

Security, Business and Human Rights in the Occupied Palestinian Territory

Marya FARAH* and Maha ABDALLAH**

Abstract

Businesses have increasingly recognized their responsibility to respect human rights in their operations. This has been in part guided by international initiatives, such as the United Nations Guiding Principles on Business and Human Rights, as well as guidance and regulations from states. Although these measures recognize risks associated with conflict-affected areas, contexts of occupation present unique concerns. These issues become even more complex when states send mixed messages to businesses. This is most evident when examining the discourse on and regulation of business operations linked to Israel's prolonged occupation of Palestinian territory, especially those with operations and relationships related to 'security'. This article seeks to highlight the frequent disregard of human rights responsibilities and obligations by states and businesses related to the occupied Palestinian territory and population, which has created a gap in accountability that civil society has attempted to address.

Keywords: civil society, complicity, corporate accountability, occupied Palestinian territory, security

I. INTRODUCTION

Situations of conflict evoke the most basic images of life and death. State and non-state actors fight for power and control, while average citizens are caught in the crosshairs. Conflict breeds instability and insecurity – a ripe environment for individuals and businesses to reap profit from the chaos by aligning themselves with the strongest entity. In the context of the Occupied Palestinian Territory (OPT),¹ where Israel, as Occupying Power, third states and private actors have largely failed to respect and implement international law, the situation of prolonged occupation is, in part, perpetuated by a discourse that distorts notions of security and disregards human rights.² As part of this discourse, Israel simultaneously brands itself as

* Research Consultant, Juris Doctor, M.P.P.

** Legal Researcher, Al-Haq, LL.M. International Human Rights Law.

¹ The Occupied Palestinian Territory encompasses the West Bank, including East Jerusalem, and the Gaza Strip.

² While outside the scope of this paper, it should be noted that Israel's prolonged occupation has been increasingly deemed illegal by scholars and others. See Orna Ben-Naftali, Aeyal M Grossand Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23:3 *Berkeley Journal of International Law*; Richard Falk and Burns H Weston, 'The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza' in *International Law and the Administration of the Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, E Playfair (ed) (Clarendon Press, 1992), p 146–147; OHCHR, 'Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967', A/72/43106 (23 October 2017), para 15–62.

vulnerable,³ while promoting itself, alongside the private business sector, as a leader in the field of security.

Israel stands in the top ten of the largest exporters of arms,⁴ using its ability to perpetually ‘field test’ weapons serving as a boon in the industry.⁵ These purported security ‘successes’ drive the insecurity and dehumanization of the protected Palestinian population in the OPT, denying their rights to life and bodily integrity, amongst others.⁶ Israel more broadly uses the umbrella of ‘security’ or ‘military necessity’ to legitimize other policies against the Palestinian population, including those that impede movement, obstruct access to natural resources, and restrict livelihoods. While not characterized by the same physical violence as other practices, they nonetheless aim at and cause suffering and threaten the viability of Palestinian life.⁷ Notably, these practices and policies all seek to project an appearance of legality.⁸

While this broad ‘security’ paradox is driven by Israel’s aim to maintain the occupation of Palestinian territory, businesses have played a central role in facilitating and reinforcing Israel’s objectives of expansion, annexation and control. By following the lead of Israel, the Occupying Power and ‘host’ state for corporations in the OPT,⁹ businesses find countless opportunities to derive profits from normalized violations of international law. By following the lead of their ‘home’ states, transnational businesses have benefited from inconsistent, and often unimplemented, domestic policies.¹⁰ Business enterprises have been able to maintain their operations in the OPT and/or their

³ Israel highlights its perceived vulnerability, including by calling Palestinian citizens a ‘security and demographic threat’ and by noting perceived regional risks. As part of this discourse, it has renewed the ‘state of emergency’ every year since its establishment in 1948. Statements by international actors, like the Quartet, support such a discourse by equating Israeli ‘security needs’ with Palestinian statehood. Evelyn Gordon, ‘No Longer the Political Fringe’, *Jerusalem Post* (13 September 2006), <https://www.jpost.com/Opinion/Op-Ed-Contributors/No-longer-the-political-fringe-34777> (accessed 2 September 2018). ‘Israel’s unique situation – a small and vulnerable country surrounded by many large and Hostile Neighbors [...]’, Gerald M Steinberg, ‘Israel at Sixty: Asymmetry, Vulnerability, and the Search for Security’ (June 2008) 564 *Jerusalem Center for Public Affairs*, <http://jcpa.org/article/israel-at-sixty-asymmetry-vulnerability-and-the-search-for-security/> (accessed 2 September 2018).

⁴ Pieter D Wezman et al, ‘Trends in International Arms Transfers, 2017’ (March 2018) *Stockholm International Peace Research Institute*, https://www.sipri.org/sites/default/files/2018-03/fssipri_at2017_0.pdf (accessed 2 September 2018).

⁵ ‘After every campaign of the kind that is now taking place in Gaza, we see an increase in the number of customers from abroad.’ Shuki Sadeh, ‘For Israeli Arms Makers, Gaza War Is a Cash Cow’, *Haaretz* (11 August 2014), <https://www.haaretz.com/gaza-war-is-arms-industry-cash-cow-1.5258893> (accessed 2 September 2018).

⁶ *Ibid.*

⁷ These policies have led to 76 per cent of Palestinian residents in East Jerusalem living below the poverty line, and the projection that Gaza will be ‘unliveable’ by 2020. The Association for Civil Rights in Israel, ‘East Jerusalem Facts and Figures 2017’ (24 May 2017), <https://www.acri.org.il/en/2017/05/24/east-jerusalem-facts-and-figures-2017/> (accessed 29 August 2018). ‘Living Conditions in Gaza “more and more wretched” over Past Decade, UN Finds’ *UN News* (11 July 2017), <https://news.un.org/en/story/2017/07/561302-living-conditions-gaza-more-and-more-wretched-over-past-decade-un-finds> (accessed 3 September 2018).

⁸ For further examples of repressive tactics used by Israel which sought to project legitimacy, see James Ron, ‘Savage Restraint: Israel, Palestine and the Dialects of Legal Repression’ (November 2000) 47 (4) *Social Problems* 445–472.

⁹ Due to its effective control over the OPT, Israel incurs the responsibilities of a ‘host’ State. Israel also acts as a ‘home’ state to the numerous Israeli business enterprises operating in the OPT. UN Office of the High Commissioner for Human Rights (OHCHR), ‘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 13 April 2018).

¹⁰ Israel acts as both home and host state for Israeli businesses present in the OPT.

business relationships linked to Israel's occupation due to the vacuum of accountability present. Within this context, continued occupation, colonization and gross human rights abuses are not only sustainable, but profitable. Chipping away at this *status quo*, however, are civil society organizations, pioneers in monitoring and advancing human rights and the rule of law, which seek to bring attention and accountability to these abuses.

The situation in the OPT is not unique in that private actors, including business enterprises, have a heightened risk of directly or indirectly being involved in human rights abuses due to the context of conflict.¹¹ What is perhaps unique are the inconsistent policies adopted by states and businesses that hold the OPT as an exception, and leave it outside of the usual business and human rights discourse.¹² As such, this article explores these inconsistencies by providing case studies of business involvement in Israeli 'security' policies and measures in the OPT, including private security companies, and companies linked to the construction of the Annexation Wall and house demolitions. Case studies presented in this paper further illustrate that mechanisms currently available, on a domestic and international level, have proven to be inadequate, and have failed to hold state actors and businesses to account for the commission of gross human rights abuses in the OPT, or provide redress for those affected.

II. APPLICABLE LEGAL FRAMEWORK

Following the Six-Day War in June 1967, Israel occupied the West Bank, including East Jerusalem, and the Gaza Strip. Israel applies Israeli civil laws to settlers in the West Bank, whereas Palestinians living in the OPT are generally subject to Israeli military law.¹³ Israel insists that the human rights treaties that it has signed on to do not apply to

¹¹ Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011), Principle 7. The 'most egregious business-related human rights abuses take place in conflict affected areas and other situations of widespread violence.' UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie – Business and human rights in conflict-affected regions: challenges and options towards State Responses' A/HRC/17/32 (27 May 2011), Summary.

¹² This is exemplified in the legislations targeting the global Boycott, Divestment and Sanctions (BDS) movement, which promotes non-violent measures to end international support to Israel given its continued occupation and oppression of Palestinians, and pressure Israel to comply with international law. Anti-BDS legislation, issued by Israel and other states, seeks to target legitimate civil society movements and obscure states' legal obligations. See the Entry into Israel Law (Amendment No. 28) (Israel), accepted March 2017. The Law denies visa or residence permit for persons associated with an organization or body that publicly calls for the boycott of Israel, or if the person is personally participating in such boycott, available in English at: <http://www.alhaq.org/en/wp-content/uploads/2018/02/P-20-1906.pdf> (accessed 4 September 2018); see also The Times of Israel, Anti-BDS Legislation, available at: <https://www.timesofisrael.com/topic/anti-bds-legislation/> (accessed 28 April 2018).

¹³ Since 1967, Israel established a military administration over the OPT. See Proclamation No. 1 Concerning the Takeover of the Administration by the Israel Defense Forces, followed by Military Proclamation No. 2 Concerning Regulation of Authority and Judiciary (West Bank) (1967). In 1981, through Military Order No. 947, the Israeli Military Commander transferred legal and administrative powers to the Israeli Civil Administration. See also Diakonia, 'Facts – Law and Order in the Occupied Palestinian Territory' (2014), <https://www.diakonia.se/globalassets/documents/ihl/ihl-resources-center/fact-sheets/law-and-order-in-the-occupied-palestinian-territory.pdf> (accessed 9 October 2018).

the OPT,¹⁴ and that the Fourth Geneva Convention is not applicable *de jure* in the OPT.¹⁵ The International Court of Justice (ICJ), United Nations (UN) bodies, including the UN Security Council and treaty bodies, the International Committee of the Red Cross (ICRC), and others have rebuked these positions.¹⁶ Israel's obligations towards the Palestinian population in the OPT are not diminished by the Palestinian Authority's presence in some parts of the West Bank nor Hamas in the Gaza Strip, as Israel retains effective control over the OPT.¹⁷

It is further important to underscore that while it is well established that settlements are illegal under international law, the Israeli government not only argues that its settler population is lawfully present,¹⁸ but also provides financial support and security for the maintenance and growth of settlements. International and Israeli businesses are also incentivized by the Israeli government, including by low rent, tax breaks and other benefits, to operate in settlements.¹⁹ The Israeli High Court of Justice (HCJ) plays an important role in sanctioning these policies, including by holding that the issue of settlements in the OPT is non-justiciable.²⁰

A. International Human Rights Law and Business Enterprises

In situations of occupation, international human rights law is applicable and complementary to international humanitarian law and the law of occupation, so that the fundamental rights of the occupied population are fully protected. While the state remains the primary duty bearer to respect, protect and fulfil human rights, non-state actors, including private actors and business enterprises, are also expected to respect human rights standards and guarantees. The Universal Declaration of Human Rights (UDHR), the foundation for other UN human rights treaties, expanded the scope of human rights obligations beyond the state. The Declaration stipulates that 'every

¹⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) (*Legal Consequences* hereinafter), para 102, 177.

