them, that conduct activities in or related to the settlements respect human rights throughout their operations.<sup>2</sup> The OHCHR is thus tasked with mapping out business activities in the OPT and outlining the ways in which certain business dealings and transactions contribute to the severity and frequency of the human rights abuses resulting from the existence and maintenance of settlements.

Israel's occupation of Palestinian territory is a paradigmatic case of a high-risk conflict-affected business environment – a 50-year-old military occupation, the longest in modern time<sup>3</sup> – but it is not the only contemporary situation of occupation to pursue the unlawful acquisition of territory and the illegal exploitation of its natural resources.<sup>4</sup> In producing the database, the OHCHR might need to provide guidance to businesses and their home states on their respective responsibilities/duties and expected standard of conduct in such operating environments. The OHCHR should set out a normative framework for a decision to include a business on the database by interpreting and applying existing international norms in the field of business and human rights to situations of unlawful foreign territorial control. A robust normative framework is key to the mechanism's legal integrity and political viability.

Guidance on the appropriate distribution of responsibilities between businesses and their home states under existing international law is lacking and much needed. The database project could make a vital contribution to the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) in high-risk contexts where businesses remain in the dark about the appropriate standard of conduct that is expected of them under international law. The conventional assumption is that the standard applicable to involvement by business in such contexts is that of individual-state complicity, but complicity involves a high threshold and does not capture the full range of circumstances in which businesses can abuse human rights. This article analyses the condition of 'proximity' of a business to an illegal situation under the jurisdiction of the host state, i.e. the illegally constituted rights and titles to property allocated to businesses through transactions related to the settlements.<sup>5</sup> The database project could also enhance the understanding of businesses and states of the consequences of such business operations under their domicile-country's domestic laws.<sup>6</sup> The database is an important opportunity for the UN to draw out the normative linkages between home states' duties

<sup>2</sup> 'Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, Including East Jerusalem', A/HRC/22/63 (16 January 2013), para 117 (hereafter 'UN fact-finding mission report on settlements').

<sup>3</sup> On the legal consequences of such illegal situations in international law, see Valentina Azarova, *Israel's Unlawfully Prolonged Occupation: Consequences Under an Integrated Legal Framework* (London: European Council on Foreign Relations, 2017).

<sup>4</sup> On business and human rights in occupied territory, see Yael Ronen, 'Responsibility of Businesses Involved in the Israeli Settlements in the West Bank' (2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2594851](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2594851) (accessed 9 June 2018); Eugene Kontorovitch, 'Economic Dealings with Occupied Territories' (2015) 53 *Columbia Journal of Transnational Law* 584.

<sup>5</sup> Such domestic law obligations align with the home state's responsibility to ensure that its territory or exclusive domain is not used to cause or further harm caused by others. On the principle of transboundary harm, see *Trail Smelter Arbitration (United States v Canada)* (1938 and 1941) 3 R.I.A.A. 905. See, for the application of the wrongful omission standard, Commission of Inquiry on Burundi, 'Final Detailed Report of the Commission of Inquiry on Burundi', A/HRC/36/CRP.1 (18 September 2017) paras 69–73 (in French).

<sup>6</sup> Such bodies 'brandish' soft enforcement powers. Yuval Shany, 'Sources and the Enforcement of International Law: What Norms International Law-Enforcement Bodies Actually Invoke?' in Samantha Besson and Jean D'Aspremont (eds.), *Oxford Handbook on the Sources of International Law* (Oxford: Oxford University Press, 2017) 789.

under the UNGPs, and their obligations as third party states under general international law to abstain from recognition as lawful of an illegal situation created through violations of peremptory norms of international law.<sup>7</sup>

By making more information available about businesses involved in settlements, the database could contribute to the activation of businesses' responsibilities in relation to the illegal situation of settlements in the OPT.<sup>8</sup> The database could also facilitate informed decision-making by investors, procurers and consumers, and bolster private (horizontal) enforcement processes. By providing guidance on the obligations of home states, the database could operationalize the latent responsibilities of domicile-countries as third states, which to a limited extent have already driven moves by foreign companies to divest from activities in Israeli settlements.<sup>9</sup> These tasks are fully within the purview of the UN, which is mandated to protect and promote human rights.

The aim of this article is to contribute to the UN Human Rights Council's efforts to establish the database of businesses in Israeli settlements by engaging with the substantive legal questions surrounding business and human rights in the OPT. This article is not concerned with the database itself: rather, it is concerned with normative and legal questions (specifically the nature and consequences of business activities) that the database should target. This article therefore begins in Section II by observing the structural and systemic violations entailed by the establishment and maintenance of settlements in the OPT. It then examines in Section III the responsibilities of business and their home states in relation to such internationally illegal situations. Section IV analyses the direct and indirect ways in which businesses come into possession of wrongfully created property rights and thus contribute to the systemic human rights abuses that result from the maintenance of the settlements in the OPT. Finally, this article reflects on the potential contribution the database could make to the regulation of business and the implementation of business and human rights norms in situations of occupation. As acknowledged in the OHCHR's January 2018 report, procedural fairness is critical to the integrity and legitimacy of the database. However, due to space constraints, this article does not engage with this issue.

## II. SETTLEMENTS IN OCCUPIED TERRITORY: A CASE OF STRUCTURAL VIOLATIONS AND SYSTEMIC WRONGS

The UN Human Rights Council Resolution 31/36 lists the number of ways in which 'business enterprises have, directly and indirectly, enabled, facilitated and profited from

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<sup>7</sup> On the scope of the obligation of non-recognition in international law, see Stefan Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in Christian Tomuschat and Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (The Hague: Martinus Nijhoff, 2005) 103.

<sup>8</sup> Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' A/HRC/17/31 (21 March 2011), Principles 4–6. See also Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117 *Journal of Business Ethics* 493.

<sup>9</sup> 'From Motorola to Ahava: The UN Blacklist of Companies Doing Business in Israeli Settlements', *Haaretz* (26 October 2017).

the construction and growth of the settlements' compiled by the UN fact-finding mission on settlements.<sup>10</sup> This list of activities is indicative of the ways in which companies contribute to the continuous unlawful acts that underpin the existence of settlements in the OPT and to the human rights abuses that their maintenance generates. However, it is neither an exhaustive list nor a normative basis for determining the wrongful character of a particular transactional relationship. Nor does it define the scope and nature of the substantive international law violations that arise from the existence and maintenance of settlements, or clarify the ways in which businesses can 'enable, facilitate, and profit from' these violations and hence contribute to the likelihood, frequency and severity of human rights abuses.

The internationally unlawful acts committed by Israeli authorities through the establishment and maintenance of settlements for Israeli civilians in the OPT 'encompass all physical and non-physical structures and processes that constitute, enable and support the establishment, expansion and maintenance of Israeli residential communities beyond the Green Line of 1949 in the Occupied Palestinian Territory', as the UNWG has pointed out.<sup>11</sup> The non-physical infrastructure of the settlements includes the legal and administrative acts that enable the establishment and maintenance of settlement-based entities, and that absorb the settlements into the economy, and social and political life in Israel proper.<sup>12</sup>

The key element in the establishment of a settlement, and thus the *sine qua non* of public and private entities' activities there, is the act of appropriation of Palestinian public and private land by the Israeli military commander.<sup>13</sup> The most common method of appropriation is the issuance of a 'state land' declaration under Israeli Military Order No. 59 regarding Government Property of 1967.<sup>14</sup> Such declarations place the land under the authority of the Military Custodian, who is authorized to administer the land 'as he sees fit', including by leasing the land for development by private bodies and

<sup>10</sup> UN settlements fact-finding mission report, note 2, para 97.

<sup>11</sup> UN settlements fact-finding mission report, note 2, para 4. See also Working Group on the issue of human rights and transnational corporations and other business enterprises, '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> (accessed 10 January 2018).

<sup>12</sup> On the peculiar character and consequences of Israel's occupation under international law, see Eyal Benvenisti, *Legal Dualism: The Absorption of the Occupied Territories into Israel* (Jerusalem: West Bank Data Base Project, 1986); Aeyal Gross, *The Writing on the Wall: Rethinking the Law of Occupation* (Cambridge: Cambridge University Press, 2017). See also Azarova, note 3.

<sup>13</sup> UN settlements fact-finding mission report, note 2. Although the appropriation of private land is no longer sanctioned by the Israeli authorities, 'outposts' on private land have been *de facto* authorized. Yesh Din, 'From Occupation to Annexation: The Silent Adoption of the Levy Report on Retroactive Authorization of Illegal Construction in the West Bank' (February 2016), <https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/מכיברוט+לסיפור+From+Occupation+to+Annexation+English+Yesh+Din.pdf> (accessed 9 June 2018). There are recent efforts to formalize the status of settlements on private land. Yotam Berger, 'Israel Presents: How to Legalize West Bank Settlements Built on Private Palestinian Land', *Haaretz* (4 May 2018), <https://www.haaretz.com/israel-news/.premium-israel-presents-how-to-legalize-west-bank-settlements-1.6054412> (accessed 7 May 2018).