¹⁵ *Ibid*, para 93.

¹⁶ International Committee of the Red Cross (ICRC), 'Conference of High Contracting Parties to the Fourth Geneva Convention' (5 December 2001), para 2, <https://www.icrc.org/eng/resources/documents/statement/57jrgw.htm> (accessed 30 August 2018); United Nations Meetings Coverage and Press Releases, 'Israel's Settlements have No Legal Validity, Constitute Flagrant Violation of International Law, Security Council Reaffirms' (23 December 2016), <https://www.un.org/press/en/2016/sc12657.doc.htm> (accessed 9 September 2018); Human Rights Committee, 'Concluding Observations of the Fourth Periodic report of Israel', CCPR/C/ISR/CO/4 (21 November 2014), para 5.

¹⁷ Theodor Meron, 'The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War' (2017) 111:2 *The American Society of International Law* 362–364.

¹⁸ The Israeli government has argued that Israeli citizens have 'a natural right to establish their homes' in the West Bank. Adalah, 'Responses of Israeli Government and Attorney General in Settlements Regularization Law Case (January 2018)', <https://www.adalah.org/en/content/view/9371> (accessed 8 October 2018). Israel Ministry of Foreign Affairs, 'Israeli Settlements and International Law, Israel Ministry of Foreign Affairs' (30 November 2015), <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx> (accessed 25 April 2018).

¹⁹ UN Human Rights Council, '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 (7 February 2013), para 22 and 97.

²⁰ In *Bargil v Government of Israel*, the issue before the Court was whether the Government's policy to allow Israeli citizens to settle the OPT was legal. The Court denied the petition, holding that the issue was 'predominately political' rather than 'predominantly legal'. *Bargil v Government of Israel*, HCJ 4481/91 (25 August 1993), para 5, <http://www.alhaq.org/attachments/article/238/91044810.z01.pdf> (accessed 25 April 2018).

individual and organ of society' must commit to the standards set forth to promote rights and freedoms, without excluding any person or entity – 'no company, no market'.²¹ Private and corporate sectors are therefore expected to observe and uphold human rights standards in their codes of conduct and operations.

A recent development concerning the conduct of businesses in the context of international human rights law is the UN Guiding Principles on Business and Human Rights (UNGPs). The UNGPs reiterate states' legal obligations to protect human rights, including by monitoring and regulating corporations within their jurisdiction. The UNGPs further stipulate that corporations themselves must respect human rights, including by undertaking enhanced due diligence and providing grievance mechanisms for those affected by their operations.²² States have recognized these shared responsibilities by developing National Action Plans (NAPs),²³ and introducing legislation that aims to prevent human rights abuses²⁴ and allows courts to have jurisdiction over companies operating extraterritorially.²⁵ In some cases, states, such as the Netherlands,²⁶ have also extended liability to parent companies for the activities of their subsidiaries.²⁷

B. International Humanitarian Law, the Law of Occupation, and Business Enterprises

The sources of international humanitarian law include the Hague Conventions of 1899 and 1907,²⁸ the four Geneva Conventions of 1949²⁹ and their Additional Protocols of

²¹ Louis Henkin, 'The Universal Declaration at 50 and the Challenges of Global Markets' (Keynote Addresses, 1999), <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1602&context=bjil> (accessed 12 April 2018).

²² Guiding Principles, note 11, Principle 15, 7 and 29.

²³ Nineteen countries have produced a National Action Plan: UK, the Netherlands, Denmark, Finland, Lithuania, Sweden, Norway, Colombia, Switzerland, Italy, USA, Germany, France, Poland, Spain, Belgium, Chile, Czech Republic and Ireland. UN OHCHR, State National Action Plans, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (accessed 1 March 2018).

²⁴ For example, the UK adopted the Modern Slavery Act 2015.

²⁵ Ashley Hogan, 'France Approves Law to Hold Parent Corporations Liable for Subsidiary Human Rights Violations' *Jurist* (23 February 2017), <http://www.jurist.org/paperchase/2017/02/france-approves-law-to-hold-parent-corporations-liable-for-subsiary-human-rights-violations.php> (accessed 2 April 2018).

²⁶ Section 2 of the Dutch International Criminal Offences Act confers extraterritorial jurisdiction to the Dutch court and Dutch criminal law to '(a) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the suspect is present in the Netherlands... (c) a Dutch national who commits any of the crimes defined in this Act outside the Netherlands.' Netherlands, International Crimes Act, available in English at: https://documents.law.yale.edu/sites/default/files/netherlands_-_international_crimes_act_english_.pdf (accessed 7 October 2018). ICRC, 'Netherlands – Practice Relating to Rule 157. Jurisdiction Over War Crimes', https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_nl_rule157 (accessed 7 October 2018).

²⁷ Robert McCorquodale, 'Human Rights and Business: Is International Law Relevant?' *OUP Blog* (19 December 2016), <https://blog.oup.com/2016/12/human-rights-business-law/> (accessed 23 March 2018).

²⁸ Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 29 July 1899), and Hague Convention (IV) Respecting the Laws and Customs of War and Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907).

²⁹ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked of Armed Forces at Sea (adopted 12 August 1949); Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949).

1977,³⁰ covering both international and non-international armed conflicts, and customary international law. Article 47 of the Fourth Geneva Convention stipulates that where a state exercises effective control over foreign territory a situation of occupation exists, and the state is required to fulfil its obligations in the best interest of the occupied population and ensure their protection and their rights.³¹

Similarly, under Article 43 of the Hague Regulations, the Occupying Power is obliged to ensure public order and the safety of the occupied population.³² The rules of international humanitarian law allow the Occupying Power to take measures of control and security when necessary;³³ however, such measures must respect fundamental guarantees of international law.³⁴ In doing so, an Occupying Power must strike a balance between military necessity, proportionality, and the interests of the occupied population. A state may not invoke the principle of necessity 'as a ground for precluding the wrongfulness of an act not in conformity with an international obligation' unless it is 'the only way for the State to safeguard an essential interest against a grave and imminent peril'.³⁵

States, armed groups and individuals are bound to respect and abide by international standards relevant to armed conflict should a nexus between their activities and the conflict exist.³⁶ As such, the rules of international humanitarian law apply to state and non-state actors.³⁷ In the same vein, the Occupying Power is also responsible for actions of private business enterprises operating within its jurisdiction,³⁸ as well as state agents including '... any person or entity... exercising legislative, executive, judicial or any other functions'.³⁹ Article 29 of the Fourth Geneva Convention specifies that the

³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1997).

³¹ The Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949), art 47.

³² Convention (IV) respecting the Laws and Customs of War on Land (Hague Regulations) (adopted 18 October 1907), art 43.

³³ Certain rights, even in times of conflict or states of emergency are non-derogable, 'not only because these rights are seen as particularly important to both international humanitarian law and human rights law, but also because human rights case-law has in practice treated them as largely non-derogable'. ICRC, Customary IHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_intofugu (accessed 1 September 2018); UN Human Rights Committee, 'General Comment 29: State of Emergency (Article 4)', CCPR/C/21/Rev.1/Add.11 (31 August 2001), para 6; Fourth Geneva Convention, note 31, art 27(4).

³⁴ Oscar Uhler and Henri Coursier, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary*, Volume IV (ICRC), art 27; Nils Melzer, *International Humanitarian Law – A Comprehensive Introduction* (ICRC 2016), 225–226.

³⁵ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) A/56/10, art 25.

³⁶ ICRC, 'Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law' (2006), <https://www.icrc.org/en/publication/0882-business-and-international-humanitarian-law-introduction-rights-and-obligations> (accessed 14 March 2018).

³⁷ Salil Tripathi, 'Business in Armed Conflict Zones: How to Avoid Complicity and Comply with International Standards' (2011), https://www.ihrb.org/pdf/Politorbis_50_Tripathi_Business_in_Armed_Conflict_Zones.pdf (accessed 1 February 2018).

³⁸ Harvard University, 'Private Security Companies in the Occupied Palestinian Territory (OPT): An International Humanitarian Law Perspective' (2008), <http://www.hpcrresearch.org/sites/default/files/publications/PSCbrief.pdf> (accessed 12 February 2018).

³⁹ This definition could be applied to business enterprises that assume state responsibilities and activities, such as private military and security agents, amongst others. International Law Commission, Draft Articles on Responsibility of States, note 35, art 4(2) and (1).

Occupying Power is responsible for the commissions and activities of its ‘agents, irrespective of any individual responsibility which may be incurred’.⁴⁰ Both the agent and the state may become the subject of liability, unless the commission of the illegal act was carried out by the agent ‘truly independently’ from the Occupying Power; in which case the latter cannot be held accountable.⁴¹

More broadly, in the case of *Congo v Uganda*, the ICJ found that the Occupying Power is in breach of its obligations under international law where it fails to exercise its due diligence with non-state actors within its jurisdiction to prevent them from becoming perpetrators of human rights violations.⁴² The UNGPs similarly emphasize state responsibility in ensuring that businesses domiciled within their territory respect human rights and humanitarian law in their operations both domestically and abroad.⁴³ Special attention is also granted to business operations and relationships in conflict-affected areas in the draft treaty to regulate the activities of transnational corporations and other business enterprises.⁴⁴

C. International Criminal Law and Business Enterprises

Grave breaches of international humanitarian law, including war crimes, have been prosecuted under domestic military tribunals and commissions, *ad hoc* international criminal tribunals, and the International Criminal Court (ICC).⁴⁵ State actors may be subject to individual criminal liability for internationally recognized crimes, involving direct participation or complicity.⁴⁶ Representatives and officers of business enterprises that commit,⁴⁷ instigate,⁴⁸ order⁴⁹ or plan⁵⁰ a crime may be held criminally liable.⁵¹ Once a link has been established between the business’s activities and grave breaches of international law in the context of an armed conflict, business leaders or representatives may be exposed to individual criminal responsibility for war crimes.⁵²

⁴⁰ Fourth Geneva Convention, note 31, art 29.

⁴¹ Fourth Geneva Convention, Commentary of 1958, art 29.

⁴² Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*), International Court of Justice Summary of the Judgment (19 December 2005).

⁴³ Guiding Principles, note 11, Principles 7 and 12.

⁴⁴ Legally Binding Instrument to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft, 16 July 2018, art 15(4).

⁴⁵ Rome Statute, International Criminal Court, adopted 17 July 1998 and entered into force 1 July 2002.

⁴⁶ The Rome Statute differentiates between participation and perpetration through the ‘control over the crime’ and ‘joint control’ and ‘essential contribution’ to the act. See William Schabas, *An Introduction to the International Criminal Court*, 4th edn (Cambridge University Press, 2014), 225. Complicity may be active, encompassing direct and indirect complicity, or passive/silent complicity characterized as beneficiary complicity. Sureya Deva and David Bilchitz, *Human Rights Obligations of Businesses: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013), 221.

⁴⁷ *Prosecutor v Galic*, Trial Chamber I (5 December 2003), para 168. Rome Statute, note 45, art 25(3)(a).

⁴⁸ *Gacumbitsi v Prosecutor*, Appeals Chamber (7 July 2006), para 129. Rome Statute, note 45, art 25(3)(b).

⁴⁹ *Ibid*, paras 181–183. Rome Statute, *ibid*.

⁵⁰ *Prosecutor v Akayesu*, Trial Chamber (2 September 1998), para 480.

⁵¹ Business and International Humanitarian Law, note 36, 15.

⁵² Anita Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon – An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations’ (2002) 20:1 *Berkeley Journal of International Law* 119.

During conflict, corporations can be directly and indirectly implicated with grave breaches of international humanitarian law as either immediate perpetrators or through their involvement and participation with other actors, i.e., complicity.⁵³ Indirect participation may occur when companies use their influence to manipulate public and governmental institutions for the purpose of increasing revenue and authority, leading to human rights abuses and violations of humanitarian law. Corporations that maintain economic relations and support state agencies or armed groups committing war crimes may also be complicit. Direct participation in the commission of crimes ranges from corporations that assume state-assigned roles, such as is the case with private security agents granted authority to use force, to those that may be involved in or linked to specific activities.

With the ICC's Office of the Prosecutor preliminary examination on Palestine ongoing, note was taken of the Office's 2016 policy brief which stated that it will prioritize cases involving 'crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land',⁵⁴ and its potential applicability to corporate actors operating in the OPT.⁵⁵

III. ISRAELI PRIVATE SECURITY CONTRACTS: WHOSE SECURITY?

A. Background

Private security contractors (PSCs)⁵⁶ are private businesses that provide military and security services to states, international organizations, and corporations. Their services include: combat; guarding prisons, detention and interrogation centres and checkpoints; collecting intelligence information; and providing training, guidance and technical support to local forces, including by installing and operating security and surveillance systems. The industry is a lucrative one, where individuals may opt to be hired by civilian contractors rather than join or remain in state military.⁵⁷ The practice of hiring

⁵³ International Commission of Jurists, 'Volume 1: Facing the Facts and Charting a Legal Path', *International Commission of Jurists* (2008), <https://www.icj.org/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf> (accessed 3 September 2018). UN OHCHR, 'The Corporate Responsibility to Respect Human Rights, An Interpretative Guide' (2012), <http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf> (accessed 27 April 2018), 79.

⁵⁴ International Criminal Court, 'Policy Paper on Case Selection and Prioritisation, Office of the Prosecutor' (15 September 2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf (accessed 30 April 2018), para 41.

⁵⁵ International Commission of Jurists, note 53, 15–16.

⁵⁶ While there is no custom definition or differentiation between military and security companies, both provide services that range between military and security services, and as such cannot be easily categorized. In light of this, the paper at hand, similar to the Montreux Document, does not adopt a strict differentiation between military and security companies. ICRC, *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict* (ICRC, 2008), <https://shop.icrc.org/document-de-montreux-sur-les-entreprises-militaires-et-de-securite-privées-2629.html> (accessed 3 September 2018), 38.

⁵⁷ Michael Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2005) 5:2 *Chicago Journal of International Law*, <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1602&context=cjil> (accessed 2 March 2018), 515.

PSCs by states, especially in conflict-affected areas, has drastically increased.⁵⁸ This privatization of wars and conflicts has not only put civilians increasingly at risk, but is also marked by an accountability gap,⁵⁹ due in part to the insufficient laws surrounding PSCs and their activities.⁶⁰

The security sector has grown considerably in Israel, generating valuable profit for the economy and the companies themselves. There are at least 600 PSCs operating in Israel, employing about 25,000 employees.⁶¹ Israel's budget for 'private security companies and the number of personnel they employ exceeds those of the public police'.⁶² PSCs hired by Israel have been local, such as *Modi'in Ezrachi*, and multinational, such as G4S and T&M Protection Resources. Military service is a compulsory requirement for the recruitment of PSC employees in Israel; those recruited for positions requiring possession and possible use of arms are expected to have combat experience.⁶³ Israel employs PSCs at checkpoints, settlement gates and construction sites, and police facilities in the OPT.⁶⁴ As of 2016, 14 checkpoints have been completely privatized in the OPT,⁶⁵ except for those located in the Jerusalem area where PSC personnel accompany Israeli military and police.⁶⁶

⁵⁸ Stella Ageli, 'Private Military Companies (PMCs) and International Criminal Law: Are PMCs the New Perpetrators of International Crimes?' (2016) 8:1 *Amsterdam Law Forum*, <http://amsterdamlawforum.org/article/view/352> (accessed 2 March 2018).

⁵⁹ The UN Working Group on the use of mercenaries has noted the impact of PMSC's on 'human rights and their lack of accountability', with a "'clear gap" regarding the jurisdiction applicable to private military and security contractors'. UN News, 'UN Body Urges Support for Treaty Regulating Private Military, Security Companies' (30 April 2010), <https://news.un.org/en/story/2010/04/337012-un-body-urges-support-treaty-regulating-private-military-security-companies> (accessed 1 September 2018). As a further example, in spite of the numerous civil lawsuits sustaining war crimes in the case of *Abu Ghraib* prison, infamous for torture and ill-treatment, involving two US PMSCs from Engility Corporation and CACI International, Inc, none of the employees of these two groups was accused. Center for Constitutional Rights, 'Accountability for Abu Ghraib Torture by Private Military Contractors' (2016), https://ccrjustice.org/sites/default/files/attach/2016/05/PrivateMilitaryContractors_Factsheet_May%202016.pdf (accessed 28 April 2018). However, in February 2018, the Court for the Eastern District of Virginia ruled that there were indeed acts of torture, war crimes, and cruel, inhuman and degrading treatment carried out, aided and abetted by the employees of CACI Premier Technology. Center for Constitutional Rights, 'Private Corporation May be Sued for Role in Abu Ghraib Torture, Judge Rules' (2017), https://ccrjustice.org/home/press-center/press-releases/private-corporation-may-be-sued-role-abu-ghraib-torture-judge-rules?utm_source=twitter&utm_medium=tweet1&utm_campaign=Corporate%20Abuses&utm_content=press%20release (accessed 28 April 2018).

⁶⁰ Sarah Percy, 'Regulating the Private Security Industry: A Story of Regulating the Last War' (2012) 94 (887) *International Review of the Red Cross*, 941–960.

⁶¹ Al-Jazeera English, 'Israel "Outsourcing" the Occupation' (2009), <https://www.youtube.com/watch?v=HtqvKfndxsQ> (accessed 29 March 2018).

⁶² United Nations Office on Drugs and Crime, 'State Regulation concerning Civilian Private Security Services and their Contribution to Prevention and Community Safety' (2014), <https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Ebook0.pdf> (accessed 29 April 2018), 1–2.

⁶³ Who Profits Research Center 'Private Security Companies and the Israeli Occupation' (2016) https://whoprofits.org/sites/default/files/private_security_companies_final_for_web.pdf (accessed 23 March 2018), 18. According to the same source, the aim following 2010 was to fully privatize 34 checkpoints in the OPT.

⁶⁴ Who Profits Research Center, *Modi'in Ezrachi* (20 March 2016), <https://whoprofits.org/company/modi-in-ezrachi> (accessed 6 September 2018). In this paper, PSC employees stationed at and operating in settlements are excluded as different rules and policies apply to them and their activities.

⁶⁵ Who Profits Research Center, note 63, 15.

⁶⁶ Shira Havkin, 'The Reform of Israeli Checkpoints: Outsourcing, Commodification, and Redeployment of the State', CERJ (2011), http://www.academia.edu/4768147/The_Reform_of_Israeli_Checkpoints_Outsourcing_Commodification_and_Redeployment_of_the_State (accessed 22 March 2018).

B. State Responsibility

In cases where PSCs are incorporated into the members of the armed forces of the state, they are bound by international humanitarian and human rights law as state agents.⁶⁷ PSCs could be afforded a civilian status in the event that they ‘provide a service to, the armed forces, not merely the State’, yet those ‘employed by civilian State authorities or by private companies do not fall into this category [civilians]’.⁶⁸ As such, in accordance with Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (DASR), the conduct of any state organ (any person or entity with the attributed status by the laws of the state) will have to be considered as an act of the state itself. The activities of persons or entities who are not an organ of the state but authorized and empowered by its laws,⁶⁹ or acting under the instruction of, or under the direction or control of the state,⁷⁰ are considered an act of the state under international law.

PSCs are under the authoritative and operational control of the State of Israel, rendering the State liable for the actions of PSC employees.⁷¹ Although the Ministry of Defence (MOD) does not directly hire private security personnel, ‘the MOD is their de facto employer: it is in charge of their training, working conditions, salary levels and employment termination; the PSCs are merely manpower contractors’.⁷² To ensure the privatization of checkpoints, the Israeli Crossing Points Authority (Authority) was created to control the ‘planning, establishment, operation, security, maintenance, supervision and management of activities in the border checkpoints, as well as for supervision over the training of employees of the private security companies’.⁷³ The Authority does not function in a vacuum and is under the aegis of the MOD, where a civil servant employee manages these checkpoints.⁷⁴ The Authority works with Israel Police and the General Security Service, who advise on security matters and regulations,⁷⁵ the District Coordination Office, Civil Administration, and the Coordinator of Government Activities in the Territories (COGAT).⁷⁶ Accordingly, at checkpoints, the structure and chains of command are multi-layered and involve an intertwined relationship between the government, military, and private actors.

PSC employees stationed at checkpoints carry out duties as either security guards or inspectors – in both instances bearing weapons.⁷⁷ Although PSC guards have been

⁶⁷ The Montreux Document, note 56, 36.