<sup>14</sup> Military Order No. 59, Order Concerning State Property (Judea & Samaria) (1967). B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, 'Under the Guise of Legality: Israel's Declarations of State Land in the West Bank' (February 2012), [https://www.btselem.org/download/201203\\_under\\_the\\_guise\\_of\\_legality\\_eng.pdf](https://www.btselem.org/download/201203_under_the_guise_of_legality_eng.pdf) (accessed 9 June 2018). According to the Civil Administration's data as of 2012, Israel has declared about 913,000 dunums of land in the West Bank as state land: B'Tselem, 'By Hook and By Crook: Israeli Settlement Policy in the West Bank' (July 2012) 24, [https://www.btselem.org/download/201007\\_by\\_hook\\_and\\_by\\_crook\\_eng.pdf](https://www.btselem.org/download/201007_by_hook_and_by_crook_eng.pdf) (accessed 9 June 2018).

granting them the right to develop the land for use as residences for Israeli citizens.<sup>15</sup> Large swathes of Palestinian public land have been allocated in this way to development companies for the construction of settlements on the basis of a decision by the government secretariat to establish or expand a settlement.<sup>16</sup> In the Mitzpe Shalem settlement, for instance, the Israeli Dead Sea cosmetics company Ahava<sup>17</sup> operates a production facility on the basis of a license granted to it by the Custodian, who signed a permit agreement and development contract with the World Zionist Organization (WZO) for the establishment of a settlement on 2,410 dunums (241 hectares) of land, for a period of 69 years.<sup>18</sup> Although the Custodian can also allocate land for use by Palestinians, in practice almost all land is allocated for the development of settlements. Since the beginning of the occupation in 1967, the Civil Administration – a branch of the military – has allocated only 0.7 per cent of state land in the West Bank (860 hectares) to Palestinians.<sup>19</sup>

These acts of unlawful appropriation of land and allocation of property rights and the unlawful transfer of the nationals of the occupying power to occupied territory violate the core of the occupying power's obligations: to protect the well-being and property of the local population, and to abstain from acts that alter the international status, legal and political order, and demographic character of the territory. Israel's unlawful appropriation and destruction of Palestinian private and public property is extensive, and carried out not for reasons of military necessity but in order to facilitate the unlawful transfer of Israeli civilians into the OPT.<sup>20</sup> The diversion of land and other natural resources such as water for the benefit of Israeli civilians constitutes the usufruct rule,<sup>21</sup> which requires that the revenues from resource extraction are used only for the benefit of the local population or to defray the costs of maintaining a legitimate military occupation. When this is not the case, such extraction activities may attract liability for the crime of pillage.<sup>22</sup>

<sup>15</sup> The Custodian allocates land to settlements based on a decision by the Government Secretariat (the Cabinet) to establish or expand a settlement. It then concludes a development agreement with the World Zionist Organization (WZO) (and company) transferring the rights in the land to the company within a year. The private developer company undertakes the preparation of the plans for the development of the settlement in coordination with the WZO Settlement Division and Israeli domestic line ministries such as the Ministry of Construction and Housing, the Ministry of Industry and Trade, and the Ministry of Agriculture. B'Tselem, note 14.

<sup>16</sup> Ibid.

<sup>17</sup> Who Profits, 'Ahava: Tracking the Trade Trail of Settlement Products' (May 2012), [https://www.whoprofits.org/sites/default/files/ahava\\_report\\_final.pdf](https://www.whoprofits.org/sites/default/files/ahava_report_final.pdf) (accessed 9 June 2018).

<sup>18</sup> 'Mitzpe Shalem' entry in the 'Brigadier General Spiegel Database of West Bank Settlements and Outposts, Developed by Israel's Ministry of Defense' (on file with author).

<sup>19</sup> B'Tselem, *Acting the Landlord: Israel's Policy in Area C, the West Bank* (June 2013), [http://www.btselem.org/download/201306\\_area\\_c\\_report\\_eng.pdf](http://www.btselem.org/download/201306_area_c_report_eng.pdf) (accessed 10 January 2018). Kerem Navot, *Closed Garden: Declaration of Closed Areas in the West Bank* (2015), [http://media.wix.com/ugd/cdb1a7\\_5d1ee4627ac84dca83419aebf4fad17d.pdf](http://media.wix.com/ugd/cdb1a7_5d1ee4627ac84dca83419aebf4fad17d.pdf) (accessed 10 January 2018).

<sup>20</sup> Articles 53 and 55, Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (18 October 1907); Articles 34 and 57, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) (Fourth Geneva Convention); Rule 50, Destruction and Seizure of Property of an Adversary, International Committee of the Red Cross (ICRC), Customary International Humanitarian Law, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule50](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule50) (accessed 10 January 2018).

<sup>21</sup> Rule 51, Public and Private Property in Occupied Territory, ICRC, Customary International Humanitarian Law, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule51](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule51) (accessed 9 June 2018).

<sup>22</sup> James G Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (New York: Open Society Foundations, 2011). On the criminal consequences of land appropriation by corporate actors, see International Criminal Court Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016) 5.

An occupying power is prohibited from absolving itself of its obligations under international humanitarian law (IHL) or depriving protected persons of their inviolable rights through changes to the legal status of any part of the occupied territory or its demographic characteristics.<sup>23</sup> However, the unlawful transfer of Israeli civilians into the OPT,<sup>24</sup> along with the protection of their presence in that territory and their constitutional rights under Israeli domestic law, has eroded the special protection afforded by IHL to the Palestinian population. Israel's sweeping legal and institutional reforms violate the occupying power's obligation to ensure normal life in the occupied territory.<sup>25</sup>

The UNGPs explicitly include IHL as standards that business should respect when operating in conflict-affected areas, consistent with the view that IHL protects individual rights and coincides with the protections enshrined in international human rights law (IHRL). The settlements regime in the OPT [which includes not just land appropriation but also the establishment of checkpoints, restricted roads and prohibited areas and activities (for Palestinians)], entails violations of the rights to work and livelihood, given their effect on access to agricultural land and other resources such as water,<sup>26</sup> and to the freedom of movement, to health, education and family life, by creating impediments to the exercise of these fundamental rights, given their location and infrastructure.<sup>27</sup> The International Court of Justice held that the maintenance of settlements results in continuous and systematic violations of Palestinian rights in breach of Israel's extraterritorial obligations under IHRL.<sup>28</sup>

The Israeli military commander is charged – under Israeli military laws – with the protection of settlers' rights as well as the rights of Palestinians. Following a rationale approved by Israel's High Court of Justice,<sup>29</sup> the military commander has purported to fulfil his responsibilities in a way that facilitates the settlements' expansion, under the pretext that Palestinians pose a security threat to the settlements that calls for restrictions on Palestinian communities' freedom of movement. In addition, the military has imposed severe restrictions on Palestinian planning and building, and has purported to justify demolitions of homes, workshops, electricity lines, solar panels and agricultural infrastructure like water wells, pipes and access roads on the basis that they lacked permits that are in practice nearly impossible for Palestinians to obtain from the Israeli military. Some of the measures imposed have led to the involuntary relocation of

<sup>23</sup> Article 47, Fourth Geneva Convention, note 18. The Israeli authorities rely on the Interim Agreements with the Palestine Liberation Organization (PLO) to claim full control in military and civil affairs in the so-called Area C (over 60% of the West Bank where all settlements are located), in violation of Articles 7 and 8, Fourth Geneva Convention, note 18.

<sup>24</sup> Article 49(6), Fourth Geneva Convention, note 20; International Court of Justice (ICJ), 'Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (9 July 2004), paras 115–122; International Committee of the Red Cross, 'What Does the Law Say About the Establishment of Settlements in Occupied Territory?' (5 October 2010), <https://www.icrc.org/eng/resources/documents/faq/occupation-faq-051010.htm> (accessed 7 May 2018).

<sup>25</sup> Article 43, Hague Regulations, note 20. Article 64, Fourth Geneva Convention, note 20.

<sup>26</sup> On the way settlements exploit mineral extraction and fertile agricultural lands, denying Palestinians access to their natural resources, see UN settlements fact-finding mission report, note 2, para 36.

<sup>27</sup> *Ibid.*, paras 105, 109.

<sup>28</sup> ICJ Wall Opinion, note 24.

<sup>29</sup> On Israel's Supreme Court's jurisprudence on the settlements, see David Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel' (2012) 94 *International Review of the Red Cross* 207.

Palestinian communities, which may amount to unlawful acts of forcible transfer.<sup>30</sup> The structure, systemic nature and coherence of this host of violations – in their aggregate effect – may attract the individual criminal responsibility of Israeli military and political officials for war crimes and crimes against humanity.<sup>31</sup>

The violations of IHL and IHRL caused by Israel's settlement activity in the OPT are abundantly documented. Less attention is paid to the fact that these violations are a product of Israel's actions in violation of the law on the interstate use of force and its prohibition on the acquisition of territory by force (*jus ad bellum*). As the existence of the settlements amounts to the *de facto* annexation of large parts of the territory by Israel,<sup>32</sup> the situation has the effect of flagrantly denying the Palestinian people's internationally recognized right to self-determination.