⁶⁸ Ibid, 36.

⁶⁹ International Law Commission, Draft Articles on Responsibility of States, note 35, art 4 and 5.

⁷⁰ Ibid, at Article 8. Paragraph 7 of the Commentary to Article 8 notes ‘the three terms “instructions”, “direction” and “control” are disjunctive; it is sufficient to establish any one of them’. Andrew Clapham, ‘Human Rights Obligations of Non-State Actors in Conflict Situations’ (September 2006) 88 (863) *International Review of the Red Cross* 490, 515.

⁷¹ Cameron Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge University Press, 2013), 20.

⁷² Who Profits, note 63, 27.

⁷³ Ibid, 16.

⁷⁴ Yael Ronen, ‘Israel: The Use and Regulation of Private Military and Security Companies in Situations of Armed Conflict’ (Priv-War, 2010), http://psm.du.edu/media/documents/reports_and_stats/think_tanks/privwar_national-report_ronen.pdf (accessed 23 March 2018).

⁷⁵ Havkin, note 66.

⁷⁶ Who Profits, note 63, 17.

⁷⁷ Leticia Armendariz, ‘The Invisible Force: A Comparative Study of the Use of Private Military and Security Companies in Iraq, the Occupied Palestinian Territories, and Colombia. Lessons for an International Regulation’

granted special powers allowing them to use force at checkpoints,⁷⁸ there are no supervising mechanisms for their activities, such as those designed to prevent representatives of security authorities from using unnecessary and excessive force, for example.⁷⁹ The MOD provides training for PSCs on the Rules of Engagement (RoE) which are differentiated based on the activity; some PSCs undergo training according to military or police regulations but without publicly disclosing which RoEs apply.⁸⁰ While the hiring, training and common tasks of PSCs by and with Israeli authorities supports findings that Israel should be responsible for the conduct of PSCs, Israel's handling of allegations of human rights violations by PSCs further suggests shared intent.

C. Human Rights Violations Linked to PSCs

Israeli checkpoints in the West Bank, including East Jerusalem, cut off villages and in some cases, neighbourhoods from one another.⁸¹ Checkpoints serve to obstruct the freedom of movement of Palestinians, which impacts the rights to work, health, education, choose one's residence, and even the right to life, amongst others.⁸² This has an overall impact of obstructing the right of Palestinians to self-determination.⁸³ In February 2016, the UN Office for the Coordination of Humanitarian Affairs (OCHA) reported that there were 85 fixed checkpoints in the West Bank.⁸⁴

Israel's hiring of PSCs and their deployment at checkpoints and other areas within the OPT illustrate a clear case where state–corporate interrelation and dependence result in human rights abuses, grave breaches and possible international crimes. Incidents of wilful killings, which may amount to war crimes, have been carried out by Israeli military and PSC personnel against Palestinians at checkpoints in the absence of any form of accountability. The deficient mechanisms of liability for PSCs as agents of the state should be perceived within the wider context of impunity in which Israeli forces operate. Israeli forces are rarely prosecuted, let alone sentenced, for the killing or injury

(Footnote continued)

(Novact 2016), http://novact.org/wp-content/uploads/2016/07/NOVACT_THE_INVISIBLE_FORCE_2016.pdf (accessed 24 March 2018).

⁷⁸ The Israeli Powers for Maintaining Public Security Law of 2005 grants private security guards at checkpoints in the West Bank and Jerusalem similar activities to soldiers and police, allowing them to use force. Armendariz, note 77, 34–6.

⁷⁹ Who Profits, note 63, 20.

⁸⁰ Armendariz, note 77, 36.

⁸¹ B'tselem, Checkpoints in the West Bank and Gaza, 30 June 2018, https://www.btselem.org/freedom_of_movement/checkpoints_and_forbidden_roads (accessed 2 September 2018).

⁸² Ibid, 3. Of constant concern are restrictions placed on ambulances at checkpoints which 'are perceived...as unnecessarily affecting the welfare and dignity of the patients'. World Health Organization, 'Report of a field assessment of health conditions in the occupied Palestinian territory (oPt) 22 March to 1 April 2015' (1 April 2015), <https://unispal.un.org/DPA/DPR/unispal.nsf/3822b5e39951876a85256b6e0058a478/93856c7853b37c6e85257e4c00681b41?OpenDocument> (accessed 29 April 2018).

⁸³ Ibid.

⁸⁴ Only nine of these were on the Green Line, and the others were within the West Bank. UN OHCHR, 'Freedom of Movement, Human Rights Situation in the Occupied Palestinian Territory Including East Jerusalem' (February 2016), https://www.ohchr.org/Documents/Countries/PS/SG_Report_FoM_Feb2016.pdf (accessed 2 September 2018), 7.

of Palestinians.⁸⁵ When they are prosecuted, they often face lesser charges, such as manslaughter, and receive reduced sentences.⁸⁶

Between 1 October 2015 and 30 November 2016 alone, there were nine Palestinians killed by private security guards. In an additional case during that same period, the source of the lethal force was unknown as Israeli 'border police, private guards and civilians fired simultaneously'.⁸⁷ In April 2016, Palestinian siblings, *Maram* and *Ibrahim Abu Saleh*, 23 and 16, respectively, were shot and killed at *Qalandiya* checkpoint, despite them posing no imminent threat, by personnel from the Israeli PSC *Modi'in Ezrachi*.⁸⁸ Although there were calls by the Israeli media and human rights organizations to release the footage of the incident from the security cameras at the checkpoint due to the conflicting accounts of witnesses and Israeli officials, Israel refused to do so.⁸⁹ The Israeli State Prosecutor dropped the charges against the two 'civilian guards' who killed the siblings.⁹⁰ The decisions to close the cases were due to 'lack of evidence' in one case, and 'lack of guilt' in another.⁹¹

The *Modi'in Ezrachi* Group Ltd is the 'largest security contractor currently employed by the Israeli government',⁹² with more than 1,000 employees in Israel. The case brought against the company's guards for the 2016 killings was not the first time its operations were linked to human rights abuses. In 2011, the Association for Civil Rights in Israel (ACRI) petitioned the HCJ regarding the use of private security guards deployed in Palestinian neighbourhoods of East Jerusalem, to guard unlawful Jewish settlements there.⁹³ Notably, the company *Modi'in Ezrachi* won the bids from the Israeli Ministry of

⁸⁵ Israeli organization *Yesh Din* found that only 3.4 per cent of investigations by the Military Police Criminal Investigations Department between 2011 and 2016 led to an indictment, and only 1.9 per cent of complaints on alleged offences by Israeli soldiers filed by Palestinians resulted in conviction. *Yesh Din*, 'March 2018 Data Sheet: Law Enforcement Against IDF Soldiers Suspected of Harming Palestinians – 2016 Summary', *Yesh Din* (27 May 2018), <https://www.yesh-din.org/en/march-2018-data-sheet-law-enforcement-against-idf-soldiers-suspected-of-harming-palestinians-2016-summary/> (accessed 1 September 2018); *Yesh Din*, 'A Court of Non-Convictions for Israeli Felons' (8 June 2015), <https://www.yesh-din.org/en/a-court-of-non-convictions-for-israeli-felons/> (accessed 29 April 2018).

⁸⁶ UN OHCHR, 'Press Briefing Note on Israel: Elor Azaria Case' (24 February 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21221&LangID=E> (accessed 30 April 2018). Al-Haq, 'Impunity Prevails Once Again: Israeli Court Sentences IOF Killer of Nadim Nuwara to Nine Months Imprisonment' (26 April 2018), <http://www.alhaq.org/advocacy/targets/accountability/81-general/1221-impunity-prevails-once-again-israeli-court-sentences-iof-killer-of-nadim-nuwara-sentenced-to-nine-months-imprisonment> (accessed 27 March 2018).

⁸⁷ Emily Schaeffer Omer-Man, 'Extrajudicial Killing with Near Impunity, Excessive Use of Force by Israeli Law Enforcement Against Palestinians' (Spring 2017) 35 *Boston University School of Law International Law Journal*, 115, 116, at fn 6.

⁸⁸ Allison Deger, 'Meet the Private Contractors Manning Israel's Checkpoints', *Mondoweiss* (5 May 2016), <http://mondoweiss.net/2016/05/contractors-israels-checkpoints/> (accessed 3 March 2018).

⁸⁹ Release the Qalandiyah Video, *Haaretz* (2 May 2016), <https://www.haaretz.com/opinion/release-the-qalandiyah-video-1.5378154> (accessed 2 September 2018). B'tselem, 'Unwarranted Killings at Qalandia Checkpoint: Systemic Legitimization of a Trigger-Happy Approach Continues to Claim Lives' (9 May 2016), https://www.btselem.org/firearms/20160509_killing_of_siblings_at_qalandia_checkpoint (accessed 1 September 2018).

⁹⁰ Raoul Wootliff, 'Charges Dropped in Shooting of Palestinian Siblings at Checkpoint' *Times of Israel* (26 October 2016), <https://www.timesofisrael.com/charges-dropped-in-shooting-of-palestinian-siblings-at-qalandiyah/> (accessed 23 April 2018).

⁹¹ *Ibid.*

⁹² Antony Loewenstein and Matt Kennard, 'How Israel Privatized its Occupation of Palestine', *The Nation* (27 October 2016), <https://www.thenation.com/article/how-israel-privatized-its-occupation-of-palestine/> (accessed 2 September 2018).

⁹³ Association for Civil Rights in Israel (ACRI), 'Petition: Deployment of Private Security Guards in East Jerusalem Is Unlawful' (31 October 2011), <https://www.acri.org.il/en/2011/10/31/petition-deployment-of-private-security-guards-in-e-jerusalem-is-unlawful/> (accessed 29 April 2018).

Housing,⁹⁴ estimated at 100 million shekels in 2014.⁹⁵ It was estimated that 350 private security guards from *Modi'in Ezrachi* were deployed to provide protection for 2,000 settlers. The petition asserted that the presence of the guards 'endanger Palestinian life and limb, and they harm the normal exercise of residential daily life due to the improper and illegal discretion they wield'.⁹⁶ The petition further highlighted the case of *Samer Sarhan* who was fatally shot by a *Modi'in Ezrachi* guard in 2010.⁹⁷ After two years, Israel decided not to indict the guard, 'claiming there was not enough evidence to bring him to trial – especially since the bullet that killed *Sarhan*, a key piece of evidence, had gotten lost'.⁹⁸ Years after the petition was filed, the presence of *Modi'in Ezrachi* in unlawful settlements in East Jerusalem continues.⁹⁹

IV. BUILDING WALLS, BUILDING BUSINESS

A. Background

Referred to as the 'Security Fence' by Israel, and by others as the Annexation Wall, the Wall, composed of concrete barriers, barbed wire and fences, dissects the West Bank. It has undoubtedly become one of the most infamous yet normalized symbols of Israel's occupation, and a stark reminder of the role that businesses play in it. Israel first began appropriating land for and constructing the Wall in the West Bank in 2002. At the time, Israel asserted that the Wall's construction was in response to a rise in attacks that began in September 2000, the start of the second *Intifada*. The Israeli Ministry of Foreign Affairs alleged that the Wall's path was 'determined on the basis of security needs and topographical considerations', would not 'annex Palestinian lands', and that 'no Palestinians will have to relocate'.¹⁰⁰

Although the pretence of respecting the rights of Palestinians while ensuring the 'security' of Israeli citizens was at the centre of Israel's discourse, the reality was far different. Palestinians immediately felt the impact of the Wall on nearly all aspects of life. The first phase of construction in the northern West Bank alone led to the uprooting of over 80,000 trees, the loss of nearly 30 water wells, and the obstruction of access to basic services ranging from medical care to education.¹⁰¹ More broadly, the West Bank

⁹⁴ Ibid.

⁹⁵ Nir Hasson, 'Israel Spends Annual \$8K per Settler in East Jerusalem Security Costs', *Haaretz* (23 November 2014), <https://www.haaretz.com/premium-state-spends-8-000-on-security-of-each-e-j-lem-settler-1.5333550> (accessed 28 April 2018).

⁹⁶ ACRI, 'Excerpts from ACRI Petition to the High Court', <https://www.acri.org.il/en/wp-content/uploads/2011/10/E-Jlem-Petition-Security-guards-ENG.pdf> (accessed 9 September 2018).

⁹⁷ Ibid.

⁹⁸ Yonah Bob, 'Rule of Law: Navigating the Muddy Waters of Private Security Firms', *Jerusalem Post* (9 November 2014), <https://www.jpost.com/Opinion/Rule-of-law-Navigating-the-muddy-waters-of-private-security-firms-381070> (accessed 30 April 2018).

⁹⁹ The company's website notes its presence in 'securing East Jerusalem'. Modiin Ezrachi Group, English website, <http://modiin-ezrachi.co.il/english/> (accessed 4 September 2018).

¹⁰⁰ Israeli Ministry of Foreign Affairs, 'Saving Lives: Israel's Anti-Terrorist Fence – Answers to Questions' (1 January 2004), <http://www.mfa.gov.il/MFA/MFA-Archive/2003/Pages/Saving%20Lives-%20Israel-s-%20anti-terrorist%20fence%20-%20Answ.aspx#3> (accessed 12 April 2018).

¹⁰¹ UN Relief and Works Agency for Palestine Refugees in the Near East, 'OPT: Special Report on the West Bank Security Barrier' (15 July 2003), <https://reliefweb.int/report/israel/opt-special-report-west-bank-security-barrier> (accessed 13 March 2018).

was further fragmented, as the Wall isolated and subdivided Jerusalem, and wholly encircled other Palestinian communities. In addition, the Wall exacerbated food insecurity, physical insecurity, and psychological insecurity for Palestinians in the OPT.¹⁰²

Underlying these conditions are Israel's effective confiscation and obstruction of access to land via the construction and establishment of the Wall. Following a trip to the OPT in 2003, UN Special Rapporteur John Dugard stated in relation to the construction of the Wall: '[t]he fact must be faced that what we are presently witnessing in the West Bank is a visible and clear act of territorial annexation under the guise of security'.¹⁰³ One month after the issuance of Dugard's report, an emergency session was held in October 2003 where the UN General Assembly passed resolution ES-10/13, demanding 'Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law'.¹⁰⁴ With no action taken by Israel, the General Assembly issued another emergency resolution requesting an advisory opinion from the ICJ on the legal consequences arising from the construction of the Wall.¹⁰⁵

The ICJ issued its opinion in July 2004, finding that the route of the Wall's proximity to the Green Line was critical, as 'the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements'.¹⁰⁶ This came in violation of the customary law prohibition of 'territorial acquisition resulting from the threat or use of force'.¹⁰⁷ The ICJ concluded that the construction of the Wall was in violation of international law, including provisions related to unlawful transfer and the unlawful destruction of property.¹⁰⁸ Accordingly, '[g]iven the character and the importance of the rights and obligations involved', third states had specific obligations to: not render aid or assistance in maintaining the unlawful situation created by the wall; to not recognize the illegal situation resulting from it; and, to bring to an end 'any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination'.¹⁰⁹

¹⁰² 'Access to health services is restricted through the separation wall and checkpoints [...]', World Health Organization, 'Report of a field assessment of health conditions in the occupied Palestinian territory' (February 2016), http://apps.who.int/gb/Statements/Report_Palestinian_territory/Report_Palestinian_territory-en.pdf (accessed 2 September 2018). '[T]he situation has aggravated food insecurity in the region [...]', *Legal Consequences*, note 14, para 132. The construction of the Wall has led to the confiscation of hundreds of thousands of dunums of farmland. In cases where the land was not confiscated, farmers face limited access due to 'agricultural gates' (authors' note: 1 dunum = 0.01 hectare). Ma'an Development Center, 'Food Security in the Occupied Palestinian Territories', <https://reliefweb.int/sites/reliefweb.int/files/resources/FS.pdf> (accessed 2 September 2018), 13.

¹⁰³ UN Economic and Social Council, 'Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine – Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967', E/CN.4/2004/6 (8 September 2003), para 6.

¹⁰⁴ UN General Assembly, Resolution ES-10/13, A/RES/ES-10/13 (27 October 2003).

¹⁰⁵ UN General Assembly, Resolution ES-10/14, A/RES/ES-10/14 (12 December 2003).

¹⁰⁶ *Legal Consequences*, note 14, para 122.

¹⁰⁷ *Ibid.*, para 87.

¹⁰⁸ *Ibid.*, paras 120 and 132.

¹⁰⁹ *Ibid.*, para 159.

Within and in spite of this backdrop of condemnation by UN bodies and experts, and a definitive ICJ opinion, Israel continued to build the Wall, establishing 85 per cent of it inside the West Bank,¹¹⁰ and effectively appropriating Palestinian land and resources. Although the Israeli HCJ has ruled that some portions of the Wall have a disproportionate impact on Palestinians when balanced against the security advantage gained,¹¹¹ it has largely deferred to the decisions of the military commander. Prior to the issuance of the ICJ's advisory opinion, the HCJ found that the 'fence is motivated by security concerns', and not political considerations,¹¹² and determined that its route must be examined under a 'security perspective...without regard for the location of the Green Line'.¹¹³ The Israeli HCJ confirmed these positions, even following the issuance of the ICJ opinion.¹¹⁴

B. *Riwal* and the Construction of the Wall

Although not addressed in the ICJ opinion, the role of businesses in the construction and maintenance of the Wall¹¹⁵ was nonetheless brought to the forefront early on. In 2006, mobile cranes with the logo of *Riwal*, a Dutch company, were filmed being used to construct the Wall. At the time, *Riwal* admitted that its equipment was being used, but for 'commercial' purposes only.¹¹⁶

In March 2010, a criminal complaint was filed on behalf of Palestinian human rights organization, *Al-Haq*, against *Riwal*'s parent company, *Lima Holding*, in the Netherlands for war crimes and crimes against humanity during the period from 2004 until the filing.¹¹⁷ The complaint alleged that *Riwal* contributed to the construction of the Wall in the Palestinian villages of *Al-Khader* and *Hizma*, and participated in the building of a settlement near the village of *Bruqin*.¹¹⁸ The complaint further alleged that as a result of *Riwal*'s activities, Palestinians had their properties destroyed, and 'have been denied access to their lands, their freedom of movement has been restricted, the fundamental

¹¹⁰ UN OCHA, '10 Years Since the International Court of Justice (ICJ) Advisory Opinion' (9 July 2014), https://www.ochaopt.org/sites/default/files/ocha_opt_10_years_barrier_report_english.pdf (accessed 12 February 2018), 3.

¹¹¹ *Beit Sourik Village Council et al v The Government of Israel et al*, HCJ 2056/04, Judgment Summary (30 June 2004), <http://www.hamoked.org/Document.aspx?dID=6520> (accessed 23 April 2018).

¹¹² *Beit Sourik Village Council et al v The Government of Israel et al*, *ibid*, para 28.

¹¹³ *Ibid*, para 30.

¹¹⁴ 'Our conclusion is, therefore, that the military commander is authorized to construct a separation fence in the area for the purpose of defending the lives and safety of the Israeli settlers in the area. It is not relevant whatsoever to this conclusion to examine whether this settlement activity conforms to international law or defies it, as determined in the Advisory Opinion of the International Court of Justice at The Hague.' *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04, Judgment (15 September 2005), para 19, http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf (accessed 24 April 2018).

¹¹⁵ UN Human Rights Council, Report of the independent international fact-finding mission, note 19, para 96.

¹¹⁶ Martin Seipermann, 'Dutch Company Involved in Construction of the Separation Wall', *Electronic Intifada* (18 September 2006), <https://electronicintifada.net/content/dutch-company-involved-construction-separation-wall/6423> (accessed 23 February 2018).

¹¹⁷ Liesbeth Zegveld, 'Prosecution of Riwal for Involvement in Construction of Israeli Wall and Settlements Discontinued' (14 May 2013), <http://www.liesbethzegveld.com/en/selection-of-cases/prosecution-of-riwal-for-involvement-in-construction-of-israeli-wall-and-settlements-discontinued/> (accessed 1 March 2018).

¹¹⁸ *Al-Haq*, 'English Translation of Complaint Against Riwal' (15 March 2010), <http://www.alhaq.org/images/stories/PDF/accountability-files/Complaint%20-%20English.pdf> (accessed 1 September 2018), 13.

rights of the Palestinian residents have been violated, and Israeli settlements have been expanded'.¹¹⁹

Following a three-year investigation, which included searches of corporate offices,¹²⁰ the Netherlands National Prosecutor's Office (NPO) announced in May 2013 that it would not prosecute *Riwal*. From its criminal investigation, it found that the company 'rented out cranes and aerial working platforms that were used for the construction works in the occupied territory'.¹²¹ The NPO's statement acknowledged the ICJ's advisory opinion, and that under domestic law, Dutch companies were 'required to refrain from any involvement in violations of the International Crimes Act or the Geneva Conventions'.¹²² However, the NPO decided to end its investigation, after finding that the company's work was 'small scale', and its equipment was 'used only occasionally and only for a few days, sometimes after having been rented to third parties'.¹²³ The NPO also reportedly considered that the company had decided to end its activities in the OPT, and that Israel would likely not cooperate.¹²⁴ Although the investigation did not lead to prosecution, the issue of business complicity in Israel's violations of international law, including abuses related to the Wall, was highlighted.