Nevertheless, judicially imposed penalties for the severity and frequency of the human rights abuses that result from such instances of use of force are a rarity. The Human Rights Committee's current draft General Comment on the right to life (Article 6 of the Covenant) maintains that 'States parties engaged in acts of aggression contrary to the United Nations Charter violate ipso facto article 6.'<sup>33</sup> However, the serious nature of human rights violations that result from the maintenance of an illegal situation predicated on the use of force was condemned by the European Court of Human Rights for the first time in its interstate award judgment in *Cyprus v Turkey*. The Court ordered Turkey to pay Cyprus a sum total of EUR90 million for serious human rights violations in Northern Cyprus since 1974,<sup>34</sup> and Judge Pinto de Albuquerque's ruling contained a strong message: 'those member States that wage war, invade or support foreign armed intervention in other member States must pay for their unlawful actions and the consequences of their actions.'<sup>35</sup>

### III. IMMITIGABLE HARM TO HUMAN RIGHTS AND HOME STATE REGULATION

The involvement of business in conflict-affected environments can increase the longevity of conflict as well as the severity, frequency and likelihood of the human rights and other violations of international law. Businesses play a prominent role not only in Israel's settlement enterprise, but also in other ongoing occupations that pursue

<sup>30</sup> UN Office for the Coordination of Humanitarian Affairs (OCHA), *Under Threat: Demolition Orders in Area C of the West Bank* (September 2015), [http://data.ochaopt.org/demolitionos/demolition\\_orders\\_in\\_area\\_c\\_of\\_the\\_west\\_bank\\_en.pdf](http://data.ochaopt.org/demolitionos/demolition_orders_in_area_c_of_the_west_bank_en.pdf) (accessed 10 January 2018).

<sup>31</sup> Article 8(2)(b)(viii), Rome Statute of the International Criminal Court (ICC) (17 July 1998). Settlement activities are under examination by the ICC. Office of the Prosecutor, 'Report on Preliminary Examination Activities 2017' (4 December 2017), para 59. See also Michael Kearney, 'On the Situation in Palestine and the War Crime of Transfer of Civilians into Occupied Territory' (2016) 28:1 *Criminal Law Forum* 1.

<sup>32</sup> Human Rights Council Resolution, 'Israeli settlements in the Occupied Palestinian Territory, Including East Jerusalem, and in the Occupied Syrian Golan', A/HRC/34/L.41/Rev.1 (16 March 2017), para 7; Azarova, note 3; Omar Dajani, 'Israel's Creeping Annexation' (2017) 111 *American Journal of International Law Unbound* 51.

<sup>33</sup> Human Rights Committee, 'General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life', para 71 [http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6\\_EN.pdf](http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf) (accessed 10 January 2018).

<sup>34</sup> *Cyprus v Turkey*, Application No. 25781/94, Just Satisfaction Award, 20 May 2014, para 4.

<sup>35</sup> *Ibid*, para 24.

the displacement of the local population and engage in the appropriation of their property and the conveyance of its possession to the nationals of the occupying state.<sup>36</sup> In such environments, businesses contribute to the economy of settlements, further the expansion of settlement industrial zones and production facilities (including farms), and contribute to the diversion of land and other natural resources such as water for the benefit of Israeli civilians and Israel's market economy.<sup>37</sup> A considerable amount of settlement's agricultural and industrial products are meant for export, including to the European Union (EU) and North America.<sup>38</sup> But what standard of conduct are businesses that operate in settlements held to in international law? Who shoulders the obligation to regulate such activities? This section addresses the responsibilities of businesses and the obligations of their home states under the UNGPs in relation to activities in or related to settlements in the OPT.

### A. The Limits of Businesses' Due Diligence Responsibilities

The immitigability of the adverse human rights effects of a business's involvement in the illegal situation maintained by the settlements arises from the contribution of a business to the wrongdoing through its transactional proximity to the illegal situation in the settlements. That is, businesses engaged in transactions in relation to the settlements come into possession of titles and rights to property illegally constituted under the administrative and legal order that is implemented in the OPT by the occupying state. This includes the property rights allocated to the business, and the revenues and potential gains it becomes entitled to by virtue of its contractual relations. Business transactions with entities in the settlements not only consolidate the legal claims that the Israeli authorities seek to further through their maintenance, but benefit from the illegal rights to control and use property that are created under the Israeli laws applicable to the settlements and allocated to businesses.

In cases of occupations, the occupying state acts as the host state for foreign businesses. Occupying states that seek annexation bring the occupied territory under their domestic jurisdiction by either unlawfully extending their domestic laws into the occupied territory or adopting military laws that protect the habitual residence of their nationals in the occupied territory. For instance, Israeli law is extended to all activities related to settlement-based entities and activities. Compliance with the host state's laws in such instances, as the UNWG noted in June 2014, does not shield business from their due diligence responsibilities under the UNGPs:

... due diligence is also particularly important in a situation where the occupying power, exercising obligations equivalent to those of a 'host State', may be unable or unwilling

<sup>36</sup> Pal Wrangle, 'Occupation/Annexation of a Territory: Respect for International Humanitarian Law and Human Rights and Consistent EU Policy' (Brussels: European Parliament Think Tank, 2015). Eugene Kontorovich, 'Unsettled: A Global Study of Settlements in Occupied Territories' (2017) 9 *The Journal of Legal Analysis* 285.

<sup>37</sup> For documentation on over 500 Israeli and foreign companies involved in the settlement, see 'Who Profits from the Occupation', <https://whoprofits.org/> (accessed 10 January 2018).

<sup>38</sup> International Federation for Human Rights (FIDH) and others, 'Trading Away Peace: How Europe Helps Sustain Illegal Israeli Settlements' (October 2012) [https://www.fidh.org/IMG/pdf/trading\\_away\\_peace\\_-\\_embargoed\\_copy\\_of\\_designed\\_report.pdf](https://www.fidh.org/IMG/pdf/trading_away_peace_-_embargoed_copy_of_designed_report.pdf) (accessed 10 January 2018).



effectively to protect human rights or may itself be implicated in human rights abuses. In this regard, even if businesses in the settlements are operating in compliance with Israeli laws, the corporate responsibility to respect human rights ‘exists over and above compliance with national laws and regulations’.<sup>39</sup>

This logic resonates in the OHCHR’s report on the establishment of the database, released in January 2018:

The scale, scope and immitigability of the human rights impacts caused by settlements must be taken into consideration as part of businesses’ enhanced due diligence exercises. The Guiding Principles do not explicitly require companies to terminate operations where they are involved in human rights abuses; they do stipulate, however, that such companies should be prepared to ‘accept any consequences – reputational, financial or legal – of the continuing connection.’

... considering the weight of the international legal consensus concerning the illegal nature of the settlements themselves, and the systemic and pervasive nature of the negative human rights impact caused by them, it is difficult to imagine a scenario in which a company could engage in listed activities in a way that is consistent with the Guiding Principles and international law. This view was reinforced in Human Rights Council resolution 34/31 on the Israeli settlements, in which the Council referred to the immitigable nature of the adverse impact of businesses’ activities on human rights.<sup>40</sup>

The continuous violations underpinning the establishment of settlements and the systemic human rights abuses entailed by their regular maintenance pose a challenge to businesses looking to respect their responsibilities under the UNGPs by ensuring that their activities do not have an adverse impact on human rights. The first challenge flows from the fact that businesses that operate in settlements invariably contribute to violations of IHRL and IHL, including the unlawful appropriation of land (not for military necessity), and the wrongful allocation of property rights by the military commander for the development of settlements. Such activities not only entrench the wrongful enjoyment of property rights described above, but contribute to the generation of revenue from their use. These circumstances preclude businesses from operating in settlements with due diligence and without infringing on their responsibilities to respect human rights.<sup>41</sup>

The unlawful appropriation and routine creation of unlawfully constituted rights to possess, use and control land is enabled by Israel’s extension of its domestic legal jurisdiction to business activity in or related to settlements, such as the protection of Israeli domestic laws, courts and law enforcement, as well as the Israeli banking system, government benefits and foreign investment.<sup>42</sup> As a matter of international law, the laws in force in the occupied territory before it was occupied continue to apply. Thus, the

<sup>39</sup> Working Group, ‘Statement on the Implications of the Guiding Principles on Business and Human Rights’, note 11, 11.

<sup>40</sup> United Nations Office of High Commissioner for Human Rights (OHCHR), ‘Database of All Business Enterprises Involved in the Activities Detailed in Paragraph 96 of the Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural rights of the Palestinian People Throughout the Occupied Palestinian Territory, Including East Jerusalem’, A/HRC/37/39 (1 February 2018) (‘OHCHR report on the database’) paras 40–41.

<sup>41</sup> Compare Ronen, note 4.

<sup>42</sup> All foreign and Israeli companies that operate in Israel and the settlements are registered in Israel’s Companies Registrar based at the Israeli Ministry of Justice, under the Israeli Business Licensing Law 1968.

occupying state is obligated to keep them in force, and permit the institutions that enforce them to operate, barring limitations based on imperative security concerns. Israel's settlements is a case in point for business being unable to lawfully submit to the Palestinian laws, as the laws applicable in the territory from the perspective of international law are not those that Israel is applying, since local law has not been amended in line with the narrow restrictions for such revisions in international law.