Irrespective of heightened awareness and the ICJ opinion, there has been no concrete action taken by the international community to change the unlawful *status quo*. Instead, the Wall has become a selling point for businesses involved in its construction, while remaining a severe burden for Palestinians. Following the election of United States (US) President Donald Trump, whose campaign focused on expanding the border wall¹²⁵ with Mexico, shares of Israeli company *Magal* rose by nearly 50 per cent.¹²⁶ *Magal* was a major contractor during the building of the Wall in the OPT, and hoped to use its experience to gain contracts for the US–Mexico wall.¹²⁷ *Elbit*, another Israeli company whose surveillance equipment is used for the Wall in the OPT, won US contracts in 2014

¹¹⁹ Ibid.

¹²⁰ Vertikal.Net, 'Riwal Investigated' (14 October 2010), <http://www.vertikal.net/en/news/story/10961/> (accessed 1 March 2018).

¹²¹ Ibid.

¹²² Landelijk Parket, 'No Further Investigation into Crane Rental Company', *Openbaar Ministerie* (14 May 2013), <https://www.om.nl/@31796/no-further/> (accessed 13 March 2018).

¹²³ Ibid.

¹²⁴ Al-Haq, 'Prosecutor Dismisses War Crimes Case against Riwal' (14 May 2013), <http://www.alhaq.org/advocacy/targets/accountability/71-riwal/704-prosecutor-dismisses-war-crimes-case-against-riwal> (accessed 4 September 2018).

¹²⁵ It should be noted that organs and officials of the US government prior to Trump typically referred to a 'border fence', although activists, local officials, and others used the term 'border wall'. See, for example, El Paso County, 'Local, State and Federal Elected Officials Send Letter to President-Elect Barack Obama Opposing the Border Wall' (3 December 2008), http://www.epcounty.com/CS/blogs/ca_press/archive/2008/12/03/local-state-and-federal-elected-officials-send-letter-to-president-elect-barack-obama-opposing-the-border-wall.aspx (accessed 28 August 2018); The Working Group on Human Rights and the Border Wall, 'Obstructing Human Rights: The Texas–Mexico Border Wall' (June 2008), <https://law.utexas.edu/humanrights/borderwall/analysis/briefing-FULL-SET-OF-REPORTS.pdf> (accessed 28 August 2018).

¹²⁶ Jonathan Ferziger, 'Israeli Company that Fenced in Gaza Angles to Help Build Trump's Mexico Wall', *Bloomberg* (29 January 2017), <https://www.bloomberg.com/news/articles/2017-01-29/israel-s-magal-pushes-for-mexico-wall-deal-as-trump-buoys-shares> (accessed 12 March 2018).

¹²⁷ Ibid.

to provide and install surveillance systems for the US–Mexico wall.¹²⁸ Most recently, another Israeli company’s subsidiary, *Elta North America*, was one of four companies that will receive a grant to build a ‘prototype of smart systems integrated into the border wall’.¹²⁹

V. HEAVY MACHINERY: SYSTEMATIC DEMOLITIONS

A. Background

A feature of Israel’s prolonged occupation has been the demolition of Palestinian homes, structures and infrastructure. Pretexts for demolitions vary between administrative and ‘security’ considerations to those that are punitive in nature, with both pretexts often working together as part of collective punishment operations. Administrative demolitions are conducted against structures that are built without a license. The UN and others have noted that building permits are nearly impossible to acquire in Area C and East Jerusalem, forcing Palestinians to build illegally (deemed as ‘construction terrorism’ by one Israeli parliamentarian¹³⁰) and face possible demolition.¹³¹ Punitive demolitions are carried out against the homes of Palestinians alleged to have committed an attack as a form of collective punishment. In many cases, the suspect is killed at the scene, therefore causing the punishment to be inflicted solely on his surviving relatives. Israel paused its use of punitive home demolitions following the second *Intifada*, and the finding by an Israeli committee that ‘no effective deterrence was proven, except in a few cases, and that the damage to Israel caused by the demolitions was greater than the benefits [...]’.¹³² Israel nonetheless returned to the practice in 2014,¹³³ with the HCJ affirming it was ‘not inclined to intervene with the security agencies’ evaluation concerning the effectiveness of using the measure of demolishing houses or sealing them as a means to deter others’.¹³⁴

¹²⁸ Jack Moore, ‘Israel’s Elbit Systems wins £87m Contract on US–Mexico Border Fence’, *International Business Times* (7 March 2014), <http://www.ibtimes.co.uk/israels-elbit-systems-wins-87m-contract-us-mexico-border-fence-1439378> (accessed 12 March 2018).

¹²⁹ Udi Etsion, ‘Israeli Company to build US–Mexico Border Wall Prototype’ *Ynet News* (9 November 2017), <https://www.ynetnews.com/articles/0,7340,L-5014926,00.html> (accessed 23 March 2018).

¹³⁰ Amira Hass, ‘Israeli Lawmakers Debate “Construction Terror” by Palestinians in West Bank’, *Haaretz* (29 January 2018), <https://www.haaretz.com/israel-news/mk-decries-construction-terror-by-palestinians-in-west-bank-1.5770343> (accessed 26 August 2018).

¹³¹ According to UN OCHA, 1.5 per cent of permit applications for Palestinians in Area C were approved by Israel between 2010 and 2014. UN OCHA, ‘Under Threat: Demolition Orders in Area C of the West Bank’, https://reliefweb.int/sites/reliefweb.int/files/resources/demolition_orders_in_area_c_of_the_west_bank_en.pdf (accessed 1 September 2018), 3. Israel has zoned only 13 per cent of land in East Jerusalem for Palestinian construction, and confiscated 35 per cent of East Jerusalem for settlement construction. The system has led to at least one-third of all Palestinian homes to lack a building permit and be at risk of demolition. UN OCHA, ‘East Jerusalem: Key Humanitarian Concerns’ (August 2014), https://www.ochaopt.org/sites/default/files/ocha_opt_Jerusalem_FactSheet_August2014_english.pdf (accessed 2 September 2018).

¹³² Amos Harel, ‘IDF Panel Recommends Ending Punitive House Demolitions for Terrorists’ Families’, *Haaretz* (17 February 2005), <http://www.haaretz.com/idf-panel-recommends-ending-punitive-house-demolitions-for-terrorists-families-1.150620> (accessed 3 September 2018).

¹³³ Between July 2014 and 18 January 2017, 42 Palestinian homes were punitively demolished or sealed. Hamoked, ‘Updated Summary on Punitive Home Demolitions from July 2014 to January 18, 2017’ (18 January 2017), <http://www.hamoked.org/Document.aspx?dID=Updates1828> (accessed 9 September 2018).

¹³⁴ *Qawasmeh v Military Commander of the West Bank* (7 August 2014), para 25. The Court has accordingly upheld demolition orders in cases where a house is being rented by a third party and doubt existed as to the circumstances

B. Caterpillar

Caterpillar, a US manufacturer of heavy machinery, is perhaps one of the most infamous international companies associated with Israel's occupation. *Caterpillar* machines have been used to demolish thousands of Palestinian homes and structures,¹³⁵ to construct the Annexation Wall and settlements, and in 'crowd control' against Palestinian demonstrators.¹³⁶ In some cases, the Israeli military has demolished homes without warning, killing its residents inside.¹³⁷ In addition to these activities which Israel may claim as 'security operations', the machines have a broader impact on Palestinian livelihoods through wider-scale demolitions.

In 2004, the UN Special Rapporteur on the Right to Food wrote to *Caterpillar* expressing his concern that the company was 'supplying its specially modified armed D9 and D10 bulldozers to the occupying army, in full knowledge that they will be used to destroy farmland, greenhouses, crops and olive groves as well as water installations', which 'might amount to complicity with or acceptance of actual and potential violations of the right to adequate food'.¹³⁸

Initiatives launched to raise awareness and end the use of *Caterpillar* equipment in Israel's occupation have included: letter campaigns targeting the CEO,¹³⁹ divestment campaigns, shareholder resolutions,¹⁴⁰ a petition to the US government,¹⁴¹ and a criminal complaint. Many of these actions were spurred by the tragic death of Rachel Corrie, an American peace activist, who was killed by a *Caterpillar* bulldozer operated by the Israeli military in the Gaza Strip in 2003. Rachel, 23 at the time, was peacefully trying to protect a Palestinian home from being demolished in Gaza. The Israeli military launched an 'operational debriefing' and a criminal investigation into Rachel's death but failed to hold any individual accountable.¹⁴² The Israeli Supreme Court also exempted

(*F*'note continued)

surrounding the alleged attack. *Halabi v Commander of IDF Forces in the West Bank*, HCJ 8567/15 (2015), para 9. *Ska fi v Commander of IDF Forces in the Judea and Samaria Area*, HCJ 1014/16 (2016).

¹³⁵ During the 2008–2009 Operation Cast Lead alone, which lasted less than one month, it was reported that the Israeli military used the Caterpillar D9 armed bulldozers to raze approximately 1,000 homes in Gaza. Who Profits, 'Heavy Engineering Machinery and the Israeli Occupation' (July 2014), https://www.whoprofits.org/sites/default/files/facts_on_the_ground_-_heavy_engineering_machinery_and_the_israeli_occupation.pdf (accessed 23 March 2018), para 18. Ali Abunimah, 'Israel Uses Caterpillar Equipment in Revenge Demolition', *Electronic Intifada* (16 August 2017), <https://electronicintifada.net/blogs/ali-abunimah/israel-uses-caterpillar-equipment-revenge-demolition> (accessed 9 September 2018).

¹³⁶ *Ibid* at Who Profits, 54.

¹³⁷ CCR Justice, 'Factsheet: Home Demolitions and Caterpillar' (17 October 2007), <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/factsheet-home-demolitions-and-caterpillar> (accessed 27 April 2018).

¹³⁸ UN General Assembly, 'Interim report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler,' A/59/385 (27 September 2004) para 24, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/1B855814A29E512485256F390072EBD2> (accessed 12 March 2018).