What is more, an occupying power is absolutely prohibited from extending its domestic laws, and its public bodies' administrative jurisdiction to the occupied territory, as is the case with the application of Israeli law in Palestinian territory.<sup>43</sup> Indeed, Israeli businesses cannot but operate in settlements insofar as Israeli law prohibits them from 'discriminating' against settlements.<sup>44</sup> In doing so, they must liaise with Israeli public bodies, pay taxes to Israeli authorities, and thus exclusively benefit the Israeli market economy; contributing to violations of the occupying power's obligations not to exploit the resources of the occupied territory for its national benefit.<sup>45</sup> Israeli law also offers private individuals and businesses a range of financial benefits that incentivize their transfer into occupied territory, including grants and subsidies to cover start-up costs, rent payments and operational costs.<sup>46</sup>

Some activities undertaken by the Israeli authorities with the purpose of expanding or maintaining the settlements may mean that businesses with whom they contract are making a direct contribution to a violation of international law such as the destruction of property without military necessity for the purpose of expanding settlement units or constructing settlement infrastructure. Other activities engaged in by businesses in relation to the settlements are in large part mundane transactions such as the rental or purchase of property, or the sale, purchase or provision of services, products or financial capital to projects in the settlements. Such activities also contribute to the frequency and severity of the rights abuses that result from the conversion of property rights into revenues, often with access to wrongfully utilized assets such as state benefits for settlements.<sup>47</sup>

As all settlement-based or related business transactions benefit from the wrongful property rights regime underpinning the settlements, they contribute to the likelihood,

<sup>43</sup> Association for Civil Rights in Israel, 'One Rule, Two Systems: Israel's Regime of Law in the West Bank' (2014) 19, <https://www.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf> (accessed 9 June 2018). See also Michael Karayyani, *Conflicts in A Conflict: A Conflict of Laws Case Study on Israel and the Palestinian Territories* (Oxford: Oxford University Press, 2014). On the application of Israeli labour laws to the occupied territory, see Amir Paz-Fuchz and Yael Ronen, 'Occupational Hazards' (2012) 30 *Berkeley Journal of International Law* 580.

<sup>44</sup> See, e.g., Human Rights Watch, 'Israeli Law and Banking in West Bank Settlements' (12 September 2017), <https://www.hrw.org/news/2017/09/12/israeli-law-and-banking-west-bank-settlements> (accessed 14 June 2018).

<sup>45</sup> Article 55, Hague Regulations 1907, note 20. On the consequences of such transgressions, see Stewart, note 22.

<sup>46</sup> Who Profits, 'Financing Land Grab: The cDirect Involvement of Israeli Banks in the Israeli Settlement Enterprise' (February 2017), <https://whoprofits.org/content/financing-land-grab-direct-involvement-israeli-banks-israeli-settlement-enterprise> (accessed 10 January 2018).

<sup>47</sup> On the activities of G4S Israel in Israeli prisons, see Diakonia International Humanitarian Law Resource Center, 'Securing Injustice: Legal Analysis of G4S Israel Operations in Occupied Palestinian Territory' (2013) 15, <https://www.diakonia.se/globalassets/documents/ihl/ihl-resources-center/securing-injustice-legal-analysis-of-g4s-operations-in-occupied-palestinian-territory.pdf> (accessed 9 June 2018); Who Profits, 'The Case of G4S: Private Security Companies and the Israeli Occupation' (March 2011), <https://whoprofits.org/sites/default/files/WhoProfits-PrivateSecurity-G4S.pdf> (accessed 9 June 2018).

frequency and severity of human rights violations that are perpetuated by their maintenance. While required to respect Israeli law, businesses active in the settlements become constrained, from the perspective of international law, to mitigate in any meaningful way the adverse impact their transactions with settlement-based entities have on human rights. The systemic nature of the human rights abuses that result from the establishment of settlements and their maintenance is such that all business operations in or related to the settlements contribute to the continuous abuses of human rights resulting from the settlements.<sup>48</sup> These contributions may be impalpable and unintended, often falling short of the standard of complicity, but nonetheless entail the conversion of wrongful rights and titles into financial gains.

The fact that the violations in question are integral to the business environment in the settlements means that businesses must abstain from undertaking activities in such contexts to guarantee their ability to align their operations with their responsibilities under the UNGPs.<sup>49</sup> In a situation where businesses cannot ensure that their operations do not have an adverse impact on human rights, as they cannot conceivably be expected to influence an entire legal and political regime such as that which underpins the creation and maintenance of settlements in occupied territory, the business cannot avoid becoming involved in the situation maintained by continuous violations.<sup>50</sup> Being in fact mandated by the host state's legal order to contribute to illicit revenue flows, businesses engaged in settlement-related activity lack the means to redress or alleviate the harms.<sup>51</sup> All businesses' ability to operate diligently in this context therefore is inhibited *ab initio*, by virtue of the particular characteristics of the violations of international law entailed by the existence and maintenance of the settlements, and by the particular mode of perpetration of these violations – which are premeditated, organized and sanctioned by the host state's laws and policies.

While there is no explicit mention of the notion of an 'immitigable situation' in which all business activity would contribute to human rights in the UNGPs, Principle 17 states that 'business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.' This standard was upheld by the Human Rights Council Resolution 31/36 of March 2016 establishing the database, which stated that all businesses must terminate all activities in Israel's settlements.<sup>52</sup> Moreover, the integral

<sup>48</sup> Human Rights Watch, 'Occupation Inc.: How Settlement Businesses Contribute to Israel's Violations of Palestinian Rights' (19 January 2016), <https://www.hrw.org/news/2016/01/19/occupation-inc-how-settlement-businesses-contribute-israels-violations-palestinian> (accessed 14 June 2018).

<sup>49</sup> On the regulation of corporate wrongs in high-risk business environments, see Shift, 'Due Diligence in High Risk Circumstances' (March 2015), <https://www.shiftproject.org/resources/publications/human-rights-due-diligence-high-risk-circumstances/> (accessed 10 January 2018); SOMO – Centre for Research on Multinational Corporations, 'Multinationals and Conflict' (2014), <https://www.somo.nl/multinationals-and-conflict/> (accessed 9 June 2018); Danish Institute for Human Rights, 'Doing Business in High-Risk Human Rights Environments' (2010), [http://nhri.ohchr.org/EN/Themes/BusinessHR/DocumentsPage/Highrisk\\_Environments\\_ENG.pdf](http://nhri.ohchr.org/EN/Themes/BusinessHR/DocumentsPage/Highrisk_Environments_ENG.pdf) (accessed 9 June 2018). See also Valentina Azarova, 'The Bounds of (Il)legality: Rethinking the Regulation of Transnational Corporate Wrongs' in Ekaterina Yahyaoui (ed.), *Human Rights and Power in Times of Globalization* (The Hague: Brill, 2017) 248.

<sup>50</sup> Human Rights Council, 'Clarifying the Concepts of "Sphere of influence" and "Complicity"', A/HRC/8/16 (15 May 2008) 4–5.

<sup>51</sup> See Commentary on Principle 19, UNGPs, note 8.

<sup>52</sup> Human Rights Council, 'Resolution 31/36 Israeli Settlements in the Occupied Palestinian Territory', note 1, para 13(b).

nature of the Israeli and settlements economies means that Israeli or foreign businesses that operate in Israel assume a high risk of becoming involved in settlement-related transactions. They must therefore take ‘enhanced due diligence measures’ to ensure that they do not entrench and consolidate the internationally unlawful claims to titles and rights being furthered by the occupying state.<sup>53</sup> The inability of most business to operate in line with their UNGPs responsibilities in this kind of business environment, as we consider next, emboldens the regulatory role of home states with the aim of protecting domestic subjects from their harmful effects.

## B. The Regulatory Duties of Home States

The UNGPs maintain that the responsibilities of business and duties of states as regards situations of corporate abuses are complementary.<sup>54</sup> They also place the business in the position of determining the content of appropriate due diligence measures, and expect states (including home states) to at least encourage the adoption and monitoring of the effectiveness of such measures.<sup>55</sup> The home state’s responsibility for the actions of its businesses abroad may either flow from the potential attribution of such conduct to the state, in the case of state-owned companies or delegated authority,<sup>56</sup> or from the state’s obligation to act with due diligence to regulate the (horizontal) rights abuses of private actors.<sup>57</sup>

The home state’s responsibility is secondary and residual only up to the point that a business is either unwilling or unable to guarantee that it conducts its business operations diligently, due either to its own choices or to the lack of choice given the nature of the legal and administrative regime of the host state.<sup>58</sup> At that point, it is only right that the regulatory burden shift to the home state in line with the broader logic that ‘no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein’.<sup>59</sup> Home states are obligated to inform their businesses of the risks that certain business activities could entail under international law, but also the consequences certain activity will incur under domestic laws. In a recent opinion, the Inter-American Court on Human Rights held that

<sup>53</sup> Commentary on Principle 17, UNGPs, note 8 (‘business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.’).