¹³⁹ Amnesty International, 'Act Now to Stop Caterpillar Inc. From Selling Life-Destroying Bulldozers to Israel' (2015), <http://212.78.226.15/our-work/act-now-stop-caterpillar-inc-selling-life-destroying-bulldozers-israel> (accessed 29 April 2014); in 2007, the Center for Constitutional Rights reported that 50,000 letters were sent to the CEO of Caterpillar. CCR Justice, note 137.

¹⁴⁰ CorpWatch, 'Caterpillar Shareholder Resolution on Israeli Human Rights Violations' (14 April 2004), <https://corpwatch.org/article/caterpillar-shareholder-resolution-israeli-human-rights-violations> (accessed 23 April 2018).

¹⁴¹ Change.org, 'Stop Delivery of CAT D9 Bulldozers to Israel', <https://www.change.org/p/stop-delivery-of-cat-d9-bulldozers-to-israel> (accessed 27 April 2018).

¹⁴² Human Rights Watch documented various faults of the investigation, including Israeli investigators threatening foreign volunteers and failing to interview Palestinian witnesses. See Human Rights Watch, 'Israel: Dangerous Ruling

the Israeli Ministry of Defence from liability in a civil suit brought by the Corrie family.¹⁴³

In 2005, American and Palestinian groups¹⁴⁴ represented the Corrie family and Palestinian plaintiffs who had family members killed during house demolition operations in suit against *Caterpillar* in the US. The lawsuit charged *Caterpillar* with selling D9 bulldozers, which the company knew would be used for unlawful activities, and therefore aided and abetted in war crimes committed by the Israeli forces.¹⁴⁵ The District Court dismissed the case, finding that ‘it interferes with the foreign policy of the United States of America’, and that because other branches of government had not ‘urged or enjoined sale of weapons to Israel nor restrained trade with Israel in any other manner’ it could not preclude sales to Israel.¹⁴⁶ The decision was confirmed on appeal in 2007.

Alongside the defences provided for in court documents, *Caterpillar* has provided responses to inquiries on its equipment being used by the Israeli military. It has stated that it ‘cannot monitor the use of every piece of its equipment around the world’,¹⁴⁷ but that it does ‘not condone the illegal or immoral use of any *Caterpillar* equipment’.¹⁴⁸ It has further asserted that it sells non-weaponized machines to the US government through the Foreign Military Sales program, which then transfers ownership to Israel.¹⁴⁹ *Caterpillar*’s reputation was further damaged in 2017, when leaked documents reported that it hired intelligence firms to spy on the Corrie family, as well as to monitor activists.¹⁵⁰

VI. UPHOLDING HUMAN RIGHTS: STATES, COMPANIES AND CIVIL SOCIETY

A. State Duty and State Practice

Israel’s political and legal positions relevant to the OPT expose pertinent risks associated with the potential commission of human rights abuse through business operations or relationships. While the Occupying Power should ensure ‘equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty,

(*F*note continued)

in the Rachel Corrie Case’ (17 February 2015), <https://www.hrw.org/news/2015/02/17/israel-dangerous-ruling-rachel-corrie-case> (accessed 23 April 2018).

¹⁴³ Ibid.

¹⁴⁴ The Center for Constitutional Rights, the Ronald A. Peterson Law Clinic at Seattle University School of Law, the Public Interest Law Group PLLC, and the Palestinian Center for Human Rights were counsel on the case.

¹⁴⁵ CCR Justice, note 137.

¹⁴⁶ *Cynthia Corrie et al v Caterpillar, Inc, United States District Court Western District of Washington at Tacoma* (22 November 2015), Judgment, https://ccrjustice.org/sites/default/files/assets/Corrie_decision_11_05_0.pdf (accessed 23 April 2018).

¹⁴⁷ Who Profits, note 135, 77.

¹⁴⁸ Business and Human Rights Resource Centre, ‘Caterpillar Response re Alleged Complicity in Human Rights Abuses in Israel and the Occupied Territories’ (23 January 2012), <https://www.business-humanrights.org/en/caterpillar-response-re-alleged-complicity-in-human-rights-abuses-in-israel-the-occupied-territories> (accessed 25 April 2018).

¹⁴⁹ Who Profits, note 135, 77.

¹⁵⁰ Haaretz, ‘Report: Caterpillar Hired Intelligence Firm to Spy on Rachel Corrie’s Family, Leaked Documents Reveal’ (12 December 2017), <https://www.haaretz.com/world-news/europe/report-caterpillar-spied-on-rachel-corrie-s-mourning-family-leaked-documents-reveal-1.5628444> (accessed 12 April 2018).

and procedural and legal transparency',¹⁵¹ the aforementioned case studies demonstrate that these protections are not afforded to Palestinians,¹⁵² and that claims brought against a company where a 'security' decision is concerned would likely fail.

More broadly, cases related to business operations and economic benefits to Israel in its prolonged occupation demonstrate the absence of remedy for the occupied population within Israel's judicial system. For example, in its 2011 judgement concerning Israeli-administered quarries in the West Bank, the Israeli HJC argued that Article 55 of the Hague Regulations, which seeks to limit the use of resources present in an occupied territory by an occupying power, had to be read in light of the need to adjust 'the laws of occupation to the reality of prolonged occupation',¹⁵³ and that a strict interpretation 'might result in the failure of the military commander to perform his duties pursuant to international law'.¹⁵⁴ The Court similarly interpreted Article 43 of the Hague Regulations, on the occupying power's duty to ensure public order and safety, and found the respondents' claims regarding the employment of Palestinians in the quarries, the marketing of quarried products to Palestinians, and other factors, as in the interest of the protected population.¹⁵⁵ Notably, this view of adapting the laws of occupation was previously dismissed in a Separate Opinion in the ICJ's Wall case.¹⁵⁶ Since the HJC's ruling, Israeli quarrying activity in the occupied West Bank has significantly expanded.¹⁵⁷

Meanwhile, 'home' states of business enterprises have an important role to play in ensuring business respect for human rights, including when they operate extraterritorially. Principle 7 of the UNGPs urges states to engage with business enterprises 'at the earliest stage possible...to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships'.¹⁵⁸ It further calls for effective measures to be taken by the state, including legislation and regulations, in order to address 'the risk of business involvement in gross human rights abuses'.¹⁵⁹ In cases of prolonged conflict, the objective of Principle 7 can be met by proactive and long-term guidance and measures in conformity with domestic policy and international law.

¹⁵¹ Guiding Principles, note 9, Principle 1 commentary.

¹⁵² See more generally: B'Tselem, 'Getting Off Scot-Free: Israel's Refusal to Compensate Palestinians for Damages Caused by its Security Forces' (March 2017), https://www.btselem.org/publications/summaries/201703_getting_off_scot_free (accessed 4 September 2018). Human Rights Watch, 'Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories' (19 December 2010), <https://www.hrw.org/news/2010/12/19/israel/west-bank-separate-and-unequal> (accessed 27 August 2018).

¹⁵³ HJC 2164/09 Judgement [YD Quarries case] (2011), para 10.

¹⁵⁴ *Ibid.*, para 13.

¹⁵⁵ *Ibid.*

¹⁵⁶ 'No one underestimates the inherent difficulties that arise during situations of prolonged occupation. A prolonged occupation strains and stretches the applicable rules, however, the law of belligerent occupation must be fully respected regardless of the duration of the occupation.' International Court of Justice, 'Separate Opinion of Judge Elaraby' (2004), <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-06-EN.pdf> (accessed 11 October 2018), 255.

¹⁵⁷ Yesh Din, 'The Great Drain: Israeli Quarries in the West Bank: High Court Sanctioned Institutionalized Theft' (14 September 2017), <https://www.yesh-din.org/en/great-drain-israeli-quarries-west-bank-high-court-sanctioned-institutionalized-theft/> (accessed 10 September 2018).

¹⁵⁸ Guiding Principles, note 9, Principle 7.

¹⁵⁹ *Ibid.*

Although strong unilateral and multilateral initiatives have been taken in relation to business activities in other conflict-affected areas, efforts in relation to the OPT have largely been unimplemented or ineffective in bringing to an end Israeli and transnational businesses' violations of international law. As noted in the *Riwal* case study, third states have not taken any action in line with the ICJ opinion to ensure an end to the situation created by the Wall. Many states have recognized the risks involved with business operations contributing to or benefiting from the presence of Israeli settlements. According to the European Council on Foreign Relations (ECFR), 18 'EU member states have published business advisories warning of the legal, reputational, and financial risks of such activities'.¹⁶⁰ Moreover, regional action was taken in November 2015, when the European Commission issued a notice that requires that products produced in Israeli settlements give appropriate notification so that consumers may 'take an informed transactional decision', when the listing of origin is mandatory.¹⁶¹ However, 'many member states – including those who called for such guidance – remain unable or unwilling to implement the guidelines at the national level'.¹⁶² Further frustrating the implementation of accurate labelling is Israel's introduction of a seven-digit postal code system, making it 'impossible for the European Union to establish a list of settlements' postcodes'.¹⁶³

In 2016, the UN Security Council passed Resolution 2334, which reaffirmed the illegality of Israeli settlements, and called on all States 'to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967'.¹⁶⁴ The Resolution included a reporting requirement on the status of implementation every three months. The first initiative recorded in such reports occurred in early 2018, when the Danish parliament passed a resolution 'urging that future agreements between Denmark and Israel clearly state their inapplicability to occupied territory and encouraging the Government to strengthen its guidance to private and public investors'.¹⁶⁵

In 2016, the UN Human Rights Council passed a resolution to create a database of all business enterprises involved in specified activities that have led to the 'construction and growth' of Israeli settlements.¹⁶⁶ More than two years later, and within a reported context of pressure by the US and Israel to prevent the development of the database, names of businesses have yet to be made public. In other contexts, the UN Security Council has listed business enterprises that are involved in gross human rights abuses

¹⁶⁰ European Council on Foreign Relations (ECFR), 'Occupation and Sovereignty: Renewing EU Policy in Israel–Palestine' (21 December 2017), http://www.ecfr.eu/publications/summary/occupation_and_sovereignty_renewing_eu_policy_in_israel_palestine (accessed 23 April 2018).

¹⁶¹ European Commission, 'Interpretative Notice on Indication of Origin of Goods from the Territories Occupied by Israel Since 1967' (11 November 2015), paras 8–11, https://eeas.europa.eu/headquarters/headquarters-homepage/10130/interpretative-notice-indication-origin-goods-territories-occupied-israel-june-1967_en (accessed 23 April 2018).

¹⁶² ECFR, note 160.

¹⁶³ Belgium's economic and commercial relations with Israeli settlements in the Occupied Palestinian Territories, Opinion of the Advisory Council on Policy Coherence for Development, 18 January 2018, para 12.