<sup>54</sup> See Rachel Davis, ‘The UN Guiding Principles on Business and Human Rights and Conflict-Affected Areas: State Obligations and Business Responsibilities’ (2012) 94 *International Review of the Red Cross* 961.

<sup>55</sup> On due diligence measures in national action plans, see International Corporate Accountability Roundtable and Danish Institute for Human Rights, ‘National Action Plan Toolkit and National Baseline Assessment’ (29 November 2017).

<sup>56</sup> Article 11, International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts 2001.

<sup>57</sup> Antal Berkes, ‘Extraterritorial Responsibility of the Home States for MNCs Violations of Human Rights’ in Yannick Radi (ed.), *Research Handbook on Human Rights and Investment* (Cheltenham: Edward Elgar Publishers, 2018) (forthcoming).

<sup>58</sup> Sara L Seck, ‘Conceptualizing the Home State Duty to Protect Human Rights’ in Karin Buhman, Mette Morsing and Lynn Roseberry (eds.), *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (London: Palgrave Macmillan, 2011) 40.

<sup>59</sup> *Trail Smelter Case (United States, Canada)* (1938, 1941) III *UNRIAA* 1905, 1965; in the same sense: *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22. See also Sigrun Skogly, ‘Extraterritorial Obligations and the Obligation to Protect’ (2016) *Netherlands Yearbook of International Law* 217.

the state's control over domestic activities with extraterritorial effect can substantiate an extraterritorial jurisdictional nexus.<sup>60</sup> Neither the UNGPs nor the OHCHR's report on the database engage in detail with questions concerning the nature and extent of the extraterritorial reach of home states' human rights responsibilities. Nor has the scope and content of domestic measures with extraterritorial effect, performed within a state's territory but with effect beyond its borders, been extrapolated beyond a cursory discussion in the lead up to the UNGPs, as a separate category of regulatory measures.<sup>61</sup>

This under-explored approach to the regulation of transnational corporate activity would, however, align with the responsibility of home states as third states for internationally wrongful acts engaged in by host states under the general international law. In cases of occupation that pursue the annexation of the territory, the principal wrongs constitute serious breaches of peremptory norms of international law.<sup>62</sup> Thus, all states are under an obligation not to aid, assist or recognize as lawful, including in their domestic legal orders, violations of the peremptory norms of international law by other states and international actors. In the settlements, these breaches include foremost the violations of intransgressible rules of IHL, such as the prohibition on the 'extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly'.<sup>63</sup> The maintenance of settlements also entails transgressions of the right to self-determination of people and the prohibition on the use of force against the territorial integrity and political independence of another state, e.g., by seeking to acquire territory.<sup>64</sup>

The obligation of third states not to recognize, aid or assist the 'maintenance of an illegal situation' created by serious breaches of peremptory norms is a customary rule with roots in general principles of law that was codified by the International Law Commission in Article 41 of its Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001. This non-recognition obligation of third states codified in the Draft Articles was upheld by the Security Council in relation to the OPT on two occasions: resolution 465 (1980) called on states 'not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories',<sup>65</sup> and resolution 2334 (2016) called on states to distinguish between Israeli and Palestinian territory in their dealings with Israel and Israeli entities.<sup>66</sup> A third state whose domestic legal order gives effect to the illegal situation,

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<sup>60</sup> Inter-American Court of Human Rights, 'The Environment and Human Rights', Advisory Opinion, OC-23/17 (15 November 2017). See also Antal Berkes, 'A New Extraterritorial Jurisdictional Link Recognised by the IACTHR', *EJIL:Talk!* (28 March 2018).

<sup>61</sup> Human Rights Council, 'Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework', A/HRC/14/27 (9 April 2010) para 49. See also Berkes, note 57.

<sup>62</sup> Articles 40 and 41, International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts 2001.

<sup>63</sup> Rule 50, Destruction and Seizure of Property of an Adversary, note 20.

<sup>64</sup> Commentary on Chapter III, Articles 40–41, International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001.

<sup>65</sup> Security Council Resolution 465 (1 March 1980). The Norwegian authorities used Resolution 465 as a benchmark for assessing the charitable nature of activities under Norwegian law. Norwegian People's Aid, 'No More Tax Deductibles for Funding Settlements in Occupied Territory' (2012) <https://www.npaid.org/News/News-archive/2012/No-more-tax-deductibles-for-funding-settlements-in-occupied-territory> (accessed 10 January 2018).

including the rights, titles and entitlements that it purports to create would be liable for wrongfully recognizing as lawful the proceeds of a serious breach of a peremptory norm of international law. While the extent to which international norms on the responsibility of third states cover private dealings remains unclear, the very idea of home state regulation supposes the creation of consequences for corporate nationals that would protect the domestic legal order and dis-incentivize certain transnational activities.

To ensure the non-admission of unlawfully obtained rights and titles under the national system, home states should ensure that domestic regulatory authorities are able to address restrictive measures to its corporate nationals. Home states of businesses should examine the consequences of their companies' enjoyment of illicit rights and titles to property obtained in the OPT. This entails calibrating the application of laws related to taxation, financial regulation, procurement and consumer protection to these titles and rights in view of their invalidity as a matter of international law.<sup>67</sup> With extension of home states' civil and private laws extraterritorially, a domestic legal practice consistent with international law would ensure that such extraterritorial situations do not generate negative legal and financial consequences for procurers, investors and consumers.<sup>68</sup>

In March 2014, Human Rights Council Resolution 25/28 urged all states to notify their businesses of the legal liabilities entailed by settlement-related activities and follow through with concrete domestic regulatory measures. Less than a year earlier, the report of the UN fact-finding mission on settlements equally emphasized the role of home states in 'ensur[ing] that business enterprises domiciled in their territory and/or under their jurisdiction [...] respect human rights throughout their operations', but without offering any further guidance on the matter.<sup>69</sup>

Since 2013, 18 European governments have issued advisories that address their business communities and alert them to the reputational, economic and legal risks that may arise from operating under the particular legal regime that Israel maintains in the settlements. The UK government's advisory, like most others, provides:

There are therefore clear risks related to economic and financial activities in the settlements, and we do not encourage or offer support to such activity. Financial transactions, investments, purchases, procurements as well as other economic activities (including in services like tourism) in Israeli settlements or benefiting Israeli settlements, entail legal and economic risks stemming from the fact that the Israeli settlements, according to international law, are built on occupied land and are not recognised as a legitimate part of Israel's territory. This may result in disputed titles to the land, water, mineral or other natural resources which might be the subject of purchase or investment.<sup>70</sup>

<sup>66</sup> Security Council Resolution 2334 (26 December 2016), para 5.

<sup>67</sup> On public law coherence and home state responsibility, see Karin Buhmann, 'Juridifying Corporate Social Responsibility Through Public Law: Assessing Coherence and Inconsistencies Against UN Guidance on Business and Human Rights' (2016) 11:3 *International and Comparative Corporate Law Journal* 194.

<sup>68</sup> On this logic of 'legal necessity' for consistency, see Krassimir Nikolov, 'Ashton's Second Hat: The European Union's Funding Guidelines on Israel as a Post-Lisbon Instrument of Foreign Policy Making' (2014) 1 *Diplomacy* 167.

<sup>69</sup> UN settlements fact-finding mission report, note 2, para 117.

<sup>70</sup> UK Foreign and Commonwealth Office, 'Overseas Business Risk – Israel, Settlements', <https://www.gov.uk/government/publications/overseas-business-risk-israel/overseas-business-risk-israel-3> (accessed 10 January 2018).

Both the presentation and implementation of these advisories leave much to be desired. These advisories neither specify the potential regulatory consequences businesses may face in their domicile country for claiming to enjoy titles and rights that were wrongfully constituted and obtained, nor sets out the types of risks that business could expect to incur. The dissemination of the advice was also inconsistent. With the EU deciding not to issue an EU-wide advisory, some member states like the Netherlands undertook a more *ad hoc*, softer communications strategy dubbed as ‘discouragement policy’<sup>71</sup> to engage in dialogue with specific businesses, like the Dutch engineering firm Royal Haskoning, in order to let them ‘understand that future involvement in the project [in occupied East Jerusalem] could be in violation of international law.’<sup>72</sup> In January 2014, the second largest Dutch pension fund, Stichting Pensioenfonds Zorg en Welzijn (PGGM), divested from five Israeli banks, due to the latter’s operations in the settlements, including through contribution to their construction.<sup>73</sup>

The growing awareness of the consequences of dealings in or related to Israel’s settlements under both international law and domestic law had resulted over the last decade in an increasing number of engineering, telecommunications and retail companies, financial institutions and pension funds, reviewing and terminating their relations in the settlements.<sup>74</sup> This apparent wave of divestment decisions received a notable boost from developments at the level of EU–Israeli privileged bilateral dealings, and in particular the EU’s realization that its own dealings with Israel had been misconstrued in that it was treating as lawful rights and titles constituted by Israeli unlawful acts under EU law.<sup>75</sup>

While the basis for these decisions varied considerably, at least in the way they were publicly communicated, it is fair to say that they were all driven by the understanding that rights and titles created in such circumstances will likely attract consequences under international and domestic law. This legal reasoning was adopted in December 2016 and February 2018 when the Court of Justice of the European Union upheld the invalidity of certain EU–Morocco agreements insofar as they were being extended to Western Sahara under Morocco’s auspices without explicit consent from the Sahrawi people under the law

<sup>71</sup> Noah Browning, ‘Major Dutch Pension Firm Divests from Israeli Banks over Settlements’, *Reuters* (8 January 2014), <https://www.reuters.com/article/netherlands-israel-divestment/major-dutch-pension-firm-divests-from-israeli-banks-over-settlements-idUSL6N0KI1N220140108> (accessed 14 June 2018).

<sup>72</sup> Royal Haskoning DHV, ‘Royal Haskoning DHV Terminates its Involvement in the Wastewater Treatment Plant in East Jerusalem’ (September 2013), <http://www.royalhaskoningdhv.com/en/news/royal-haskoningdhv-terminates-its-involvement-in-the-wastewater-treatment-plant-in-east-jerusalem/727> (accessed 10 January 2018).

<sup>73</sup> Who Profits, ‘Financing Land Grab: The Direct Involvement of Israeli Banks in the Israeli Settlements Enterprise’ (February 2017) <https://whoprofits.org/content/financing-land-grab-direct-involvement-israeli-banks-israeli-settlement-enterprise> (accessed 10 January 2018).

<sup>74</sup> See, for example, Diakonia IHL Resource Centre, ‘The Unsettling Business of Settlement Business’ (May 2015), <https://www.diakonia.se/globalassets/documents/ihl/ihl-in-opt/briefs/the-unsettling-business-of-settlement-business.pdf> (accessed 10 January 2018); United Methodist Church, ‘Wespath Human Rights Guidelines and Management of Excessive Sustainability Risk’, <https://www.wespath.org/gbphb-human-rights-guidelines-and-management-of-excessive-sustainability-risk/> (accessed 10 January 2018); Peter Beaumont, ‘Orange says it Plans to Terminate Contract with Brand Partner in Israel’, *The Guardian* (4 June 2015), <https://www.theguardian.com/world/2015/jun/04/orange-says-it-plans-to-terminate-contract-with-brand-partner-in-israel> (accessed 14 June 2018).

<sup>75</sup> See, e.g., Nikolov, note 69; Patrick Mueller and Peter Smolinski, ‘The Role of Law in EU Foreign Policy-making’ (2016) *Journal of Common Market Studies* 1. See also Hugh Lovatt and Matteo Toaldo, *EU Differentiation and Israeli Settlements* (European Council for Foreign Relations, June 2015).

of treaties.<sup>76</sup> The South African High Court in February 2018 enforced the automatic invalidity of the phosphate cargo titles granted to shipping companies by the Moroccan authorities in Western Sahara.<sup>77</sup> This shows that both the legal consequences of certain activities under existing positive international law and the incipient practice of states and businesses in line with these normative standards are in need of substantiation.

#### IV. FROM COMPLICITY TO PROXIMITY: THE NORMATIVE AND FACTUAL BASIS FOR CONTRIBUTION TO HUMAN RIGHTS ABUSES

To make determinations concerning the inclusion of businesses on the database, the OHCHR should operate this mechanism under a robust normative framework that captures the legal consequences of different modalities of business transactions that ‘enable, facilitate and profit, directly or indirectly’ from the existence and maintenance of the settlements. The database is not an adjudicative mechanism, as the OHCHR report rightly notes.<sup>78</sup> However, the OHCHR can, and is indeed expected by civil society, to take on the role of monitoring, fact-finding and analysis of activity that entails transgressions of the business and states responsibilities under existing international law.<sup>79</sup>

In compiling an annual list of companies, the OHCHR needs to be able to justify and substantiate its decisions to include a business on the database with a clear set of thresholds. It must elaborate on the types of transactions and business relations that contribute to the maintenance of the settlements and are not too ‘minimal or remote’.<sup>80</sup> Considering that all business transactions related to the settlements contribute to rights abuses resulting from their maintenance, the appropriate approach to such assessments, as considered below, will be relying on a hard factual test of the direct link that is maintained between the business and entities or activities in the settlements.

##### A. Proximity to an Illegal Situation

A 2008 report of the former Special Representative of the Secretary General on Business and Human Rights (SRSG) states: ‘Avoiding complicity is part and parcel of the responsibility to respect human rights, and entails acting with due diligence to avoid knowingly contributing to human rights abuses, whether or not there is a risk of legal liability.’<sup>81</sup> Although considerable ambiguity exists about the criteria for establishing criminal or civil complicity, the most common test for accomplice liability demands that a business be in control of the wrongful act, and have the specific intent to cause the harm that

<sup>76</sup> *Council of the European Union v Polisario Front*, Judgement, C-104/16 (21 December 2016), para 106. See also *Western Sahara Campaign et al v Commissioners for Her Majesty’s Revenue and Customs*, C-266/16 (27 February 2018).

<sup>77</sup> *The Sahrawi Arab Democratic Republic and Polisario Front v NM Shipping High Court of South Africa*, C-1487/2017 (23 February 2018, [http://wsw.org/files/dated/2018-02-23/20180223\\_south\\_africa\\_ruling.pdf](http://wsw.org/files/dated/2018-02-23/20180223_south_africa_ruling.pdf) (accessed 7 May 2018)).

<sup>78</sup> UN report on the database, note 40, para 8.

<sup>79</sup> See, e.g., Amnesty International and others, ‘Joint NGO Statement in Support of the UN Human Rights Database on Business Activities Related to Settlements in the Occupied Palestinian Territory’ (20 November 2017) <https://www.amnesty.org/download/Documents/MDE1575212017ENGLISH.pdf> (accessed 9 June 2018).

<sup>80</sup> UN report on the database, note 40, para 13.

<sup>81</sup> Human Rights Council, ‘Clarifying the Concepts of “Sphere of influence”’, note 50, para 71.



is aided and abetted by its business activity.<sup>82</sup> As complicity is preoccupied with acts that cause and produce harm, it does not capture the incidental ways in which business come to possess and use illicit property rights in the illegal situation maintained by the settlements, which thereby results in their contributing or being directly linked to human rights harms.<sup>83</sup>

Whereas complicity is most often used as an adjudicative standard by judicial bodies, proximity to an illegal situation of the settlements, and the illicit property rights regime that underpins it, accounts for the wrongful gains and rights generated by such situations.<sup>84</sup> Business that come into possession of such illicit rights and titles do not cause or enable the appropriation of land, but rather contribute to the chain of custody of the illicit financial flows generated by the settlements economy.<sup>85</sup> In so doing, they consolidate and sustain the continuous violations of international law that underpin the maintenance of the settlements.

The term 'proximity' has been used in the corporate accountability debate to refer to a range of circumstances, not limited to legal relationships, that demonstrate the business' closeness to the wrongs in a manner that enables it to influence them.<sup>86</sup> The UNGPs do not use the concept of proximity. Principle 13(b) of the UNGPs provides that businesses should 'seek to prevent or mitigate human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.' It perhaps assumes a logic of proximity as a standard for determining the 'degree of directness' and the contribution of the business' product or service to an adverse impact on human rights.<sup>87</sup> As all products and services destined for the settlements contribute to the human rights abuses that result from the settlements' maintenance, each and every transaction with a settlement-based entity (and not the particular characteristics of the product or service it is intended to provide) would factually link the business' activities with adverse impact on human rights.

The logic of contribution through a direct link or proximity does not, unlike the concept of complicity, operate as a mode of liability for holding corporate officials and companies accountable. Rather, it is a form of fault for wrongful enjoyment of property rights, which pertains not only to business activities that for instance directly contribute to the construction and securitization of settlements, but also to those that provide

<sup>82</sup> See, e.g., *Richardson et al v Director of Public* [2014] UKSC 8, para 17. See also International Commission of Jurists (ICJ), *Expert Legal Panel on Corporate Complicity in International Crimes: Corporate Complicity & Legal Accountability* (Geneva: ICJ, 2008).

<sup>83</sup> For the definition of 'contribution' and 'direct link', see Debevoise Business Integrity Group and Enodo Rights, 'Discussion Draft 8: Practical Definitions of Cause, Contribute, and Directly Linked' (Debevoise & Plimpton, 2017) 7–8, <https://www.business-humanrights.org/sites/default/files/documents/Debevoise-Enodo-Practical-Meaning-of-Involvement-Draft-2017-02-09.pdf> (accessed 9 June 2018).

<sup>84</sup> On objective illegality and invalidity of wrongful titles and rights, see James Crawford, *Brownlie's Principles of Public International Law* (Cambridge: Cambridge University Press, 2012) 608.

<sup>85</sup> On the 'financialization' of land, see Tomaso Ferrando, 'Land Rights at the Time of Global Production: Leveraging Multi-Spatiality and "Legal Chokeholds"' (2017) 2 *Business and Human Rights Journal* 275.