¹⁶⁴ UN Security Council, Resolution 2334 (2016), S/RES/2334 (2016), 23 December 2016.

¹⁶⁵ The Office of the United Nations Special Coordinator for the Middle East Peace Process, 'Briefing to the Security Council on the Situation in the Middle East – Report on UNSCR 2334 (2016)' (26 March 2018), <https://unsco.unmissions.org/briefing-security-council-situation-middle-east—report-unscr-2334-2016-0> (accessed 12 April 2018).

¹⁶⁶ These activities were detailed in the 2013 UN Fact-Finding Mission report, including the supply of security services to the use of natural resources in the OPT, amongst others. UN Fact-Finding Mission report, note 19, para 96.

and violations of international law.¹⁶⁷ The divergence in these outcomes highlights the importance of political will and state support for such initiatives. In total, ‘home’ states of multinational corporations operating in the OPT and those contributing to Israel’s prolonged occupation can do far more to uphold their obligations under international law, including by ensuring that businesses domiciled in their territory do not contribute to or profit from the commission of human rights abuses in the OPT.

B. Role of Businesses

Domestic policies, measures and statements by ‘home’ states in line with international law standards, should be primary considerations when businesses conduct their due diligence, and assess whether it can ‘prevent or mitigate adverse impacts’.¹⁶⁸ However, businesses may also look to ‘home’ and ‘host’ states’ actions, including the implementation of policies and avenues for remedy, and feel undeterred to operate in the OPT. More generally, businesses may question other mixed messages sent by states, such as the production of business advisories on the OPT while also penalizing businesses and other institutions who seek to uphold their responsibilities under law and respect human rights by enacting Anti-Boycott Divestment Sanctions (BDS) legislation and executive orders.¹⁶⁹

The framework provided for in the UNGPs plays a critical role in ensuring consistency and coherence in the standards and expectations applicable to businesses.¹⁷⁰ In a situation where a conflict in laws puts ‘an enterprise at risk of being involved in gross abuses of human rights such as international crimes’, a business should consider if it can continue to operate at all.¹⁷¹ Accordingly, businesses should carefully examine Israel’s political and legal positions in light of international law. Irrespective of whether a business may be involved in a more traditional business activity, or one linked to the security sector, the impacts of the activity on the occupied Palestinian population should be carefully considered. In conducting due diligence, businesses should directly consult with Palestinian communities that may be impacted, as well as with relevant Palestinian organizations, agencies, and representative authorities.¹⁷² Given that the Israeli

¹⁶⁷ In March 2018, the UN Security Council listed shipping companies that allegedly smuggled oil and coal for North Korea. See also UN Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie – Business and human rights in conflict-affected regions: challenges and options towards State Responses’, A/HRC/17/32 (27 May 2011), para 18.

¹⁶⁸ Guiding Principles, note 9, Principle 19 commentary.

¹⁶⁹ The first Anti-BDS executive order was signed by New York Governor Andrew Cuomo. The order states that any business or entity deemed to be involved in BDS activities would lose public funding. A business enterprise that decided to withdraw its presence from settlements, in line with the UNGPs, would likely be subject to penalty under the order. State of New York, Executive Order Directing State Agencies and Authorities to Divest Public Funds Supporting BDS Campaign Against Israel, 5 June 2016, https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_157_new.pdf (accessed 1 September 2018).

¹⁷⁰ This includes internal standards amongst ‘various government policy and regulatory instruments, and internationally across countries’. UN Working Group on Business and Human Rights, ‘Guidance on National Action Plans on Business and Human Rights’ (December 2014), http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf (accessed 26 April 2018), 3.

¹⁷¹ UN OHCHR, ‘The Corporate Responsibility to Respect Human Rights, An Interpretative Guide’ (2012), <http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf> (accessed 27 April 2018), 79.

¹⁷² This may include the ‘legitimate representatives’ of the affected communities. *Ibid.*, 32.

government and its institutions support settlements, businesses should also carefully assess their business relationships with all entities and businesses based in Israel, to ensure that their operations and activities have no direct or indirect connection with unlawful policies that may amount to internationally recognized crimes. Businesses may find that Israel 'is unable or unwilling effectively to protect human rights or may itself be responsible for human rights violations',¹⁷³ creating legal, reputational, and other risks for the company.

C. The Role of Civil Society in Advancing the Business and Human Rights Framework

Civil society has played an important role in advancing the global business and human rights agenda and ensuring that the voices of indigenous and vulnerable communities are heard. This has been especially crucial in trying to fill the accountability gap produced by states in the OPT. Civil society organizations working on the situation of human rights in the OPT have exposed the relationships between Israel and businesses in sustaining and profiting from the occupation, and their impact on the civil, political, economic and social rights of the occupied Palestinian people.¹⁷⁴ This advocacy and awareness-raising work has been an important step in ensuring that the OPT is not excluded from the discourse on business and human rights.

In this capacity, organizations have set up profiles on companies operating in or with settlements, as well as those directly contributing to Israel's prolonged occupation.¹⁷⁵ Organizations have also sought to directly communicate with concerned businesses,¹⁷⁶ to remind the corporations in question of their responsibilities under international law and expected codes of conduct in situations of occupation. Furthermore, organizations have used judicial and non-judicial mechanisms for accountability. Israeli, Palestinian and international NGOs have all brought complaints related to business operations in the OPT, and their violations of international human rights and humanitarian law. Non-judicial mechanisms, such as submitting complaints through the appropriate OECD National Contact Point regarding company involvement with the commission of human right abuses, have also been used.¹⁷⁷

¹⁷³ UN OHCHR, '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 29 April 2018), 4.

¹⁷⁴ See, for example, Al-Haq, 'Business and Human Rights Focus', <http://www.alhaq.org/advocacy/topics/business-and-human-rights-focus> (accessed 28 August 2018); Trocaire, 'What You Need to Know about the Occupied Territories Bill' (10 July 2018), <https://www.trocaire.org/news/what-you-need-know-about-occupied-territories-bill> (accessed 28 August 2018).

¹⁷⁵ See, for example, Online Database and Information Center created by Who Profits, <https://whoprofits.org/content/about-who-profits> (accessed 26 August 2018).

¹⁷⁶ See, for example, Lawyers for Palestinian Human Rights (LPHR), 'LPHR submits letter to the UK company, JCB, raising serious legal and human rights concerns about their involvement in the imminent demolition of Khan al-Ahmar' (21 August 2018), <https://lphr.org.uk/latest-news/lphr-submits-letter-to-the-uk-company-jcb-raising-serious-legal-and-human-rights-concerns-about-their-involvement-in-the-imminent-demolition-of-khan-al-ahmar/> (accessed 9 October 2018).

¹⁷⁷ See, for example, LPHR, 'Q&A on LPHR's Human Rights Complaint against G4S' (9 June 2015), <https://lphr.org.uk/blog/qa-on-lphrs-human-rights-complaint-against-g4s/> (accessed 25 April 2018).

Although these more traditional avenues for accountability have not brought widespread and immediate remedy to victims or an end to profiteering from the occupation, the cumulative actions of civil society often do have a tangible impact. This has included the relocation of businesses from settlements in the OPT, and successful divestment campaigns.¹⁷⁸

VII. CONCLUSION

Conflict-affected areas, including situations of occupation, present unique and numerous risks for business operations in an environment that may thrive on the deliberate misinterpretation of the law, the legitimization of illicit acts, and impunity. Moreover, an operational environment once cloaked in a security discourse may sanction rampant human rights abuses, and violations that rise to the level of internationally recognized crimes. Such contexts also, however, provide substantial opportunities for profit.

Israel's prolonged occupation of Palestinian territory and its booming 'security' industry and economy provoke genuine questions on the status and implementation of international law, and the role of and opportunity for third states and businesses to impact change.¹⁷⁹ The case studies presented on PSCs, and companies linked to the construction of the Wall and demolitions, demonstrate that Israel's 'security' sector, as well as its produced results – i.e., control over land and the occupied population – are indeed profitable. By legitimizing and continuing their activities under Israel's security discourse, a business's impact on deepening Palestinian insecurity is either dismissed or translated into a marketing advantage.

Both state and non-state actors have obligations and responsibilities with regard to protecting and respecting human rights. Israel, as occupying power, and in its role as 'host' state should ensure that international human rights law and international humanitarian law are upheld and respected. Instead, over the course of its prolonged occupation of Palestinian territory, it has become clear that Israel is not only unwilling to uphold such obligations, but that violations of international law are part and parcel of its policy for expansion, annexation and control. Meanwhile, third states are under the obligation to take concrete measures to not recognize and bring to an end Israel's unlawful policies and practices in the OPT,¹⁸⁰ and more broadly, Israel's unlawful

¹⁷⁸ See, for example, Al-Haq, 'Second-Largest Dutch Pension Fund Manager PGGM Withdraws All Investments from Israeli Banks Over Settlement Activities' (8 January 2014), <http://www.alhaq.org/advocacy/targets/accountability/81-general/768-second-largest-dutch-pension-fund-manager-pggm-withdraws-all-investments-from-israeli-banks-over-settlement-activities> (accessed 8 October 2018).

¹⁷⁹ Common Article 1 of the Geneva Conventions provides for obligations of third states to respect and ensure respect for the Conventions. On the duty to 'ensure respect' for the Convention, see Marco Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (June 2002) 84 (846) *International Review of the Red Cross* 401–434. Article 41 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that 'states shall cooperate to bring to an end through lawful means any serious breach...', refrain from recognizing wrongful situations and from providing aid or assistance that would maintain them. On the duty of non-recognition, see Annie Bird, 'Third State Responsibility for Human Rights Violations' (November 2010), 21:4 *European Journal of International Law*.

¹⁸⁰ International Law Commission, Draft Articles on Responsibility of States, note 35, art 41; Legal Consequences, note 14, para 157.

prolonged occupation of Palestinian territory.¹⁸¹ In line with international law, states are also required to ensure accountability for human rights abuses by business and state actors alike. In practice, the international community, represented by states and various stakeholders and bodies, have failed to adopt a consistent policy towards regulating business operations in the OPT in line with international law.

While businesses have benefited from this gap in law and practice, it is undeniable that business enterprises can make informed decisions on actual and potential operations and relationships in the OPT given the wealth of documented information on the context. Civil society organizations have played a central role in gathering and producing such information, and using other measures to ensure that the legal, reputational, and other risks to businesses are not just known, but also felt.

¹⁸¹ UN OHCHR, 'Israel must face new international legal push to end illegal occupation of Palestine, UN expert says' (26 October 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22315> (accessed 3 September 2018).