<sup>86</sup> ICJ Expert Legal Panel Report, note 83, 25–26. See also Human Rights Council, 'Clarifying the Concepts of "Sphere of influence"', note 50, para 15.

<sup>87</sup> Thun Group of Banks, 'Paper on the Implication of UN Guiding Principles 13b and 17 in a Corporate and Investment Banking Context' (December 2017) [https://www.business-humanrights.org/sites/default/files/documents/2017\\_12\\_Thun%20Group%20of%20Banks\\_Paper\\_UNGPs%2013b%20and%2017.pdf](https://www.business-humanrights.org/sites/default/files/documents/2017_12_Thun%20Group%20of%20Banks_Paper_UNGPs%2013b%20and%2017.pdf) (accessed 9 June 2018). However, see John Ruggie, 'Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 and 17 in a Corporate and Investment Banking Context' (21 February 2017), <https://www.business-humanrights.org/sites/default/files/documents/Thun%20Final.pdf> (accessed 14 June 2018).

products to settlements that do not necessarily have any pernicious characteristics. In essence, the notion of proximity accounts for a lower threshold of harm.

The unit of analysis for determining a harmful contribution in the case of business active in the settlements is the transaction itself. In other cases, the degree of proximity to the wrongful acts and the rights claims they make would depend on the specific nature of a company's contractual relations with an entity based in or operating in the settlements: the business should be servicing, selling or buying goods to or from a settlement-based entity itself or through a business partner, while undertaking such activities as part of a continuous contract or through a recurrent set of transactions. It is through such transactions that the business wrongfully comes to possess and enjoy rights and titles, and thus to contribute to the generation of revenues based on the original wrongs (as well as consolidate the legal claims made through the wrongdoer's actions).

Although the inclusion of a business on the database is expected to affect a business' reputation, the mandate of the database is not to adjudicate the liability of businesses involved in the settlements. It is therefore appropriate to think of the database as a mechanism for monitoring, analysing and disseminating information about businesses and their activities that contribute to and benefit from serious human rights abuses in a high-risk business environment such as the OPT. Such a process should enable other businesses and their home states to comply with their respective responsibilities and duties under existing international law.

As all forms of businesses that maintain transactions in relation to the settlements are contributing to the severity and frequency of the human rights abuses that result from the very maintenance of settlements, it is appropriate that the test for determining the inclusion of a business on the database for its harmful contribution to the illegal situation is a factual one related to the directness of the link between its activities and the settlements.<sup>88</sup> The typology of degrees of proximity that follows below takes this normative standard as its starting point.

## B. Differentiated Proximities

The most common forms of relationships that businesses maintain with entities that are either based or operate in settlements can be classified into three categories, distinguished by the degree of proximity of the business to the illegal situation and thus the contribution to human rights abuses. The organizing principle for this classification is the directness of the link that a given business maintains with the settlements-based activity which seeks to generate revenues from wrongfully enjoyed property rights. Thus, proximity is a basis for substantiating the contribution that a business's activities make to the frequency and severity of the human rights abuses resulting from the existence and maintenance of the settlements. The difference in degrees of proximity accounts for the business's knowledge of the legal nature of its activities and for its ability to make adjustments in its or its partner's operations.

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<sup>88</sup> ICJ Expert Panel Report, note 83, 23.

First-degree proximity results either from the business being based in a settlement, including through a branch or franchise, or from its having entered into a contractual relationship with a settlement-based entity. This category of proximity is applicable mainly to the activities of the corporate nationals of the occupying state, but it also includes foreign parent companies with subsidiaries in Israel or the settlements, and franchise grantors with franchisees based in the settlements.<sup>89</sup> Where *prima facie* evidence demonstrates that a business is based in and operates out of a settlement, in whole or in part, that business would be deemed in ‘direct’ proximity to the human rights harms resulting from the maintenance of settlements.

Second-degree proximity is made up of companies that regularly transact with settlement-based entities and entails the ‘indirect’ proximity of business to the harmful activities. Such dealings include those of Israeli and foreign companies that buy or supply products, equipment and services to or from settlement-based entities, such as companies based in Israel with direct distribution contracts with entities based in the settlements or service providers that operate in settlements.<sup>90</sup> It further includes Israeli and foreign purchasers of services and products from settlement-based producers and wholesalers,<sup>91</sup> such as foreign importers and wholesalers that contract directly with a settlement-based manufacturer of agricultural or industrial products. This category also encompasses businesses that contract with Israeli public bodies for the implementation of illegal policies, such as a business that supplies demolition services for the Jerusalem municipality in occupied East Jerusalem, or that contracts with Israeli government bodies for the development of housing or infrastructure or the provision of other services to entities based or regularly operating settlements. It could also include an Israeli or foreign parent company that maintains operations in settlements, or is a principal financier of a project that is being implemented in the settlements.<sup>92</sup>

Lastly, third-degree proximity consists of businesses that become ‘indirectly’ involved in settlement-based operations through a business partner that itself is likely to be included in the second-degree proximity category. This includes businesses that provide services to another business based in Israel or abroad, such as a contractor, distributor or service provider, which in turn regularly engages settlement-based entities, or businesses that maintain an ongoing contractual relationship or regularly contract for

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<sup>89</sup> See, e.g., the multi-national real estate company Remax who has franchisees in settlements and includes settlement properties on its global database, Human Rights Watch, note 48. Telecommunications giant Orange, who had a brand licensing agreement with an Israeli company Partner which regularly operated in settlements. International Federation for Human Rights (FIDH) and others, ‘Dangerous Liaisons in Israeli Settlements: Orange and its Shareholder the French State’ (6 May 2015) <https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/dangerous-liaisons-in-israeli-settlements-orange-and-its-shareholder-17609> (accessed 9 June 2018).

<sup>90</sup> See, e.g., Israeli telecommunications companies that service settlements. Who Profits, ‘Bezeq – The Israeli Telecommunications Corporation’ <https://whoprofits.org/company/bezeq-israeli-telecommunication-corporation> (accessed 10 January 2018). The French company Veolia operates a landfill that services settlements. Human Rights Watch, note 48.

<sup>91</sup> See, e.g., Israeli supermarkets that buy settlement agricultural products from settlement farms, and Israeli wholesale and export companies that contract with settlement-based manufacturers.

<sup>92</sup> See, e.g., a foreign company that owns shares in an Israeli company that operates in settlements. John Mulligan, ‘CRH Sells Controversial Stake in Israel’s Only Cement Firm Mashav’, *The Independent* (8 January 2016), <https://www.independent.ie/business/crh-sells-controversial-stake-in-israels-only-cement-firm-mashav-34345981.html> (accessed 14 June 2018).

the provision of products or services to the settlements. These may be manufacturers that supply wholesalers or distributors who in turn either maintain contractual relations or regularly contract with settlement-based entities;<sup>93</sup> foreign companies that buy settlement products from Israeli exporters of settlement products (most of which are based inside Israel) or from subsidiaries of settlement-based companies;<sup>94</sup> or financial institutions that invest in companies that conduct some of their operations in the settlements.<sup>95</sup> It is not unreasonable to assume that such businesses are in a position to gain knowledge of their partners' activities and hence should with proof to this effect be considered to be *knowingly* engaged in such transgressions that directly link their operations with the adverse impacts on human rights caused by the maintenance of the settlements.

Perhaps wisely, the OHCHR report does not intend the database to cover the third-degree category of proximity. Most of the sectors enumerated in the OHCHR report on the establishment of the database contribute to the economic integration of the settlements within Israel.<sup>96</sup> The report notes that companies that responded to allegations of their involvement in the settlements by maintaining that they have no control over their partners' activities, are nevertheless required by Principle 13 of the UNGPs to 'actively identify and assess any actual or potential adverse human rights impacts made as a result of business relationships.'<sup>97</sup> The report further maintains that relations that are 'remote and minimal' will not result in a business's inclusion on the database, but does not provide any further guidance on the relation between this exclusionary criterion and the 'strict liability' standard consonant with the seriousness and structural character of the violations that underpin the business environment in the settlements.

## V. CONCLUDING REMARKS: THE DATABASE IN CONTEXT

In the Israeli–Palestinian context, the turn to corporate accountability by human rights advocates coincided with the invocation of the international obligations of third states not to recognize as lawful, aid or assist an illegal situation created and maintained through serious – continuous and systemic – breaches of peremptory norms.<sup>98</sup> It has naturally been combined with appeals to all states and international actors such as the EU, to exercise their *erga omnes* obligation to engage in international cooperation to

<sup>93</sup> See, e.g., a foreign construction equipment company that supplies an Israeli distributor who in turn contracts with a settlement-based municipality or development companies. Who Profits, 'Facts on the Ground: Heavy Engineering Machinery and the Israeli Occupation' (July 2014), <https://whoprofits.org/bulldozers> (accessed 14 June 2018).

<sup>94</sup> See, e.g., foreign importers that buy agricultural produce from exporters that source their products from settlement farms, and foreign retailers or wholesalers who buy from European subsidiaries of an Israeli exporter of settlement agricultural products.

<sup>95</sup> See, e.g., banks or pension funds that invest in a company with operations in the settlements. VBDO, 'Dutch Institutional Investors and Investments related to the Occupation of the Palestinian Territories' (February 2014), [https://business-humanrights.org/sites/default/files/media/vbdo\\_dutch\\_institutional\\_investors\\_7.pdf](https://business-humanrights.org/sites/default/files/media/vbdo_dutch_institutional_investors_7.pdf) (accessed 10 January 2018).

<sup>96</sup> OHCHR report on the database, note 40, para 47.

<sup>97</sup> *Ibid.*, para 59.

<sup>98</sup> James Crawford, 'Third Party Obligations with Respect to Israeli Settlements in the Occupied Palestinian Territories, Expert Opinion' (24 January 2012) <https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> (accessed 7 May 2018).

bring such illegal situations and the violations that maintain them to an end.<sup>99</sup> In view of the scale of ongoing foreign corporate involvement in Israel's settlements, such obligations appear at first blush to ring hollow.

The establishment of a database of businesses active in the settlements can contribute to mending the critical knowledge gaps and to the resolution of some of the indeterminacies concerning the scope and content of corporate and state responsibilities in existing international law in relation to such activities. Neither the incipient practice of the EU and its member states to ensure the correct territorial application of bilateral agreements in line with the EU's internal laws and policies,<sup>100</sup> nor the decisions of business to terminate or revise settlement-related dealings provide a clear picture of the full range of legal consequences of such business activities as a matter of international law.<sup>101</sup> In the business and human rights context, there is a notable shortage of guidance about the type of business environments that entail systemic rights abuses either within the territory of the host state or beyond its borders, and may thus require a stricter standard of due diligence of businesses, and hence a more proactive regulatory role on the part of their home states.

The institutional role of the UN is to address contemporary challenges and assist states to understand the consequences of their actions in international law. The database is thus expected to function as an implementing mechanism for existing business and human rights norms; one that offers interpretative guidance on the consequences of such business activities for the role of home states, and on the due diligence standard that businesses are expected to follow. Settlements – established and maintained in occupied territory with the aim of enabling the unlawful transfer of the population of the occupying state and displacing that which is indigenous to the occupied state – are but one emblematic business environment where the full remedial potential of existing international law norms in regulating corporate actors' transnational dealings can be translated into practice.

It is against this background that the development of a database for business involved in settlements becomes a significant milestone. The normative framework and regulatory model that the OHCHR would develop for this database could also be transposed to other ongoing cases of occupation where property rights are generated and allocated on the basis of unlawful legislative reforms in the occupied territory and in a manner that is systematically (positively) discriminatory against the occupying state and its nationals:<sup>102</sup> Armenian-occupied Nagorno Karabakh,<sup>103</sup> Moroccan-annexed Western Sahara,

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<sup>99</sup> Francois Dubuisson, *The International Obligations of the European Union and Its Member States with regard to Economic Relations with Israeli Settlements*, Expert Opinion (Centre de Droit International, Brussels Free University, 11.11.11. and FIDH February 2014).

<sup>100</sup> Patrick Mueller and Peter Slominski, 'The Role of Law in EU Foreign Policy-Making: Legal Integrity, Legal Spillover, and the EU Policy of Differentiation towards Israel' (2016) 55:4 *Journal of Common Market Studies* 1.

<sup>101</sup> 'Legal Opinion on Third Party Obligations with Respect to Illegal Economic and Other Activities in the Occupied Territories of Azerbaijan', Annex to the letter dated 10 April 2017 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, A/71/880-S/2017/316 (26 April 2017).

<sup>102</sup> On the inconsistent application of international law to business in occupied territory, see Kontorovich, note 4. On the inconsistent enforcement of international law to settlements, see Kontorovich, note 36.

<sup>103</sup> Ministry of Foreign Affairs of the Republic of Azerbaijan, 'Illegal Economic and Other Activities in the Occupied Territories of Azerbaijan' (2016), [http://mfa.gov.az/files/file/MFA\\_Report\\_on\\_the\\_occupied\\_territories\\_March\\_2016\\_1.pdf](http://mfa.gov.az/files/file/MFA_Report_on_the_occupied_territories_March_2016_1.pdf) (accessed 10 January 2018).

Russian-occupied Crimea,<sup>104</sup> Abkhazia and South Ossetia,<sup>105</sup> Transnistria,<sup>106</sup> and Turkish-occupied Northern Cyprus.<sup>107</sup>

Notwithstanding the exigency of the task at hand, the political climate surrounding the creation of the UN database has been predominantly hostile: Israeli politicians and their US allies have criticized the UN for singling out Israel through its exceptional treatment by creating a new mechanism intended to specifically address its actions. Israeli officials maintain that the list is ‘non-binding and insignificant’,<sup>108</sup> and have managed to subject the UN to intense political pressure through threats to its financial integrity.<sup>109</sup> Political narratives in the US, the UK and France have assimilated the database with ‘boycotts’ against Israel, which are prohibited under their respective domestic laws.<sup>110</sup> The misconceived view of the purpose of this initiative as one that is intended to politically isolate and bully Israel has fuelled state and business hostility towards it.

The OHCHR report on the establishment of the database begins to dispel these misconceived views by setting out its work methods and providing an initial sketch of its normative framework.<sup>111</sup> These are important first notes towards a decision-making process that can explain and raise awareness amongst businesses of the consequences of activities in settlements in occupied territories. Two critical issues should be elaborated upon to clarify when a business active in settlements would contribute to rights abuses such that it would be included on the database: the wrongful acts that underpin the illicit property regime in Israel’s settlements and hence all commercial activity taking place there; and the types of transactions that would be deemed as contributing to this regime.

Ultimately, the likelihood of this much-needed regulatory initiative properly conceived to succeed hinges on the ability of the UN to demonstrate the database’s added value for both business and home states. In particular, this initiative has the potential to further understanding and application of the existing obligations of home states as third states in the law of state responsibility, in relation to their corporate nationals’ transnational dealings; namely, how a home state could and should protect its domestic legal order and domestic subjects from contributions to illicit proceeds and financial flows in transnational contexts.<sup>112</sup>

<sup>104</sup> See, e.g., European Union External Action (EEAS), ‘EU Restrictive Measures in Response to the Crisis in Ukraine’ (16 March 2017). EEAS, ‘The EU non-recognition policy for Crimea and Sevastopol: Fact Sheet’ (12 December 2017).

<sup>105</sup> Government of Georgia, ‘Occupied Territories of Georgia’, [http://gov.ge/index.php?lang\\_id=ENG&sec\\_id=220](http://gov.ge/index.php?lang_id=ENG&sec_id=220) (accessed 10 January 2018).

<sup>106</sup> See, e.g., *Mozer v The Republic of Moldova and Russia*, Application No. 11138/10 (23 February 2016).

<sup>107</sup> Cyprus Ministry of Foreign Affairs, ‘Greek Cypriot Properties Under Turkish Military Occupation’, [http://www.mfa.gov.cy/mfa/mfa2016.nsf/mfa12\\_en/mfa12\\_en?OpenDocument](http://www.mfa.gov.cy/mfa/mfa2016.nsf/mfa12_en/mfa12_en?OpenDocument) (accessed 10 January 2018).

<sup>108</sup> Barak Ravid, ‘Israel to the West: Don’t Honor UN Human Rights Council’s Vote to Blacklist Settlement-Linked Firms’, *Haaretz* (25 March 2016), <https://www.haaretz.com/israel-news/.premium-israel-to-the-west-don-t-honor-unhrc-vote-1.5422459> (accessed 14 June 2018).

<sup>109</sup> ‘US Threatens to Cut UN Funding Over Settlement ‘Blacklist’ – Report’, *Times of Israel* (30 August 2017), <https://www.timesofisrael.com/us-threatens-to-cut-un-funding-over-settlement-blacklist-report/> (accessed 14 June 2018).

<sup>110</sup> See, e.g., Amir Tibon, ‘US Legislators, AIPAC Push Anti-BDS Bill After UN Letter Warns Companies Against Operating in Settlements’, *Haaretz* (28 September 2017), <https://www.haaretz.com/us-news/.premium-u-s-legislators-aipac-push-anti-bds-bill-in-light-of-un-blacklist-1.5454314> (accessed 14 June 2018).

<sup>111</sup> UN report on the database, note 40, 3–6.

<sup>112</sup> On domestic regulatory agencies as international law-applying and enforcing actors, see Benedict Kingsbury, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’ (1998) 19 *Michigan Journal of International Law* 345. See also Catherine Redgewell, ‘National Implementation’ in Daniel Bodansky *et al* (eds.), *Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007).

To this end, the database's proponents should arguably prioritize the need to secure the support of states and businesses for this initiative. This support will be crucial in overcoming institutional hurdles (e.g., budgetary and staff allocation) and ensuring that states do not lose sight or render into disrepute their commitment to the UNGPs and their existing obligations under other international law, while leaving their businesses to unwittingly perpetuate and profit from some of the most egregious cases of human suffering.